there is a dangerous probability that an attempt to monopolize will succeed, the plaintiff has generally been required to show that the defendant had a significant share of the market in which the attempt to monopolize occurred.[21] This requirement flows naturally from the fact that the crime being attempted—monopolization—can only occur in the context of a specific market.[22]

A dangerous probability of success might or might not be construed by future antitrust courts to be the same thing as the "conduct which, in fact, corroborates his intent" required by Section 1001 in S.1400 and the "conduct constituting, in fact, a substantial step toward commission" of a crime required by Section 1-2A4 in S.1. There is certainly a real—perhaps even "dangerous"—probability that these new words will be construed to mean something different from the dangerous probability of success in a specific market which is required today for an attempt to monopolize conviction.

The risk that a general attempts section would not incorporate this requirement when applied to attempts to monopolize is underscored by an examination of the examples given in Section 1-2A4 of S.1 for conduct which would constitute a "substantial step toward commission" of a crime. These examples include lying in wait for the victim; reconnoitering the place where the crime is to be committed; enticing the victim to a place where the crime is to be committed; entering a structure where the crime is to be committed; and possession or collecting material to be used in connection with the crime.

These standards fit nicely with attempts to commit many common law crimes, such as rape, murder or robbery. They are wholly inapplicable to an attempt to monopolize. One can envision the prosecution offering evidence, in an effort to comply with these examples, that the incipient monopolist took substantial steps toward completion of its crime by lying in wait for its unfortunate competitor at the Metropolitan Club, by skulking about its headquarters office (the "structure" where the crime was to be committed) or "reconnoitering" the market through the use of market surveys and public opinion polls.

It simply seems inappropriate to wipe away the standards which judges have developed over 83 years for determining when an attempt to monopo-

[21]Walker Process Equipment Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); Hiland Dairy, Inc. v. Kroger Company, 402 F.2d 968, 974 (8th Cir. 1968); *contra,* Industrial Building Materials Inc. v. Inter-chemical Corp., 437 F.2d 1336, 1344 (9th Cir. 1970); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-5 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964).

[22]United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. duPont de Nemours Co. (Cellophane), 351 U.S. 377 (1956).

lize exists and substitute for them general standards designed with common law crimes in mind.

2. *Conspiracies*

Similarly, the effort to apply general criminal conspiracy statutes to conspiracies to restrain or monopolize trade could wipe out the existing law which has been developed with those particular offenses in mind. Both S.1 and S.1400 make it a crime "to agree with one or more persons . . . to engage in or cause the performance of conduct" constituting a crime and then take action to "effect an objective" of the agreement.[23]

This definition of conspiracy would apply both to conspiracies to restrain trade in violation of Section 1 of the Sherman Act and to conspiracies to monopolize trade in violation of Section 2 of the Sherman Act. Under S.1400, the term "conspiracy" when used in those sections "means . . . criminal conspiracy as described in [Section 1002]".[24] While there is no equivalent provision in S.1, Senator McClellan mentioned specifically in his remarks when he introduced S.1 that the general conspiracy section—Section 1-2A5—would apply in the antitrust field.[25]

The law of conspiracy under the Sherman Act has developed in numerous cases over many years and taken particular note of special problems in antitrust conspiracies.

One of the most troublesome questions has been where to draw the line between legal and conspiratorial conduct when the alleged conspirators are connected with the same business enterprise. Under present law, parent corporations and their subsidiaries conspire in violation of the Sherman Act if they are held out as competitors,[26] or if they act in concert to coerce or restrain third parties,[27] but not if they only act collectively to decide how they conduct their own affairs.[28] At the present time, however, neither

[23]§1-2A5 in S.1; §1002 in S.1400.

[24]S.1400, §1004(b).

[25]93 CONG. REC. S-569 (daily ed. Jan. 13, 1973, Vol. 119, No. 6).

[26]Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951).

[27]Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 131, 141-2 (1969); United States v. General Motors Acceptance Corp., 121 F.2d 376 (7th Cir. 1941), *cert. denied,* 314 U.S. 618 (1941).

[28]Beckman v. Walter Kidde & Co., Inc., 316 F. Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd per curiam,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972); Report Of The Attorney General's Committee To Study The Antitrust Laws, at 34 (1955); Letter from Assistant Attorney General Richard W. McLaren to Thomas J. O'Connell, General Counsel of the Board of Governors of the Federal Reserve System, Feb. 22, 1971, CCH Trade Reg. Rep. ¶ 50,122.

joint activities between a company and its unincorporated division[29] nor joint action by officers and employees of a single business enterprise[30] constitute a conspiracy.

This law, so laboriously developed, may be inconsistent with the proposed general conspiracy statutes. Both S.1 and S.1400 define "person" as including both human beings and organizations.[31] There would appear to be nothing in either bill which would prevent the two persons who conspire from being, for example, either two officers of a single corporation discussing the company's marketing strategy or a manufacturing corporation and its wholly-owned sales subsidiary discussing the prices at which the sales subsidiary will sell the products manufactured by the parent. Problems such as these can be avoided if antitrust conspiracies are left solely the province of the antitrust laws.

There is an additional problem with Section 1-2A5, the conspiracy provision in S.1. That provision is superimposed on the present conspiracy provisions in the Sherman Act, which make it a crime to conspire to restrain or monopolize trade. Since Section 1-2A5 of S.1 makes it a crime to conspire to commit any other crime, apparently it will be a felony under S.1 to conspire to commit the crime of conspiring to restrain or monopolize trade.

Thus, if two competitors get together to try to organize a price-fixing conspiracy among their fellow competitors, are rebuffed and give up the attempted conspiracy, it would appear that they would be guilty, under Section 1-2A5, of conspiring between themselves to organize a conspiracy to restrain trade in violation of Section 1 of the Sherman Act. A similar problem would not appear to exist in S.1400 because it simply amends the definition of conspiracy in the Sherman Act to "mean . . . criminal conspiracy as described in [Section 1002]".[32]

It is doubtful that the two competitors described above did anything close enough to restraining trade that the law should take notice of their conduct. Perhaps it was not the intention of the draftsmen of S.1 to reach this result since a conspiracy to organize a conspiracy to restrain trade sounds very much like an attempted conspiracy, and Section 1-2A5 specifically provides that criminal attempt "is inapplicable under this section".

[29]Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1962 (1970); Cliff Food Stores Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969).

[30]Nelson Radio & Supply Co., Inc. v. Motorola Inc., 200 F.2d 911, 914 (5th Cir. 1952); New Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135, 138 (S.D.N.Y. 1973); *see* Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643, n.9 (9th Cir. 1969).

[31]§1-1A4(52) in S.1; §111 in S.1400.

[32]S.1400, §1004(b).

On the other hand, it may have been intended to attach criminal significance to organizing an aborted conspiracy because Section 1-2A3 of S.1 makes it a crime if a person intentionally "requests, commands, induces or otherwise endeavors to persuade another person to engage in conduct constituting, in fact, a crime". Although this Section specifically excepts criminal attempts from its application, it contains no similar exception for criminal conspiracies. S.1400, on the other hand, specifically limits its equivalent provision—Section 1003—to certain specified crimes, such as treason, murder and trafficking in hard drugs.

3. *Solicitations*

Whatever the merits may be of punishing solicitation to commit treason, murder, or drug pushing, it is both unnecessary and unwise to make it a crime to solicit someone to violate the antitrust laws, when the solicitation results in neither an attempt nor a conspiracy. In antitrust cases, courts agonize at length over whether business conduct constitutes an antitrust offense. The length of antitrust trials and volume of antitrust records is too well known to need documentation, and it is not uncommon for important antitrust opinions by trial judges to review and analyze the facts for 100 pages.

If problems of this complexity are presented by completed transactions, they become even more difficult when a transaction is inchoate. In the case of both attempts and conspiracies, some concrete action is required which may give the court some idea whether the contemplated business conduct, if completed, would restrain trade. Criminal solicitation leaves out the requirement of action, thereby moving the restraint into the realm of conjecture.

When one man asks another to kill a third man, there is little speculation involved in deciding that, if the offer were accepted, a crime would result. But if one man asks another to accept an exclusive distributorship in Illinois for a new product on the condition that either party can cancel it on six months' notice, it is far from clear that an antitrust violation would occur even if the offer were accepted. At the very least, the detailed provisions of the never-prepared contract, the size of the parties, the nature of competition in Illinois, the qualified Illinois distributors available to other manufacturers and the sources of supply open to other Illinois distributors are relevant and unknown. When it is unclear that the final arrangement would be illegal, and it was never entered into anyway, what purpose is served by having already busy courts spend time trying to decide whether the proposal would have been illegal if it had been implemented?

Even in the area of per se offenses—such as price fixing and group boy-

cotts—it can be difficult to tell whether the conduct involved constitutes a proscribed activity. For example, courts have struggled mightily—and inconclusively—over whether consciously parallel conduct evidences an agreement to fix prices or boycott distributors.[33] What point is there in expending this type of judicial effort in situations where the proposed price fixing scheme or group boycott never got further than one competitor asking another and getting rebuffed? If the proposal gets into the action stage, it becomes an attempt or conspiracy and can be dealt with as such.

A related problem presented by S.1 arises from the interplay between the criminal attempt and conspiracy sections (§§ 1-2A4 and 1-2A5) on the one hand and, on the other hand, the amendment of the Robinson-Patman and Clayton Acts to make any violation of those statutes a felony (§316(c) and §316(d)). The way the bill is now drafted, every salesman who solicits an order at a price containing a discriminatory discount is guilty of a criminal attempt, and, if the order is accepted, buyer and seller are guilty of a criminal conspiracy. And every executive who unsuccessfully proposes a merger which a court might later decide "may . . . substantially lessen competition or tend to create a monopoly" is guilty of a criminal attempt if he took any substantial action in preparation for the meeting and, if an executive of the other corporation works with him in exploring the possibility before calling it off, they are both guilty of criminal conspiracy. Surely such results are unwise and unintended, and they can be easily remedied by modifications of the conforming amendments.

Changes in the conforming amendments would not, however, solve the basic problem. Attempts to conspire, conspiracies to conspire, solicitations to conspire, are all too hypothetical to concern the courts when they involve complex antitrust offenses. The judiciary has more important work to do than trying to unravel the legal and economic consequences of business arrangements that never came close enough to fruition to constitute at least an attempt or conspiracy under present antitrust standards.

MR. McINERNEY: Our next speaker is George W. Liebmann, a member of the firm of Frank, Bernstein, Conaway and Goldman in Baltimore. George graduated from the University of Chicago Law School where he served as Managing Editor of the Chicago Law Review. He is a member of the bars of both Illinois and Maryland, a former Assistant Attorney General in Maryland, and the author of a number of learned articles in the American Bar Association Journal and other legal publications. His subject is sanctions. Mr. Liebmann.

[33] *Compare* Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939) *and* Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948) *with* Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954) *and* United States v. National Malleable and Steel Castings Co., 1957 Trade Cas. ¶ 68,890 (N.D. Ohio 1957), *aff'd per curiam*, 358 U.S. 38 (1958).

PENALTIES

By GEORGE W. LIEBMANN
Member of the Illinois and Maryland Bars

My comments on the proposed Federal Criminal Codes and their bearing on antitrust offenses will focus particularly on the sanctions provided by the various bills though you may be led to draw more general conclusions inspired by our examination of sanctions.

I begin with the depressingly familiar summary observation that each of these codes undertakes to do both too much and too little. Each of them contains innovations incompatible in principle with many of the presuppositions of our economic and legal systems. At the same time, each of them would do little in practice either to stiffen or alter the present system of monetary sanctions for antitrust offenses and the enactment of any one of them would be productive of much sound and fury, together with little real change in the status quo, at least over the short term. The sanctions proposed fall into seven categories:

First, there is the familiar albeit rare sanction of imprisonment. None of the proposals increase the available one year prison term for the basic antitrust offenses. Each and all of the proposals would considerably expand the availability of prison sentences for violation of regulations impinging on the antitrust area. As Mr. Crane has noted, each of the proposals would broaden, intentionally or otherwise, the definition of antitrust offenses denounced by federal law. The increased application of penal sanctions to economic regulatory provisions and the felony treatment which the Brown Commission draft and S. 1 would extend to antitrust offenses would undoubtedly, over time, alter the climate of opinion surrounding the Sherman Act prison sentences by rendering them a familiar rather than exceptional form of punishment. Felony treatment is, of course, a development with substantial collateral consequences by reason of the disqualifications imposed by federal and state law upon persons convicted of felonies,[1] by reason of the denial to the Justice Department of the right to proceed by information rather than indictment, and by reason of other possible changes, including changes in the law of arrest. All three drafts have shunned some of the draconian proposals for higher prison terms, mandatory minimum sentences,

[1] Comment, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L.REV. 929 (1970).

and the like of which more will undoubtedly be heard as the congressional hearings proceed.

Second, there are proposals in all these bills relating to fines. These would make changes in present law that are substantial on paper but likely to be unimportant in practice. The Brown Commission conforming amendments retain the present $50,000 fine limit as to antitrust offenses, but provide for other economic offenses a new penalty of "twice the gain so derived or twice the loss caused to the victim."[2] The conforming amendments to S. 1 likewise embrace the present $50,000 maximum. Section 1-4 C 1 of S. 1 provides two alternate means of computing fines. The first of these would allow a daily fine for a Class E felony such as antitrust offenses are designated to of up to $100 a day for up to three years or a maximum fine in the somewhat bizarre amount of $109,500, discounted to present value. The penalty is not however one of the familiar daily penalties related to the duration of the proscribed conduct. In the alternative, S. 1 provides for a fine of "twice the benefit * * * derived or twice the loss * * * caused [provided] the court shall not sentence an offender to pay a fine in any event which will prevent him from making restitution or reparation to the victim."

As in the Brown commission report, these alternate fine measures are considerately albeit probably unintentionally rendered inapplicable to antitrust offenses by the use in the conforming amendment of the phrase "except that the maximum fine shall be $50,000."

S. 1400, the administration bill, provides a maximum fine for Class A misdemeanors which antitrust offenses are declared by Section 2002 (a) (1) (a) to be of $10,000, but preserves existing fines where these are higher. S. 1400 does, however, effectively supply an alternate fine not to "exceed twice the gross gain derived or twice the gross loss caused, whichever is greater."[3]

We may assume that the failure of the Brown Commission and S. 1 bills to provide for the applicability of the alternate fine measures to antitrust offenses is an oversight which will be corrected. Nonetheless, it is fair to suggest that enactment of any of the provisions would work little practical change. The fine provision in the administration bill is simpler of administration as well as more draconian than the double fine provisions in the Brown Commission Report and S. 1 since it appears to require the use of gross rather than net figures and thus involves less cost accounting.

[2]FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, Sec. 3301 (2) (1971).

[3]S. 1400, Sec. 2201 (c).

The experience under the analogous provisions of the Canadian Combines Investigation Act[4] and the similar provision of the New York Penal Code[5] suggest, however, that these provisions will find limited use since judges who have survived complex criminal antitrust trials are not likely to relish the prospect of equally protracted proceedings over factual issues defining an allowable sentence. If these alternate provisions are enacted, however, the provision of some sort of appellate review of sanctions—also an issue in these bills—will become of enhanced importance.

Third, there is a publicity-notice sanction which appears in somewhat differing forms in each of the proposed codes. Section 1-4 A 7 of S.1, for example, provides with respect to both corporations and individuals that they may be:

> "* * * required * * * to give appropriate notice of the conviction to the person or class of persons or sector of the public affected by the conviction by advertising in designated areas or by designated media or otherwise for a designated period of time."

Sections 2001 and 2004 of S. 1400 contain similar provisions with respect to organizations and with respect to individuals found guilty of an offense involving fraud or other deceptive practices. The Brown Commission, whose enthusiasm for the works of Nathaniel Hawthorne was less intense than that of the framers of the other two bills, restricted this sanction to organizations as distinct from individuals. Section 3007 of its report, a masterpiece of imprecision, provides that "the Court may require the organization to give notice of its conviction to the person or class of persons ostensibly harmed by the offense." An even broader alternate version contained in the Brown Commission Study Draft would have required the organization "to give appropriate publicity" as distinct from notice of the conviction.

There are subtle but unimportant differences between these various formulations. The Brown Commission Study Draft prefers the copywriting talents of Madison Avenue to those of the members of the federal bench. The Senate Committee does not share the Brown Commission's faith in the postal service. There may also be differences in meaning between "affected by," "financially interested in" and the remarkable phrase "ostensibly

[4]"The fine under the present law is at the moment not limited. The proposed fine is $1 million or; for a second offense, $2 million. The only reason for the $1 million is that the courts never did get the message that there was no limit, that they could go that high, so no court ever went higher than $75,000 against an individual company." Henry, *Current Trends in Canadian Antitrust Enforcement,* 40 ANTITRUST L.J. 780, 786-87 (1971).

[5]New York Revised Penal Law, §80.00 (3), *see also* New York Criminal Procedure Law, §400.30, providing for an offset of payments in restitution. *See* People v. Yanicelli, 40 A.D. 2d 564, 334 N.Y.S. 2d 550 (2d Dept. 1972).

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harmed by" used in the Brown Commission version, but we may dispense with morbid reflections of this character. The principle of all these provisions is the same, however, and that is that it is an appropriate function of the judiciary to stir up rather than lay to rest social disputes and that it is appropriate for it to impose sanctions, the impact of which upon particular defendants is highly variable and unforeseeable. The inarticulate major premise of each provision is that federal judges are befuddled creatures who can be relied upon to blunder about stirring up hornets' nests by utilizing the provisions to notify prospective suitors and plaintiffs.

To the extent that the sanction is designed to encourage private suits it seems to embody a new perception of the judicial function and to the extent that the sanction is designed to decrease corporate sales or individual opportunities of employment by exposure to bad publicity, it seems a reversion to the primitive. As Judge Learned Hand once reminded us: "the arts of publicity are black arts."[6]

Fourth, there is a drastic proposed sanction of suspension from interstate commerce provided for by Section 1-4A 1 C of S. 1. The apparent inspirations of this provision are the rarely utilized quo warranto provisions under state law[7] and perhaps the well known provisions of the Panama Canal Act.[8]

But analogies to the discretionary grant of authority to do business in corporate form may break down in so far as the regulation in question purports to be a regulation of commerce, since recourse to the national market protected by the commerce clause has not hitherto in our history been deemed a mere "privilege". The proposal involves more than "the petty larceny of the police power"[9] and its application may raise problems under the just compensation clause. As former counsel to the Senate Committee observed at its hearings "if the definition of 'effect on commerce' is as broad as the Supreme Court has read it, wouldn't it practically mean no business?"[10]

Fifth, we must consider the proposed sanction of corporate probation, provided for by Section 2001(c) of S. 1400 and Section 1-4A 1 C 6 of S. 1. Section 3001(4) (a) of the Brown Commission Report likewise expressly

[6]*Proceedings of the Bar of the Supreme Court in Memory of Mr. Justice Brandeis,* 317 U.S. xi (1942).

[7]*See* Fletcher, *Cyclopedia of Corporations,* Sections 5048, 8058.

[8]15 U.S.C.A., Section 31, *see* 30 OP. ATT'Y GEN. 355 (1915).

[9]Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1928).

[10]*Hearings on S. 1 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate,* 93d Cong., 1st Sess. on *Reform of the Federal Criminal Laws,* May 3, 1973, p. 5992.

authorizes corporate probation. Although cases arising under present law suggest that corporate probation is theoretically available, no federal case appears to have in fact imposed it.[11]

In fact, the only conditions of probation that might reasonably be applied to corporations are restitution and various provisions of an injunctive nature. The application of such sanctions thus results in a confusion of the procedures of criminal and civil law since adoption of the provision would supplant the case law relating to government injunctions and procedures for obtaining them with a new, undefined, and much more discretionary body of case law accompanied by more summary procedures for both the imposition of the injunction and the imposition of sanctions for its violation. At the Senate Hearings former counsel for the McClellan Committee observed in arguing for corporate probation "there are no parallel injunctive remedies to all crimes."[12] That argument seems an argument against and not for corporate probation. It should be recognized that to provide corporate probation as a sanction for corporate criminal violations is to substantially expand the authority of the government to obtain injunctive relief against challenged commercial practices, at least if the unlimited definition of the government's present authority advanced by Judge Frankel in the *Brand Jewelers* case[13] is not accepted.

It has been pointed out by Edward Levi that one of the great advantages of the antitrust laws as a mode of regulation is that notwithstanding the availability and familiarity of consent decrees the statutes are not primarily intended as means of imposing government regulation upon industries but rather as means of avoiding such regulation.[14] That advantage would be importantly compromised if the normal consequence of a government criminal conviction was the imposition of a discretionary scheme of permanent regulation upon the defendant via a probation decree.

Sixth, the sanction of disqualification from occupations or professions is proposed by two of the drafts. Section 1-4A 1 C-8 of S. 1 permits disquali-

[11]The availability of corporate probation was suggested in United States v. Atlantic Richfield Co., 465 F.2d 58 (7th Cir. 1971) and United States v. A.B.C. Freight Forwarding Corp., 112 F. Supp. 190 (S.D.N.Y. 1953), and was denied in State ex rel Howell County v. West Plains Telephone Co., 135 S.W. 20 (Mo. Sup. Ct. 1911).

[12]*See* note 10, *supra,* at 5594.

[13]United States v. Brand Jewelers Co., 318 F. Supp. 1293 (S.D.N.Y. 1970). *Compare* Comment, *Nonstatutory Executive Authority to Bring Suit,* 85 HARV. L.REV. 1566 (1972), rejecting the expansive view of the *Brand Jewelers* opinion.

[14]Levi, Book Review, 26 U. CHI. L.REV. 672, 673 (1959), characterizing the antitrust laws as: "***a responsive and pliable instrument, reflecting, to be sure, our own ignorance, and yet at least to some extent saving us from our ignorance through the negative value of filling up a void otherwise too inviting for more harmful regulatory schemes."

fication of a corporate officer "from exercising similar functions in the same or in other similar organizations" or if "a member of a licensed profession" from "practicing his profession". Section 3502 of the Brown Commission Report would disqualify "an executive officer or other manager of an organization" from "exercising similar functions in the same or other organizations for a period not exceeding five years". Just how broad the phrase "in the same or other" is intended to be is not clear. The executive director of the Brown Commission, Professor Schwartz, at one time in its deliberations suggested that "in this day, when vast quasi-public responsibilities are entrusted to business and labor leaders, there may be appropriate occasions for excluding miscreants from posts of responsibility in particular organizations*** or interstate or foreign commerce".[15]

Even in the *Grinnell* case,[16] the only instance of such a disqualification under the antitrust laws imposed in a civil proceeding, the government was obliged to admit to the Supreme Court that the sanction "is unduly harsh and quite unnecessary on this record".[17] The Supreme Court, though stating that "relief of this kind may be appropriate where the predatory conduct is conspicuous"[18] concluded that the executive before it in that case bore an insufficient resemblance to Mephistopheles to warrant such a sanction—a sanction which, if modern writers on 'the new property'[19] are to be given credence, is the equivalent in modern form of the forfeiture of estate of past times. The patently nonrehabilitative nature of the sanction[20] certainly gives credence to the observation some years ago of Professor Sanford Kadish that "liberally oriented social scientists, otherwise critical of the case made for the deterrent and vindicatory uses of punishment of ordinary offenders, may be found supporting stern penal enforcement against economic violators."[21]

[15]Working Papers of the National Commission Reform of Federal Criminal Laws, Vol. II, p. 1394 (1970). The Working Papers elsewhere express a different attitude: "It does not appear to be proper in a Federal Code to go beyond the draft provisions in removing disqualifications imposed upon ex-convicts, since most such disqualifications and disabilities are matters of state law" at 1345.

[16]United States v. Grinnell, 326 F. Supp. 244 (D. Mass. 1964), per Wyzanski, J.

[17]*See* United States v. Grinnell Corp., 384 U.S. 563, 576 (1966).

[18]*Id.* at 579.

[19]*See* Reich, *The New Property,* 73 YALE L.J. 733 (1964).

[20]It has been said of such proposed sanctions, however, that "there are methods, cheaper than incarceration, of imposing costs even on prior offenders. ***Exclusion from particular occupations can be used as a sanction***. Some of these methods are not entirely free from the objections advanced earlier to incarceration*** [They] reduce the offender's income from legitimate activity and so also his incentive to choose it in preference to criminal activity. POSNER, ECONOMIC ANALYSIS OF LAW (1973), at 363-64.

[21]Kadish, *Some Observations on Criminal Sanctions and Economic Regulations,* 30 U. CHI. L.REV. 423, 424 (1963).

Seventh, the remedy of restitution is provided for by Section 1-4a 1 C-5 of S. 1 which refers to restitution as an authorized disposition of an offender and also, of course, by the more familiar provisions of the Brown Commission and Administration bills establishing it as an allowable condition of probation. Restitution in a bad check or stolen goods case is one thing. Where it is applied, however, to large scale economic violations it places the court in the position of bestowing largesse on large classes of injured persons. There is reason here to take note of the caution of a distinguished student of the criminal law made in another contest:

> "* * * the courts are well adapted to weigh the competing claims of individual litigants, but they are poorly equipped to resolve broad issues of policy involving for example, the reallocation of resources among large social groups or classes. Judicial lawmaking in the latter area is confronted with a dual peril: it may ignore considerations relevant to intelligent policy formulation or, in taking them into account, it may inspire doubts about the integrity of the judicial process."[22]

In summary these new proposals have two vices:

First, they constitute an acceptance in principle of the proposition that the appropriate powers of the national government in dealing with individual defendants as well as organizations should be virtually unlimited.

Second, notwithstanding their broad sweep in principle, they are likely in practice to produce little immediate change in the status quo.

The startling element of these proposals is that they constitute a neglect of obvious measures in favor of exotic ones. The obvious measures are an increase in authorized corporate fine levels, the possible denomination of criminal fines as civil penalties, and perhaps felony treatment of hardcore offenses involving elaborate concealment, bid-rigging, or threats of force, the only categories of antitrust offenses in which prison sentences have in fact been imposed in the past.[23]

Such measures would involve no innovation in principle. They are preced-

[22]Allen, *Preface* to Freund, STANDARDS OF AMERICAN LEGISLATION at xxviii-xxix (2d ed. 1965).

[23]The first two criteria of "blatant" violation listed by the Director of Operations of the Antitrust Division are:

> "(1) consciousness of guilt, which includes evidence of willful intent, knowledge of the illegality of one's conduct, and intentional concealment of the violation.
>
> "(2) the nature of the violation based upon whether there were predatory practices, violence, threats or intimidation, or other coercion". Rashid, *Settlements and Consent Decrees,* 42 ANTITRUST L.J. 110, 112 (1971).

ed by the regulations of the Common Market[24] and of West Germany[25] which effectively allow the imposition of fines up to a million dollars and in the case of specially willful violations up to a small percentage of annual sales and they are also preceded by the recommendations of the Administration Task Force on Productivity and Competition in the Stigler report[26] which noted that, among other things, a more realistic fine structure—long overdue—would undercut the present demand for class actions as well as, no doubt, the present demand for the strange creations which we have just examined. Certainly, there are varying views on this subject. There are those who are satisfied with the status quo, there are those who would favor dramatically increased sanctions for all economic violations and there are those prepared to display indulgence toward increases in monetary sanctions for violation of the antitrust laws in part because of the conviction that antitrust enforcement differs from most forms of government regulation in that its object is the minimization of need for more direct government controls.

But surely the contention between these schools of thought should center upon determination of appropriate fine levels and perhaps the felony-misdemeanor issue in the case of hard-core offenses and should not be diverted to the side shows which the unusual proposals in these bills offer as a substitute for what should be the central issue. For these other proposals cannot resolve or bypass the central area of dispute, save at great costs in terms of other values which cannot be acceptable to those who believe with Justice Jackson that "we should draw a line between the necessity of a central regulation of commerce in the sense of finance and trade and the necessity for diffused control of such things as affect civil liberties.[27]

MR. McINERNEY: I am particularly happy to welcome our next speaker, James T. Halverson, the Director of the Bureau of Competition of the Federal Trade Commission. After graduation *cum laude* from Harvard Law School, he joined a leading Minneapolis law firm, specialized in antitrust law and soon became a partner. At the same time, he served as Special

[24]The Common Market's Regulation 17, Article 15 provides for penalties of up to $1 million, or up to 10 percent of the previous year's sales in the case of especially willful violations. "The highest penalty levied by the Commission so far has been $210,000 on one of the respondents in the Quinine cartel case." Rahl, *European Common Market Antitrust Laws,* 40 ANTITRUST L.J. 810, 818 (1971).

[25]*See generally* Schapiro, *German Law Against Restraints of Competition,* 62 COLUM. L.REV. 1, 201 (1962).

[26]REPORT OF THE ADMINISTRATION TASK FORCE ON PRODUCTIVITY AND COMPETITION, reprinted in TRADE REG. REP. ¶ 50250.

[27]*Statement to the Columbia Oral History Project,* quoted in 4 FRIEDMAN & ISRAEL, THE JUSTICES OF THE SUPREME COURT 1789–1969 at 2543, 2565 (1970).

Assistant Attorney General of the State of Minnesota. Then having learned the "black arts" of prosecution and defense (to borrow a phrase borrowed by our previous speaker), he was appointed Acting General Counsel of the Federal Trade Commission, and then Acting Chief of the Bureau of Consumer Protection, and finally assumed his present position. He brings to his task of criticizing the critics you have just heard a rather impressive background as both a defense counsel and as a prosecutor, but I think that you may sense a little more enthusiasm for the latter role. I give you Mr. Halverson.

AN EVALUATION OF SUBSTANTIVE CHANGES AND PENALTIES

By JAMES T. HALVERSON
Director, Bureau of Competition
Federal Trade Commission

Because of our time limitations and the vast number of potential changes in the antitrust laws posed by the bills revising the federal criminal code, I will not be able to discuss all pertinent modifications of the antitrust laws. My perspective on areas covered will not only be that of an antitrust attorney interested in the contours of antitrust laws, but also that of a government official responsible for effective antitrust enforcement. Of course, my opinions are my own, and do not necessarily reflect the views of the Federal Trade Commission or any of its individual Commissioners.

Both the McClellan bill (S. 1) and the Administration bill (S. 1400) attempt to bring together many crimes found outside the existing Title 18. Both codify defenses and establish standard definitions and principles of criminal liability. They change the sentencing system by defining the classes of crime and the range of penalties for each crime more distinctly. Both bills affect those sections of the antitrust laws carrying criminal sanctions.

This revision of the federal criminal code aims at consistency, clarity, and the imposition of equitable penalties. Despite these laudable goals, I believe that partial revision of the antitrust and consumer protection statutes in the manner attempted is improper. Many problems will arise, including an unwitting change in the substantive nature of many crimes associated with antitrust.

I
Changes In Liability For Substantive Violations Of The Sherman Act

Let me first turn to some proposed revisions in criminal liability for substantive violations of Sections 1 and 2 of the Sherman Act.

A. *Conspiracies and Attempts to Monopolize*

Both the McClellan and Administration bills would apply their particular definition of conspiracy to violations of Sections 1 and 2 of the Sherman

Act.[1] I see no advantage, however, in scrapping our accumulated antitrust experience on this point.[2] Definition of conspiracy has always been elusive and the proposed redefinitions will add nothing to clarity as courts try to reconcile the old standards with the new.[3]

The general sections of both bills dealing with criminal *attempts* also place in doubt the applicability of the law developed in antitrust litigation, even though some question does exist as to whether proof of a dangerous probability of success in a relevant market is required of plaintiffs who charge an attempt to monopolize.[4]

But the definition of attempt in the McClellan bill, that is, intentionally engaging in "conduct constituting, in fact, a substantial step toward commission" of a crime,[5] and that in the Administration bill, intentionally engaging in "conduct which, in fact, corroborates his intent" to complete commission of an offense,[6] both clarify no ambiguities. Instead, they could easily be construed to broaden the law of attempt to monopolize dramatically beyond those limits already set by the courts. As with the law of conspiracy, I think it is inappropriate to borrow a definition of attempt as used in association with common law crimes for use in the antitrust area.

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[1]Both S. 1 and S. 1400, using essentially the same language, make it a crime "to agree with one or more persons . . . to engage in or cause the performance of conduct" constituting a crime and then take action to "effect an object" or "objective" of the agreement (§ 1-2A5 in S. 1; § 1002 in S. 1400). That these definitions of conspiracy would apply to conspiracies in violation of the Sherman Act is made clear from the language of S. 1400 and from the remarks of Senator McClellan upon his introduction of S. 1. (*See* §§ 1004 (b) in S. 1400, and 93 CONG. REC. S-569 (daily ed. Jan. 13, 1973, Vol. 119, No. 6).

[2]The Antitrust Section, in Report No. 5 on the Brown Commission Report on Reform of the Federal Criminal Laws, took a similar position on sections in its proposed code which would apparently have substituted different definitions of criminal attempt and conspiracy for those developed under the Sherman Act by the courts. The Section stated that "adoption of these sections" could "wipe out 81 years of case law defining these offenses under the Sherman Act" and that "generalized definitions" were inappropriate for antitrust.

[3]*Compare* the language in the two bills requiring action to "effect an object" or "objective" of the agreement with the statement in United States v. Socony Vacuum Oil Co., 310 U.S. 150, 252 (1940): "Conspiracies under the Sherman Act are on 'the common-law footing'; they are not dependent on the 'doing of any act of conspiring' as a condition of liability."

[4]*Compare e.g.*, Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-8 (1965); and Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 975 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *with* Industrial Building Materials Inc. v. Inter-chemical Corp., 437 F.2d 1336, 1344 (9th Cir. 1970); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-5 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964).

[5]§ 1-2A4 in S. 1; as with the definition of conspiracy, Senator McClellan remarked in the introduction of this bill that the definition of criminal attempts in S. 1 would apply to attempts to monopolize. Moreover, this is evidenced by the fact that the words "or attempt to monopolize" are deleted from the Sherman Act by the conforming amendments to S. 1. *See* § 316 (a) (2) of S. 1.

[6]§ 1001 in S. 1400; this section applies to antitrust offenses by virtue of § 1004 (b).

Furthermore, the McClellan bill deletes that language of the Sherman Act Section 2 applicable to attempts to monopolize, at the same time that it includes attempts to monopolize within its general section on criminal attempts.[7] This deletion would remove the right to bring a treble damage action for an attempt to monopolize, since it would no longer be included in one of the "antitrust laws" as defined in the Clayton Act.[8] In addition to limiting a private party's rights for redress, this excision deprives the government of allies in its quest to prevent attempts to monopolize.[9]

B. *Solicitations, "Conspiracies to Conspire," etc.*

Because the conspiracy section of the McClellan bill is superimposed on the present conspiracy provisions in the Sherman Act,[10] it would apparently be a crime under S. 1 to conspire to commit the crime of conspiring to restrain or monopolize trade![11] Moreover, the McClellan bill makes it a crime to intentionally request, command, induce or otherwise persuade another person to engage in conduct constituting, in fact, a crime.[12] This would apparently make it a crime to solicit a conspiracy which restrains or monopolizes trade. As for conspiracies to conspire, it appears to me that such an animal is so remote from a restraint of trade that it would be inadvisable for the law to be vigilant against it. At best, it would consume more resources than it would be worth. With respect to solicitations, in addition to the

[7] S. 1, § 316 (a) (2) deletes the words "or attempt to monopolize" from the Sherman Act.

[8] § 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15).

[9] The "antitrust laws" as used in § 4 of the Clayton Act are defined in § 1 of that Act, 15 U.S.C. § 12, to include § 2 of the Sherman Act. I would not think they include the general attempts section of the McClellan bill. I also think it would be undesirable to include in the definition of "antitrust laws" a general section in the revised Criminal Code, since it deals primarily with criminal activity having nothing to do with antitrust offenses.

[10] *See* S. 1, § 1-2A5; in contrast, S. 1400 provides that whenever a conspiracy to commit an offense is made an offense outside § 1002, it means criminal conspiracy as described in that section. S. 1400, §§ 1002, 1004.

[11] I have not attempted in the text to analyze a similar problem which flows from the relationship of the criminal attempt and conspiracy sections in S. 1 (§§ 1-2A4 and 1-2A5) and the amendment of the Robinson-Patman and Clayton Acts that make violations of those statutes a felony. (§§ 316 (c) and 316 (d); *see* discussion of this change in Section II. of the text.) I think such a change, from civil violations to criminal offenses, was unintended. Nonetheless, the way the bill is now phrased, it could impose criminal penalties on persons for a conspiracy or attempt relating to offenses in these two Acts.

[12] § 1-2A3 of S. 1 makes it a crime if a person intentionally "requests, commands, induces or otherwise endeavors to persuade another person to engage in conduct constituting, in fact, a crime." Although this section does specifically except criminal attempts from its application, no similar exception for criminal conspiracies exists. S. 1400 limits its solicitation provision (§ 1003) to certain specified crimes, such as treason, murder and trafficking in hard drugs.

evidentiary problems posed in proving that one did occur, there would be the tremendously burdensome requirement of proving that the action which was solicited would have been illegal *if* completed—a bizarre form of incipient antitrust violation.

II
Imposing Criminal Liability For Violations Of Clayton And Robinson-Patman Acts

The change in status of some acts—from mere antitrust violations to criminal offenses—has excited much comment.[13] The McClellan bill would make any violation of the Clayton Act or the Robinson-Patman Act a felony. Today most sections of these statutes, such as Clayton Act 3, 7 and 8 and Robinson-Patman 2, carry no criminal sanctions. In my opinion, to impose them for illegal mergers, exclusive dealing contracts, interlocking directorates or price discrimination is most inappropriate. Criminal penalties do not make sense when the standard of illegality used in almost all the sections creating these offenses is phrased in terms of future probability and often involves complex economic analysis, every phase of which honest men can disagree over.

III
Elevating Antitrust Violations To The Status Of Felonies

The conforming amendments to the McClellan bill make another significant change relating to penalties for antitrust criminal offenses. All violations of the Sherman Act are elevated to the status of felonies, as are all criminal violations of the Robinson-Patman and Clayton Acts, including those new

[13] § 316 (d) (2) of the conforming amendments to S. 1 would amend the fourth paragraph of § 10 of the Clayton Act (15 U.S.C. § 20). At the present time, the paragraph being amended provides criminal penalties for any common carrier, or director, agent, manager or officer of a common carrier, who "shall violate this *section*." (Emphasis added.) The proposed amendment provides for criminal penalties against "any person who violates this *Act*." (Emphasis added.) Thus, while at the present time there are provided criminal penalties for common carriers and their agents who violate § 10 of the Clayton Act, the proposed amendment would make the entire Clayton Act a criminal statute.

In a similar fashion, § 316 (c) amends the last paragraph of § 3 of the Robinson-Patman Act, a section which now provides a fine or imprisonment for "any person violating any of the provisions of this *section*." § 316 (c) would substitute the quoted phrase with one providing criminal penalties for "any person violating any of the provisions of this *Act*." (Emphasis added.) The amendment would appear to make any violation of the entire Robinson-Patman Act a criminal offense, and not just violations of § 3.

criminal offenses which attained their criminal status by virtue of the conforming amendments.[14] A person convicted in the future would thus be a felon and subject to, *inter alia,* revocation of a state-granted license, discrimination in hiring, or loss of right to vote.[15] Also, the Department of Justice would be compelled to proceed in criminal cases solely by indictment, without having the option of proceeding by information.

I doubt that such a change in status would substantially contribute to deterrence of antitrust violations.[16] Judges are now reluctant to impose criminal sanctions in the antitrust area at all, and making antitrust offenses felonies would probably aggravate their wariness. I also think it would be unfair to impose the status of felon on an offender of the antitrust laws. This is an area of the law in which the precise formulations of legal rules are difficult because of the changing circumstances and arrangements in the marketplace. I do believe that in certain areas, especially price-fixing and market allocations, there should be strenuous efforts to impose the maximum misdemeanor penalties on offenders. It is in such a policy, and not in making these crimes felonies, that the deterrent effect of the statute will get its bite.

IV
Changes In Criminal Penalties

There are a number of additional fines, penalties and damages provided for in either the McClellan or Administration bills which should be given careful consideration, and which might be beneficial supplements to existing

[14] *See, e.g.,* §§ 316 (a) (3), 316 (c), 316 (d) of the conforming amendments to S. 1. "Elevation" (which is not really the proper word since such practices have not been crimes heretofore) of those practices in the Robinson-Patman and Clayton Acts (which are changed from civil violations to criminal offenses by the McClellan bill) is particularly objectionable.

It is interesting to note that these conforming amendments make all antitrust violations Class E felonies, for which the prison term may not exceed one year. This is the same prison term presently provided in §§ 1-3 of the Sherman Act, § 3 of the Robinson-Patman Act, and § 10 of the Clayton Act. In addition, S. 1 leaves the fines for antitrust offenses at the same levels as at the present time.

By contrast, S. 1400 would not change the penalties imposed for, or the misdemeanor classification of, antitrust offenses. (*See* § 2002 in S. 1400). While S. 1 does not therefore have greater stated penalties for antitrust offenses, it imposes in an indirect fashion more severe punishment by labeling those offenses felonies.

[15] The collateral consequences of felony status are examined in *The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929 (1970).

[16] *See,* Staff Survey, Comments on Proposals To Make Certain Anti-trust Violations Class C Felonies, Senate Committee on the Judiciary, Reform of the Federal Criminal Laws, Part 3, Subpart D, p. 3420.

sanctions. Before I review some of these in more depth, I would say that, generally, such additions to the antitrust enforcers' arsenal need to be realistic and workable.

A. *Fines Related to the Offense*

Both the McClellan bill and the Administration bill would permit the trial court to impose an "alternative" fine on a corporation convicted of an antitrust offense in an amount which does not exceed twice the gain or benefit derived or twice the loss caused by the offense, whichever is greater.[17]

The alternative fine in the McClellan bill is, however, severely limited by reason of a conforming amendment (Sec. 316(a)(1)) which states that the maximum fine for Sherman Act offenses shall be $50,000. The conforming amendment should be redrafted so that it is inapplicable to the alternative fine.

One difference that should be noted between the two bills on this sanction centers around whether the gain derived or the loss caused, for purposes of doubling, is net or gross gain and loss. The Administration bill's double fine provision refers to gross figures, while the McClellan bill's, by only referring to "benefit" or "loss," appears to refer to net figures.

I endorse this sanction because I feel, as many do, that the present fine for antitrust offenses, $50,000, is far too low. Imposition of a fine tailored to the harm done by a criminal offender would, in my estimation, be a powerful deterrent. Of course, its deterrent effect would depend on how vigorously the Department of Justice pursues such a fine. Although I do not underestimate the difficulties in proving the relevant amount of loss caused or benefit gained under such a sanction, I do not think the proposal is inherently unworkable or unrealistic. In the last few years we have witnessed a dramatic increase in the number of treble damage actions as well as class actions. Their complexity rivals that of the factual issues that would

[17] S. 1, Sec. 1-4C1 (b) states: "In lieu of sentencing under subsection (a), an offender who has been convicted of an offense through which he derived pecuniary benefit or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the benefit so derived twice the loss so caused." S. 1400, Sec. 2201 (c) provides: "In lieu of a fine imposed under subsection (b) or any other provision of law, a person who has been found guilty of an offense through which he directly or indirectly derived pecuniary gain, or by which he caused personal injury or property damage or other loss, may be sentenced to a fine which does not exceed twice the gross loss derived or twice the gross loss caused, whichever is the greater."

One objection to these provisions has been that they would appear to be in addition to the treble damages right conferred by Section 4 of the Clayton Act. This could increase the liability of an antitrust offender from treble to quintuple damages, a penalty thought to be excessive.

be litigated under these alternative fines. Moreover, the law of antitrust damages does establish some guide for judges and lawyers who would attempt to grapple with the disputes over loss caused or benefit gained, whether gross or net. Also, I do not read these bills as requiring the government to press for and prove the maximum amount of benefit or loss referred to in the bills. A less-than-maximum amount might be easier to prove, yet still retain a healthy sting for the wrongdoer and a stern warning to others of the consequences of violating the law. Finally, I have faith in the prosecutorial discretion lodged in the Antitrust Division and would expect that it would seek the alternative fine only in situations in which the conduct was so reprehensible and the harm done so important as to call for application of a very significant fine.

B. *Restitution*

At the same time I do favor a fine related to the offense, I do not feel it is necessary to supplement the treble-damage right contained in the Clayton Act with a section in the criminal code permitting the trial court to require any corporation or person convicted of an antitrust offense to make restitution to a person injured by the commission of the offense. This sanction is contained in the McClellan bill.[18] It could ultimately subject the offender to sixfold damages, if we add to the restitution both the treble damages provided for by present law and the fine of twice the defendant's gain from the offense. I can imagine restitution in circumstances where no private right of action existed, or where the scales were tipped heavily in favor of defendants. But, in the area of antitrust, the treble damages remedy, taken together with the prima facie weight given to a litigated government decree and the tolling provision in the Clayton Act,[19] affords aggrieved parties with ample ammunition to secure justified damages. At the same time the defendant is not over-penalized.[20]

[18]S. 1, § 1-4A1 (c) (5).

[19]Section 5 (a) of the Clayton Act provides, in part, that a final judgment or decree in any civil or criminal proceeding brought by the United States under the antitrust laws, to the effect that the defendant has violated such laws, shall be prima facie evidence against such defendant in an action or proceeding brought by any other party. Section 5 (b) provides, in part, that whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of the antitrust laws, the statute of limitations for private rights of action based in whole or in part on any matter complained of in the United States' proceeding under the antitrust laws is suspended during the pendency of, and for one year thereafter. 15 U.S.C. §§ 16 (a), 16 (b).

[20]There is also the danger that if the restitution is made first, prior to the ordering of any treble damages, that the victim would be considered fully compensated for the injury to his business or property and there would no longer be the damages required for the victim to maintain a subsequent treble damage action. *See* Dean Foods Company v. Albrecht Dairy Company, 396 F.2d 652, 658-9 (8th Cir. 1968).

C. *Disqualification of Corporate Officer or Member of Licensed Profession*

Disqualification of a corporate officer convicted of an antitrust offense from exercising similar functions in the same or another similar organization, as well as disqualification of a member of a licensed profession from practicing his profession, are two controversial penalties contained in the McClellan bill.[21] There is some question whether these types of disqualification are appropriate *punishment*, or whether they should be preserved for use only in civil cases to insure that an equitable remedy would be effective. I would like to see more evidence on the frequency of recidivism by those convicted of antitrust offenses, before I conclude that this type of penalty should be available. Even if it is deemed advisable to include it in the panoply of penalties, I would limit its use to circumstances in which the court found that the scope or willfulness of the illegal actions made it likely that the offense would be repeated if such functions continued to be entrusted to the defendant.[22] With respect to professionals, I doubt whether this provision is needed, inasmuch as the most heinous types of activities would probably be punished by revocation of the license by the appropriate state licensing authority.[23]

D. *Corporate Probation*

Both the McClellan and Administration bills would permit a corporation convicted of an antitrust offense to be placed on probation and committed to the custody of a probation officer on conditions specified by the trial court.[24] I agree with the objections Mark Crane posed to this concept of corporate probation in his presentation before the Senate Subcommittee on Criminal Laws and Procedures, especially that the conditions of probation set forth in both bills indicate that it is designed for human beings and that the conditions, insofar as they are applicable to corporations, would

[21]S. 1, §§ 1-4A1 (c) (8), 1-4A3 (b).

[22]§ 3502 of the Proposed New Federal Criminal Code submitted by the National Commission on Reform of Federal Criminal Laws (The Brown Commission) contains such a limitation. I might note that the Antitrust Section, in its Report No. 14 on the Brown Commission Report, contended that disqualification from private office as a collateral consequence of conviction was an unwarranted sanction excessive in scope and questionable on constitutional grounds as tantamount to a bill of attainder.

[23]There is also a constitutional question: Whether a Federal court may revoke the state-granted licenses of professionals.

[24]The power to place a corporate antitrust offender on probation is expressly made in § 2001 (c) of S. 1400. It would appear to be permitted by §1-4A1 (c) (6) of S. 1. That section applies to any "offender," and although "offender" is not defined, there appears to be no reason why corporations cannot be considered under S. 1.

be best imposed in the context of a full evidentiary hearing at the conclusion of a governmental civil proceeding.[25]

E. *Suspension from Interstate Commerce*

Another penalty contained in the McClellan bill is suspension of the right to affect interstate and foreign commerce for a period for which an individual could be sentenced to jail for the same offense.[26] In addition to the ambiguities in its scope,[27] it is as unrealistic as making antitrust violations felonies. I simply believe that judges would be most reluctant to impose such a drastic measure for large, publicly-owned corporations. A penalty should be believable before it is placed on the books. Moreover, I believe that less drastic measures, such as fines linked to the offense, could be tailored to offenses and yet not suffer from the implausibility of this penalty.

F. *Notice of Conviction*

Both bills contain a publicity-notice sanction, although there are differences in coverage. S. 1 provides, with respect to both individuals and corporations, that they may be "required . . . to give appropriate notice of the conviction to the person or class of persons or sector of the public affected by the conviction by advertising in designated areas or by designated media or otherwise for a designated period of time." Sections 2001 and 2004 of S. 1400, although containing similar provisions with respect to organizations, limit the sanction to individuals found guilty of an offense involving fraud or other deceptive practices.

I support this sanction, and prefer the Administration's language limiting its application insofar as individuals are concerned.[28] The key issue for me

[25]I also agree with the comments made by the Antitrust Section on a similar section in the Brown Commission's proposed Code. The Section stated that "corporations should be exempted from probation pending additional analysis of actual experience under existing sanctions applicable to corporations." Report No. 12 of the Section of Antitrust Law on the Brown Commission Report on Reform of the Federal Criminal Laws.

[26]S. 1, § 1-4A1 (c) (1).

[27]*See* the testimony of Mark Crane before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, May 3, 1973, pp. 45-46.

[28]There is also another difference between the two bills which deserves comment. While the provision in S. 1 requires that the offender give notice to the "class of persons or sector of the public affected by the conviction," S. 1400 requires that notice be given "to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense."

I prefer the broader language because arguably the only victims "affected by the conviction" (the standard in S. 1) would be those whose right to sue for damages is enhanced by the conviction, such as treble-damage plaintiffs under the antitrust laws. However, there may be persons who have been damaged by the offense, and who could sue even in the absence of the conviction. They would come within the description "financially interested in the subject matter of the offense."

is whether a system of penalties grounded only in imprisonment or fines will serve as an adequate deterrent to the transgressions of the modern organization, and especially large corporations. Since imprisonment is impossible and fines may be absorbed as a cost of business, adverse publicity in appropriate cases might be the most feared consequence of conviction in an era when public relations are so important to management. In addition, shareholders and customers to whom notice might be given should be in a position to react and rectify the corporate abuses which gave rise to the conviction. I might also note that the Antitrust Section has already endorsed a similar provision found in the Brown Commission's proposed Federal Code.[29]

V
Destruction Of Corporate Records[30]

At the present time § 10 of the FTC Act deals with, *inter alia,* destruction of corporate records.[31] On its face § 10 applies to all accounts, records and memoranda retained by an entity which falls under the jurisdiction of the Commission, so that it could be construed to require every corporation within

[29]Report No. 11 of the Section of Antitrust Law on the Brown Commission Report on Reform of the Federal Criminal Laws.

[30]I should point out that I am not discussing in the text those sections of the McClellan and Administration bills which might affect the first paragraph of § 10 of the FTC Act insofar as it applies to penalties for refusal to testify or answer any lawful inquiry, or as it might differ from existing sections of the criminal code devoted to those offenses in such contexts as grand jury proceedings.

§ 316 (e) (2) of the McClellan bill repeals the first paragraph of §10 (15 U.S.C. § 50). § 316 (e) (1), however, states that the provisions of § 2-6C2 shall apply to any violations of § 9 of the FTC Act. § 9 would not be dealt with by § 2-6C2 rather than the first paragraph of § 10.

Insofar as the first paragraph of § 10 now applies to destruction of documentary evidence (*see* following footnote), it would be replaced or governed by § 2-6D3.

The sections of the Administration bill which apply to refusals to testify or answer any lawful inquiry are 1332 and 1333. The Administration bill contains no conforming amendments.

[31]15 U.S.C. § 50. § 10 contains a description of offenses and penalties for disobeying subpoenas (paragraph 1), and of those for false entries in accounts, records and memoranda kept by any corporation subject to the Act, for removal of records out of the United States, mutilation, alteration or falsification, and for willful refusal to submit documents for inspection by any such corporation (paragraph 2). The first paragraph, dealing with disobeying subpoenas, and phrased in terms of neglecting or refusing to produce documentary evidence, would obviously encompass purposeful destruction of documents *after* they are called for by any properly issued FTC subpoena.

While paragraph 1 of § 10 applies to *any* entity receiving a subpoena, paragraph 2 only applies to *corporations* subject to the FTC Act.

For purposes of analysis, I have used the word "destruction" to embrace also false entries, mutilation, etc.

its jurisdiction to retain all records indefinitely.[32] The McClellan bill does not really solve this problem, since its section "Tampering with a public record" defines government record to include a "record, document or thing required to be kept under a statute which, in fact, expressly invokes the sanctions of" the section.[33] One court, however, has limited the existing § 10 to records required to be kept by the FTC Act or by order of the Commission.[34] The only essential difference I see between the McClellan bill section on tampering and the existing § 10 language on that topic is that a previously unclassified crime will now be a felony, to which I do not object. The problem of whether all records must be retained indefinitely is not definitively resolved.

What about document destruction in the context of antitrust grand jury proceedings or Department of Justice CID investigations?[35] The Administration bill and the McClellan bill, with slight differences in language, would make it a felony to alter, destroy, etc., a record, document or other object with intent to impair its accuracy or availability in an official proceeding.[36] In both bills it is no defense that the proceeding was not "pending or about to be instituted." This test is not as broad as the language in § 10, but

[32]Beckstrom, *Destruction of Documents with Federal Antitrust Significance*, 61 N.W.U. L. REV. 687, 694-95 (1966).

[33]§ 316 (e) (3) states that the second paragraph of § 10 of the FTC Act is amended to read: "Any account, record or memorandum kept by a corporation subject to the provisions of this Act is subject to the provisions of § 2-6D3 of Title 18, United States Code."

[34]United States v. Cannon, 117 F. Supp. 294 (N.D. Ill. 1953).

[35]I am assuming that the Administration bill is not intended to displace Section 10 of the FTC Act. But this cannot be definitely stated since S. 1400 presently contains no conforming amendments which would give us a clue in that regard.

At the present time 18 U.S.C. §§ 1503 and 1505 deal with destruction of documents in investigations instituted by the Antitrust Division of the Department of Justice. § 1001 may also be applicable.

§ 1503 makes it a crime intentionally to obstruct or impede or endeavor to obstruct or impose the due administration of justice, and is applicable to grand jury proceedings. § 1505 applies to destruction of documentary materials which is the subject of a civil investigative demand with the "intent to avoid, evade, prevent or obstruct compliance" with the demand. § 1505 also applies to administrative proceedings, but inasmuch as the FTC Act already contains a specific section specifically aimed at obstruction of justice by such means as document destruction, it is inapplicable. *See* 15 U.S.C. § 50.

§ 1001 of Title 18 provides criminal penalties for anyone who, *inter alia*, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact. Judicial interpretation of this section so as to preserve its constitutionality, may have precluded it for use in the context of document destruction. *See* Beckstrom, *supra, Destruction of Documents with Antitrust Significance,* 691-697.

[36]S. 1400, §1325; S. 1, § 2-6C1 (a) (2). S. 1 talks of "intent to impair the accuracy or availability," while S. 1400 is phrased in terms of "intent to impair its integrity or availability," and this is regardless of "its admissibility in evidence."

it is certainly broader than the judicial interpretation of § 10 and the existing law relating to grand jury proceedings.[37]

I think these sections represent a fair means of providing protection to government and the investigated party for certain circumstances surrounding document destruction which are now, at best, unclear. I speak of destruction of documents in the course of voluntary cooperation with authorities, destruction after learning of a relevant inquiry, but before being contacted by authorities, and destruction prior to knowledge of any investigation in which the documents might be relevant.[38] At the same time I believe the element of specific intent will afford defendants adequate protection. Indeed, the approach included in these two bills could be a salutary method for solving the ambiguity posed by the language in Section 10 of the FTC Act at the present time.

VI
False Advertising—Inadequate Supplies Of Advertised Goods

The McClellan bill would make it a felony to make "a false statement in any advertisement addressed to the public or to a substantial number of persons" in connection with the promotion of one's business, or to offer property for sale with intent not to sell the property advertised "at the price or of the quality offered, or in quantity sufficient to meet the reasonable expected public demand unless the advertisement states the approximate quantity available."[39] For the reasons I stated earlier with respect to traditional antitrust offenses, I believe that making these activities a felony would be most inadvisable. Indeed, I believe that these offenses are adequately

[37]In United States v. Cannon, 117 F. Supp. 294 (N.D. Ill. 1953), the court, however, limited the broad language of § 10 to "false entries in records required to be kept by the Act or by order of the Commission."

In United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956), the court stated that 18 U.S.C. § 1503 "is violated if a person, with intent to impede an investigation, destroys or alters documents if he knows or has reason to believe that . . . (a) grand jury investigation is in progress and that the. . . . grand jury may later call upon him for the production of these documents." § 1325 of the Administration bill may be violated regardless of whether a proceeding was "pending or about to be instituted."

[38]Beckstrom, *Destruction of Documents with Federal Antitrust Significance, supra,* thoroughly analyzes the applicability of certain sections of the federal criminal code and of § 10 of the FTC Act to document destruction in these circumstances, at pages 690-704.

[39]S. 1, § 2-8F4 (a).

regulated at the national level by the Federal Trade Commission Act. Little incremental benefit would be achieved by making the offense criminal. Finally, the section relating to inadequate supplies of an advertised product contains great potential for unfairness since a person could be tried—and subject to the status of a felon—for an offense whose elements are very unclear.

VII
Conclusion

I think that this brief survey has highlighted the difficulties of revising the antitrust laws in the interests of a consistent, predictable set of rules for all federal statutes containing criminal sanctions. Some of the revisions may indeed have merit, but they should be subjected to more careful scrutiny, perhaps in the context of hearings before the Subcommittee on Antitrust and Monopoly.

MR. McINERNEY: Until I heard that story about execution for false advertising, I had not really appreciated what a relatively benevolent organization the Federal Trade Commission is.

PANEL DISCUSSION:
Antitrust And The Proposed Revision Of Federal Criminal Laws

Moderator: DENIS G. MCINERNEY
Member of the New York Bar
and
Chairman, Criminal Practice and Procedure Committee

Panelists: MARK CRANE
Member of the Illinois Bar

JAMES T. HALVERSON
Director, Bureau of Competition
Federal Trade Commission

GEORGE W. LIEBMANN
Member of the Illinois and Maryland Bars

PAUL C. SUMMITT
Chief Counsel
Senate Judiciary Subcommittee on Criminal Laws and Procedures

MR. McINERNEY: Completing our panel we have Paul C. Summitt, Chief Counsel of the Senate Judiciary Subcommittee on Criminal Laws and Procedures. He holds a M.A. in political science as well as his law degree from Duke University. He is a member of the bar of the State of Arkansas and various federal courts. On graduation from law school, he joined the Criminal Division of the Department of Justice in the honors program. While there, his duties included serving as senior advisor to the Criminal Code Revision Unit of the Legislation and Special Projects Section, in which capacity he became quite familiar with this proposed legislation.

I would like to start off our informal discussion by asking Paul to give us a brief report of this legislation and what he sees as to its future prospects.

Mr. Summitt.

MR. SUMMITT: Thank you.

The first thing I want to do is to express my appreciation, particularly

to Mark Crane, for the invitation to appear here. I think the main function is to educate me, rather than for me to try to educate you. You already know the field. We have been trying for a long time through hearings and consultation to take a look at what kind of impact these two bills might have on special areas of federal law, such as antitrust.

I do want to emphasize that anything I say here today represents only my views and should not be construed as representing the position of the Chairman or any of the Senators on the Subcommittee on Criminal Laws and Procedures. Both Senator McClellan and Senator Hruska, when they introduced S.1 and S.1400—and they are co-sponsors of both bills—made it quite clear that the bills were study measures to be circulated to the legal profession, Bar Associations, professional groups, agencies of the federal government and other interested parties to study and evaluate in order to get the best Criminal Code possible. No provision of either bill was to be considered immune from this scrutiny.

As far as what kind of prospects we can expect, I can only speak to what the staff is planning in preparation for processing the Code. The decision to actually try to process the bills through the Senate will be one that will have to be made at the appropriate time by the Chairman and the Subcommittee.

At this time, we have completed twelve volumes of hearings on the Code consisting of nine parts that go back to the Brown Commission Final Report. Five of these volumes are hearings in this Congress on S. 1 and S. 1400—that is, they occured after S. 1 and S. 1400 were introduced. These hearings are now in print and are being evaluated. For example, Mark Crane appeared before the Subcommittee in May 1973 and raised many of the issues that he has raised with you today. These issues are being studied.

We have three major tasks ahead of us. One is to merge two large bills, S. 1 and S. 1400. There are many differences in them, but eventually the Subcommittee must resolve the differences into a single bill. Then we have the tasks of finishing and evaluating the hearings for incorporation of desired changes. And, finally, drafting the report.

Essentially, that is where we stand now. The Subcommittee will resume hearings on May 8th, which may continue for about eight days in May and perhaps eight days in June. After that, it will be necessary to see where we stand. In the meantime, the staff is working on merging the bills and writing the preliminary draft of the report. We expect to at least have the option open to introduce a single bill in the next Congress and have the paperwork completed to permit the Subcommittee, if it desires, to report a bill early next spring.

MR. McINERNEY: I should mention that last summer a *New York Times* writer, in commenting on these bills, described them as packages in which Congress appears to have reached "a legislative absolute—the unpassable bill". He went on to say that each of these bills is so complex and controversial that it is quite likely that neither one could be considered and voted on within the two-year life span of any one Congress. I would like to ask Paul if he has any comment on that?

MR. SUMMITT: The discussion this morning of the complexities involved indicates that there may be some validity to that kind of statement. Actually the codification of the Federal Criminal Code can be traced at least back to the Model Penal Code and the formation of the National Commission in 1966 and its final report in 1971. Recodification and modernization of criminal codes is a continuing trend. A number of the States—perhaps almost twenty States—have successfully processed modern Criminal Codes through their legislatures—including the State of New York, which passed a very comprehensive one. So I don't think it should be conceded that it cannot be done.

MR. McINERNEY: Our next question will be directed to Mark Crane, although I would like to advise all the panelists that they are free to respond to any of these questions. I note that these bills would provide, as one of several possible sanctions following a criminal trial, that the judge may order restitution. I wonder if the ordering of restitution would deprive the victim of an antitrust offense of his treble damage remedy—on the theory that he has no damage after restitution. Mark, would you care to answer that?

MR. CRANE: That is a very difficult question. My own view is that restitution would deprive the victim of the treble damage remedy, because one of the elements of the treble damage case is his damage, and if he has been made whole by a court order restoring to him what was taken, I don't see how he can prove that element in the treble damage case.

Now S. 1400, but not S. 1, would try to deal with problems like this by a provision that says that there is no intent to affect any civil remedy by the criminal rules set forth in the bill. But Denis, when the action of the court is to take away a substantive element of the Section 4 Clayton offense, I am not sure that a provision in the Criminal Code saying that the Code is not intended to affect any civil remedy—is going to be sufficient to give back an offense, one piece of which has been taken away, not because of the Code itself, but because of the action of a judge and the payment of money pursuant to that action.

MR. McINERNEY: Some of the defense bar here present may now want

to re-evaluate whether to lobby for this bill or against it! In listening to Jim Halverson, the thought occurred to me that it is not quite clear presently—at least, not to me—whether the destruction of a document is a crime absent the pendency of some proceeding to which the document would be relevant. Jim, would you agree with that?

MR. HALVERSON: Yes, I think I would agree, as long as you are asking me to agree with your statement that it is not clear. It is not clear to me either.

The case law interpreting both the grand jury statute pertaining to destruction of documents and Section 10 of the FTC Act is very restrictive. That is, it would only allow for punishment for destruction in a situation where there is a proceeding pending. However, certainly Section 10 of the FTC Act can be read much more broadly than that, and because there has been only one district court interpretation of it, one doesn't know exactly where it is going. That is why I, in my talk, tried to indicate that this bill might, in a sense, represent a clarification, in that it would make it a felony to alter or destroy a record with intent to impair its accuracy or availability in an official proceeding. Then the bill would leave open for defense the intent question, and I think the intent question would be adequate protection for the defendant.

MR. McINERNEY: Presently, if I violate Section 10 of the FTC Act, have I committed a crime?

MR. HALVERSON: I think probably you have committed some form of crime since Section 10 does provide for criminal penalties for willful document destruction or alteration, but there is no classification of the crime.

MR. McINERNEY: I take it from your remarks, Jim, that you believe that it is not clear presently and that it should be made clear that document destruction may be some kind of a criminal offense even though no proceeding is pending.

MR. HALVERSON: I believe so because the problem we have right now is, for instance, if someone learns through word of mouth in the industry of the interest by federal prosecutory authorities in a certain type of conduct, the destruction of documents under present case law interpretation probably would not be an offense. To me that just does not make sense. I think that the government ought to have the protection of language somewhat close to what this bill proposes in this area.

MR. McINERNEY: Mark, would you like to add to or detract from that?

MR. CRANE: I would like to register a respectful dissent to some of the things that Jim said and to alert the defense lawyers in the audience that I think that there are some real problems lurking in these bills with respect to document destruction. I agree entirely with Jim that the present law is in a terribly unsettled and unclear state. I also agree that a couple of the cases—there is one under the Federal Trade Commission Act and a couple under the obstruction of justice statute, both back in the fifties and both out of the Southern District of New York—those cases are totally inadequate to guide the bar, and we need something better. But I am worried about the way these bills go about it.

It seems to me that the rule should be that you can destroy documents unless you have reason to believe that there is some specific proceeding coming down the pike. The proceeding doesn't have to be started. It doesn't even have to be "about to be instituted" in the sense that you know they are going to court the next day. But you ought to have some specific proceeding in mind when you destroy the documents in order to commit a crime by destroying them.

Both of these bills specifically provide that it is no defense that the proceeding is not pending or about to be instituted. Then I don't know what the defense would be. You can't say that no proceeding was about to be instituted because that is not a defense. So I am afraid that these bills could be construed to make it a crime to destroy documents any time you had the thought that there might someday be some kind of a proceeding and you didn't want the documents available.

I would suggest that all of the defense lawyers in this room know that one of the motives behind any corporate document destruction program is to make sure that the documents aren't around years and years later if some proceeding is filed—not necessarily because they are bad but because the expense of examining and producing the volume of the documents is so great. Anybody who is candid about the reasons for document destruction, I believe, is going to have to say that that is at least a factor. Therefore, it is important that the statute should state that document destruction is a crime only if the person destroying the documents knows, or has reason to know, that there is some kind of an official proceeding that is at least being considered when the documents are destroyed. Otherwise, I am afraid that we are going to leave the law in a very unsettled state.

MR. McINERNEY: I will give Jim fifteen seconds to respond.

MR. HALVERSON: I believe that really, as a practical matter, that is what would be accomplished by the present language. For the government to be able to prove intent to impair accuracy or availability in an official

proceeding would be very difficult without some showing that there had been some form of communication with the defendant, that he knew that something was going on, some sort of informal government inquiry or some form of investigation.

MR. CRANE: Well, I agree with that, Jim, except for the fact that any time documents are destroyed, it is very hard to overcome the presumption that they were destroyed for some very specific reason. You get the whole problem of being able to comment in court about the possible contents of the destroyed document. That concept, I think, carries over into a criminal proceeding. . . .

MR. McINERNEY: I am going to exercise my prerogative as Moderator and cut short this debate to ask an unfair question of Mr. Summitt.

My question is this: Let us assume, arguendo only—and I don't ask you to agree with it—that the net effect of these bills in the antitrust area would be to have an adverse effect on antitrust enforcement; assuming that, if you will, what would be the best way to remedy the situation? Would it be to simply make these bills completely inapplicable in the antitrust area, or is there some better alternative?

MR SUMMITT: Well, Denis, I think that probably the better approach, from the Subcommittee's standpoint, would be to study the bills closely and suggest areas of revision that would not detract from the general Federal Criminal Code aspects of the bills. Antitrust is only one area of special federal enforcement. There are others. If we tried to exempt them all, the modern federal criminal code concept itself could be in jeopardy.

And the other thing is that these bills may well have some provisions, as Jim has pointed out, that are good provisions that should be applied to antitrust. I think that the best approach would be to remedy those areas that, for example, Mark has pointed out as possible real problems where the bills have either inadvertently or unwisely altered the substance of the antitrust laws. This seems preferable to exemption to me.

MR. McINERNEY: Thank you.

I gathered, George Liebmann, from your remarks that you feel that criminal courts may not be able to fairly assess the gross harm done to a class or group, absent some more deliberate consideration than criminal procedures provide, and absent, for example, some representation for the class. Is that an accurate summary?

MR. LIEBMANN: Well, I think that the assessment of gross loss and gain has a number of defects. First, I think it could create a paradise for

the accounting profession, because no defendant is going to subject himself to this without fully litigating the various economic and accounting issues that go into its measure.

There is also a question, in my view, as to whether a defendant is entitled to some jury consideration of the factual issue if the fine is specifically by its terms related to the question of fact of what the loss or gain would be.

But I think that the difficulty with the conception is deeper than that. I think that the problem is that the potential amounts that can be assessed as fines under this provision are simply astronomical, and it seems to me that it introduces an element into a case that should not be there. There is, obviously, a need for increased fine limits, but it seems to me that the better approach is to provide a ceiling founded upon the sales of the defendant, the sales at least of the product at issue—a percentage of the sales—and let the judge and the prosecution utilize their discretion within that limit in the common law fashion, and not to provide a totally open-ended double fine, which either would not be utilized, or if utilized, would result in proceedings of great length, difficulty and complexity.

MR. McINERNEY: Well, that is certainly a simpler and more readily applicable remedy—a percentage of turnover, such as you have in the common market procedures. But do you think that the aftermath of a criminal trial in which the defendant had been convicted of a very serious per se antitrust violation is the fairest atmosphere within which one could measure damages to a class? Or is that a loaded question?

MR. LIEBMANN: It is a loaded question, but I think that it goes somewhat to the desirability of the provision. You have that problem, to some degree, in any criminal case. But I do want to re-stress again the point that I made earlier, and that is that if you are going to have any sort of open-ended fine provision, whether it is one measured by the loss or gain or one measured by the means of the defendant, you have to begin to think seriously about the provision of some mechanism for appellate review of sentencing, at least in this area.

MR. McINERNEY: My next query really is to the entire panel. We have had a fair amount of levity here today about "felony mergers" and various aspects of the antitrust laws, and the FTC Act, and so on, being made a felony. Is there any member of the panel who feels that—under some circumstances—it might be a good idea to make an antitrust offense a felony? Jim.

MR. HALVERSON: It seems to me that there are certain situations

which I believe we can identify—what I would call hard-core horizontal price fixing, bid-rigging, customer rotating—in which it might be appropriate to subject the individual defendants to felony status. Let me give an example: If it is clear to the defendants that they are violating the law at the time they are entering into a conspiracy—and by that I mean, for example, when entering into the secret motel meetings in which they compare their bids before they go into the bidding procedure—I do not have much sympathy with their defense that they should not be classified as felons. Therefore, I guess I am one on the panel who would consider applying a felony status in that type of situation.

MR. McINERNEY: Paul, do you have a comment?

MR. SUMMITT: I would like to comment briefly on the felony treatment of antitrust cases in S. 1. The actual time, or prison time, remains the same as in present law. What happened is that S. 1 took a one-year offense and called it a Class E felony. As I understand it, this was done to have the most serious misdemeanor (six months) coincide with the "petty offense" construction of the Constitution by the Supreme Court and the magistrate jurisdiction of present law. Since it seemed desirable to retain a one year penalty as a code option, S. 1 gave it the lowest felony designation. That is where it came from. It was an attempt to harmonize the present law in these areas. Of course, we have had all kinds of adverse feedback.

MR. McINERNEY: In order, perhaps, to footnote that, I would add that, while S. 1400 says that a Class E felony is punishable by not more than three years, S. 1400 does not make these antitrust offenses felonies. They remain misdemeanors.

MR. SUMMITT: That is right. They remain one-year misdemeanors.

MR. McINERNEY: On the subject of notice, some panel members apparently feel that it is not the business of the courts to stir up litigation by giving notice to people who might want to bring actions, either individually or as class members, against a convicted antitrust defendant. On the other hand, I think I detect—particularly in Jim Halverson's remarks—some feeling that perhaps the public needs a Paul Revere in this respect. Is that accurate, Jim?

MR. HALVERSON: Yes, I think that public notice could be one of the most effective remedial sanctions. The problems of maintaining the corporate image for the management of a large corporation loom so large that knowledge that the notice would be given to the stockholders and all those financially interested might be one of the most important deterrents that could be added to the law.

MR. McINERNEY: George, do you agree with that?

MR. LIEBMANN: No, one of my objections to it—apart from the incongruous position in which the courts are placed by it—is the complete inequality and unpredictability of impact that would result from any such provision. With respect to consumer products, it is conceivable that the notice provision would have a substantial impact on sales. With respect to machine tools, it is less clear to me that it would have any significant effect at all. So the measure of its effectiveness in terms of the impact on the defendant would depend on the type of industry or product at issue.

But I think that the objection to it goes farther than that. I do not think that it is the function of the courts to create cases and controversies, as distinct from resolving the unfortunately too numerous social disputes which necessarily come before them. I do not think that a provision which would in effect render an impartial trier of fact into a propaganda agency, dispensing statements about the misdeeds of particular persons coming before the court, is a desirable provision. I have the same feeling in some degree, even with respect to government-generated publicity produced by the Executive Branch, where it is focused on a particular individual or firm and is not in the interests of the immediate public health and safety, because the impact is just too unpredictable and too potentially severe.

MR. McINERNEY: Jim.

MR. HALVERSON: The only comment I would make is that I do not think that George is quite correct in saying that the courts aren't already in the business of giving notice to large classes. We have the familiar provisions of Rule 23 which allow for notice to very large classes of possible violations of law.

MR. LIEBMANN: That is one of the principal criticisms that can be made of Rule 23.

MR. McINERNEY: The purpose of this program has been to stimulate. I see some members of the audience stirring in their seats. Before we all march out in a body and up the Hill, I would like to ask Paul if he has any thoughts as to how people might channel their efforts if they feel that they have some views on this legislation that they would like to express?

MR. SUMMITT: Thank you, Denis. I would just like to say that the Subcommittee on Criminal Laws and Procedures, which is chaired by Senator McClellan, is interested in having specialized input on these areas of concern. Organizations such as this could bring most of the problems to our attention. So if you are interested, and if you have the time, look at the issues and express your opinion. I can assure you that we will consider them seriously.

MR. CRANE: Do you want letters, Paul, or how do you want those opinions.

MR. SUMMITT: Letters will be fine. They should be sent to:
Senator John L. McClellan, Chairman
Subcommittee on Criminal Laws and Procedures,
Senate Committee on the Judiciary
Washington, D. C. 20510

MR. McINERNEY: In conclusion I would like to thank our panelists. I think that you will recognize that a good deal of effort went into this presentation by men who are very busy private practitioners and public servants, and I believe that, at least, we have exposed certain facets of this pending legislation that should be considered by the antitrust bar for your consideration. I hope that you will follow up, if you are interested, Paul's suggestion that you write Senator McClellan, or one way or another express your views with respect to these pending bills which could, if they went forward in their present form, obviously have a drastic impact on the enforcement of the antitrust laws. Thank you very much.

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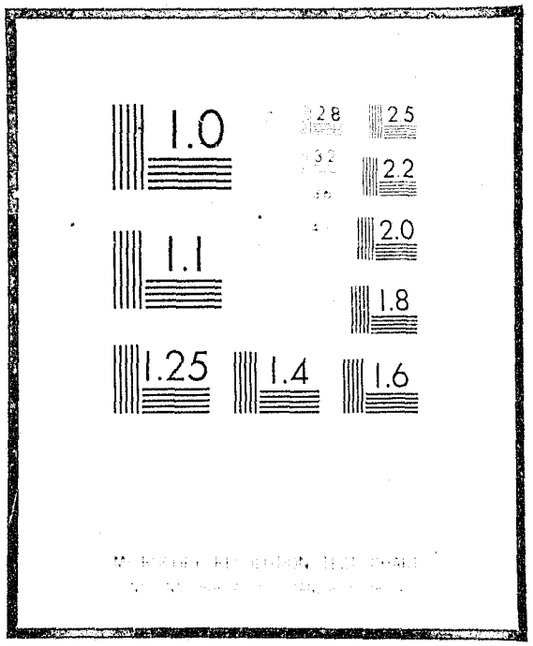

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 1

THE "CRIMINAL JUSTICE REFORM ACT OF 1975"

[JURISDICTION OVER INDIAN RESERVATIONS, NATIONAL SECURITY AND SENTENCING PROVISIONS]

APRIL 17, 18, 1975

PART XII

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PART XII

S. 1, THE CRIMINAL JUSTICE REFORM ACT OF 1975

THURSDAY, APRIL 17, 1975

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

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2228, Dirksen Senate Office Building, Senator Roman L. Hruska, presiding.

Present: Senators Hruska and Abourezk.

Also present: Paul C. Summitt, chief counsel; Dennis C. Thelen, deputy chief counsel; Paul F. Rothstein, minority counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommitee will come to order.

The Chairman is busy with other very important Senate business, and has asked me to preside in his stead. This is a continuation, and one of the concluding hearings, on S. 1, the Criminal Justice Reform Act of 1975.

The first witness that we will hear is the Hon. Edward R. Neaher, U.S. District Court from Brooklyn, N.Y. He is not a stranger to this room. Once before, Your Honor, you and I sat in the positions that we now occupy. How long ago was that?

Judge NEAHER. Almost 4 years. June of 1971.

Senator HRUSKA. At that time you were a nominee for the position which you now hold. From reports we get, you have fulfilled every expectation. We welcome your presence here today, and we thank you for taking the extra time to share your views with us on the bill that is before us.

Do you have a prepared statement?

Judge NEAHER. I have submitted a prepared statement. I do not propose to read it in deference to the time schedule you are under. I do thank you for the opportunity to be here. Let me say, first——

Senator HRUSKA. May I say just this, Your Honor. We will print the entire statement, in its full text, following your extemporaneous remarks.

STATEMENT OF HON. EDWARD R. NEAHER, JUDGE, U.S. DISTRICT COURT, BROOKLYN, N.Y.

Judge NEAHER. Let me say at the outset without any individious reference to the physical proportions of S. 1, I do regard it as a monumental achievement in terms of accommodating the needs of statutory drafting with the recommendations of the national commission.

I would also like to say at the outset, as I have indicated, I come from a district which I find, even to my surprise, had more criminal cases pending at the end of December 1974, than any other district in the United States except two, namely, the southern and central districts of California which have exceeded our number.

So, when I speak here I do believe we have a great deal of practical experience in sentencing of criminal cases among the judges in the eastern district. My comments with regard to the sentencing provisions in the bill about which I was asked to comment, have been designed to be practical in nature, and do not represent any criticism of the draft in any sense whatsoever.

I have three points in mind: One has to do with what has always been regarded as the traditional power of a judge to suspend or delay the imposition of a sentence. I notice that distinguished colleagues in the committee, or committees, of the U.S. Judicial Conference, pointed to the omission of phraseology in the draft which would recognize—or let us say, preserve, that power. Let me be a little more specific.

I recognize that the basic philosophy of this bill is to adopt the National Commission's suggestions that the imposition of probation be regarded as a positive sentencing alternative, just as the imposition of a term of imprisonment or an imposition of a fine. When you come to a term of probation in section 2104(a) of the bill, "term of probation will commence on the day that it is imposed", and the bill then goes on to state, "unless otherwise ordered".

That I find to be a recognition of what I have called the traditional power of a court to suspend or delay the commencement of a term of correctional treatment, if you can call it that; in this case, probation.

When you come to the provisions which deal with sentences of imprisonment, there is not such "an unless" otherwise ordered provision. The sentence of imprisonment will actually commence to run—and ordinarily would—upon the imposition of the sentence. And, at that point, unless the court intervenes, the defendant is supposed to promptly be turned over to the U.S. Marshal and immediately become in custody of the prison authorities.

The point of all this, Senator, is simply this: First, with regard to probation, I would say that many judges feel that in connection with sentencing someone to a term of probation, it is a good idea to hang a sword of Damocles over his head. That is to say, to make him understand that if he does not walk the straight and narrow while on probation, he is very likely to find himself immediately confronted with a several-years sentence of imprisonment.

In other words, the familiar format used to be, I hereby sentence you to a term of 2 years, or 3 years, but I am going to suspend the execution of that sentence and I am going to place you on probation for a term of 3 years. The fellow walks out of there, we think, believing that if I do not walk the straight and narrow, I am immediately going to start serving my 2- or 3-year sentence which the judge has already imposed on me.

So, my suggestion is, since the provision with respect to a sentence of probation have a so-called mandatory provision, or mandatory condition, a requirement which shall be specifically stated in the judgment of probation that the defendant not commit another Federal, State, or local crime during the period of probation, that it be given more meaningful effect by permitting the court who imposes that term of probation to couple it with a specific term of imprisonment to take effect if the defendant violates the condition. To my way of thinking, that would satisfy the feeling judges have that they can suspend the execution of a sentence, put a man on probation, but have that sentence take effect if he violates the terms of probation.

In other words, it gets down to this, we view it as an additional deterrent and, as I said earlier, a sword of Damocles, that helps a man stay straight while on probation. That is the basic idea.

Senator HRUSKA. What is the present situation?

Judge NEAHER. Just as I explained earlier. When we size up a defendant, we look at his background through the presentence report, he should be on probation, but he is marginal. We want him to do well on probation, but we want him to know that he has to do it or else. And so, as I say, we will impose a sentence of 3 years imprisonment, and let him go. And he goes out of there knowing that if he commits another crime, that is, a violation of what you have specified as the mandatory condition, he is going to start serving time.

I am saying that, of course, he is entitled to his probation revocation hearing; I am not wiping that out. He has a specific term of imprisonment hanging over his head if he does violate his probationary condition.

Senator HRUSKA. Under the probation order, that sentence and its length are not determined?

Judge NEAHER. The suggestion is, as part of what you now have as the mandatory condition, that there be added a clause giving the judge discretion in appropriate cases, to also provide for a specific term of imprisonment to take effect if the mandatory condition is violated. That is the suggestion, in essence.

Senator HRUSKA. I understand, but the condition that you do take exception to is that presently found in S. 1 at 2103(a). Under that situation, is there a sentence of exact years and days imposed before the probation order occurs?

Judge NEAHER. Oh no.

As I understand it, under the 21 series section——

Senator Hruska. In other words, the sentence is not at that time imposed, nor it it determined as to what the sentence would be if it had to be imposed after the condition were violated.

Am I correct?

Judge NEAHER. No.

You are right on the first point: the sentence is not imposed because, in my view, it is suspended. But it is specified. It says, in effect, if you look at the mandatory condition in 2103(a), that the

court shall provide—that is mandatory—shall provide as an additional condition of probation that the defendant not commit another Federal, State, or local crime during the period of probation. That is provided for.

All I am suggesting is the addition of words, in effect, that will say, "and the court may also provide for a specific term of imprisonment to take effect if the defendant violates the condition". That is what I say is the equivalent of suspending execution of a definite term of sentence as we do now, and is a sword of Damocles held over the man's head to make him realize that this mandatory condition does have teeth in it; that he is expected not to be arrested for another crime, and that if he violates that condition, he is going to serve 2 years, three years, whatever years the judge sees fit to impose at the time.

Senator HRUSKA. Let us take the situation under 2104(a) as we presently have it.

The defendant is brought before the judge and he does not impose sentence, but he says, you are free on probation. If you violate that probation, we will call you back in here.

What happens if he should be arrested and is brought back into the court?

Judge NEAHER. Then, of course, he is given his hearing on the revocation of his probation. And at that time, the judge can do any number of things. He can continue him on probation if, for example, he finds some mitigating circumstances as to why the man committed his crime.

I am not suggesting that the defendant be deprived of that; that is not my point. A court, on that revocation hearing, may also then impose, as I understand it under the bill, a term of imprisonment if he wishes.

Senator HRUSKA. What other options does the court have at that time?

Judge NEAHER. Basically, the real options are, shall I continue the defendant on probation because I am satisfied that it was an unintentional slip, or are there mitigating circumstances that make it clear to me that there is no good reason for sending the man to prison? He can continue, or he can say, this was such a grievous breach of the mandatory condition, I am going to sentence him now.

Senator HRUSKA. Then impose a sentence? Is the arrest of a man for a crime sufficient to revoke the order of probation?

Judge NEAHER. That is a very difficult problem.

I think that an arrest requires—the fact of an arrest can require he come before the court, and this hearing be held. Of course, in our district, we constantly adjourn those hearings; for instance, if it is a State crime, pending the outcome of the State crime.

In other words, we tend to keep him on Federal probation until we see what the State authorities are going to do. After all, we cannot interfere with their jurisdiction.

Senator HRUSKA. The thing that has bothered me in further considerations of the sentencing, parole, and probation, is whether or not the arrest of a man, and a charge leveled against him is sufficient to revoke the order of probation or parole, or do we really revert to that old axiom that a man is presumed innocent until he is convicted?

Judge NEAHER. I do not think that any of us feel that the mere fact of an arrest automatically revokes his probation.

Senator HRUSKA. You take into consideration all of the circumstances—the nature of the charges in a prima facie case and so on?

Judge NEAHER. Right.

That would be true even with respect to my suggestion. You understand that mine is what I call psychological conditioning basically.

The idea that we now employ when we say to a man, I hereby sentence you to 2 years, and his face gets white, and then we say we are going to suspend the sentence and place you on a period of probation for 3 years, and he walks out of here knowing that if he does violate—which means not merely an arrest—he is in trouble. If we later find that he willfully, intentionally violated his probation, he starts serving his 2 years. That is the point.

Senator HRUSKA. As I understand it, the change that you propose will take nothing away from the section as it now is, but it does vest in the court additional discretionary power to fit the case as the judge sees it.

Judge NEAHER. That is the whole point.

Senator HRUSKA. Thank you very much.

Would you go to your second point?

Judge NEAHER. The second point is what I have called an omission of the present Youth Corrections Act. I only mean that in the sense that I have examined the bill from stem to stern, and while I note there are extensive provisions relating to juvenile offenders up to the age of 18, there is nothing in the bill that I recall that deals with young offenders, except to the extent that there is a provision dealing with the possessor of narcotics. I suppose he could be of any age; we normally think of young people who are caught possessing narcotics, and for whom there is a special kind of treatment. That is to say, the court may place him on a period of probation before accepting a plea of guilty, and if, at the end of the year, he finds that there is good reason, he may dismiss the charge. And even if he has been convicted, the record of conviction will be expunged.

These are all elements of the present Youth Corrections Act which as I am sure you know Senator, covers two groups of people: 18 to 22, and 23 to 26. The 18 to 22, we call the youthful offender; the 22 to 26, we call the young adult offender.

It is my belief—and I hope you will not hold me to it—that statistics tend to indicate that, by far, the largest proportion of offenders fall into those ages, 18 to 26. They certainly do in our district, and it may be nationally.

Under the present title 18, the Youth Corrections Act takes care of those younger offenders.

Senator HRUSKA. It is repealed by S. 1—all of those sections.

Judge NEAHER. It seems to be.

Senator HRUSKA. Placed instead thereof are sections found in 3601 and following.

Did you consider those sections of S. 1 in connection with your statement?

Judge NEAHER. I thought I did, Senator.

Senator HRUSKA. I find no reference in your statement to section 3603, for example.

Judge NEAHER. I do not have the full bill with me. I made Xerox copies of all the pages that I thought would be pertinent here. If I could look at 3601 a minute——

Senator HRUSKA. I respectfully suggest that you consider it, because while we did in S. 1 repeal the present Youth Corrections Act, we placed in the bill sections to which I call your attention, provisions which we believe are an improvement on the Youth Corrections bill, because there are some blank spots in it as we all know.

Judge NEAHER. I do believe and I now recognize that I did consider 3601, and I do have the Xerox copies with me. That chapter's disposition of juvenile offenders—I take it that juvenile, as defined in the bill, is simply a young person up to the age of 18. Although there is a provision that indicates that if he has committed the act before he became 18, he may still be punished as a juvenile even though up to the age of 21. Is that not right? That only takes into account—suppose he did it at 18, but he was not picked up for it until he was 19 or 20. Do you punish him as a 19- or a 20-year-old or as a juvenile?

As I read this bill, you punish him as a juvenile, you treat him as a juvenile.

What I am saying, Senator, is that I do not find the present bill really covers those two age brackets of crimes committed after the 18th birthday up until the 22d, what we call the young offender category, or when the crime is committed by a person between the ages of 22 and 26.

Senator HRUSKA. Thank you for your comment on it.

I wonder if we could do this, Your Honor? We will take note and we will have taken note of the point that you seek to make. But may we ask you in turn to consider chapter 36 and give us a written memorandum as to what, if anything, is found lacking in chapter 36 in view of the points you make in your present statement? Could we ask you to do that?

Judge NEAHER. Certainly. I will do that.

Senator HRUSKA. Thank you very much.

Judge NEAHER. Now I come to the favorite subject over which you have labored long and hard, appellate review. Let me immediately assure you, Senator, that I am on your side, with some limitations, that may place me in opposition—I will not say to the body of judicial opinion on it—to the report of the Committee on the Administration of the Criminal Laws of the Judicial Conference of the United States which views it as not necessary, and probably there are good reasons for that belief, too.

My only point with respect to appellate review is, I believe, its primary purpose is to provide for review of what might be called a harsh or excessive sentence. That is basically what it is aimed at. Is that not so, Senator?

Senator HRUSKA. I did not quite get that.

Judge NEAHER. I believe that the idea of appellate review is aimed at trying to eliminate the harsh or excessive sentence.

Senator HRUSKA. That is correct. That is one of its aims. There are many facets, but that is the thrust of it.

Judge NEAHER. That is the thrust of it. My feeling is, as a matter of practicality and common sense, I find it difficult to believe that sentences lower than 5 years could ever be conceived of as harsh or excessive, although all things are relative. That I understand. In view of what I believe would be a tremendous burden on appellate courts, I think there ought to be a somewhat higher limitation than presently exists because it should not go down, I believe, to a felony which could be punished by 1 year and 1 day, in other words, a sentence of 1 year, 1 day.

Senator HRUSKA. Let me give you this hypothetical situation. Let us take the forgery of a Government check, for example a welfare check. Suppose there develops in a given court a judge who thinks why should we waste too much time on things like this. Let us see what the charge is. If it is the forgery of a draft or check and the sentence is 18 months, come hell or high water the sentence is 18 months.

Along comes a man, and he has been a diligent and honest citizen. He runs out of his worldly means, his job and any income whatsoever. He has eight kids at home that are very, very hungry and for the first time in his life he does something wrong because he felt that the laws of the country could be violated just this once so he could feed his kids.

That judge, when the man is brought before him, says, "Sorry mister, I have a system here where I give 18 months to anybody and everybody." The man will then say, "Yes, but I have a job and I am sorry, and I did it under these circumstances." Yet the judge will say sorry, there is a pattern. Under the present system there is no way that sentence can be appealed and reviewed.

Do you want it reviewed, or do you not?

Judge NEAHER. I respectfully differ, if I may take advantage of your statement of the facts.

If the judge did say I do not care about all these other factors, I have a rule here, anyone who steals or forges or utters a government check is going to get 18 months. Our second circuit has already held that that is the type of sentence they review as a matter of law. As a matter of law it is improper for a sentencing judge to adopt his own arbitrary rule of sentence for a given type of case, because the rule of sentencing is that you must take into account the individual factors. You cannot say, as some judges did, I know, every draft evader gets 2 years, period.

Senator HRUSKA. That was the case in the eighth circuit, where there developed a kind of a pattern for draft evasion cases, and it created a great deal of difficulty. The circuit court did deal with it, and very effectively.

That is one type of case that would be easier to meet than the other point that I seek to make.

Judge NEAHER. I understand that does not answer all the objections you raised. I am simply pointing out that considering the facts, what would open up here is this, I suppose 90 percent of our criminal cases, somewhere between 80 and 90 percent anyway, of our criminal cases, are plea cases—so that the only litigated issue then, is the sentence that was imposed.

Of course, at the present time, seeing the statistics of appellate court caseloads, both civil and criminal, a tremendous burden would be thrown on the courts of appeal.

Senator HRUSKA. Should we ration justice?

Judge NEAHER. I am not suggesting that. Touché, Senator.

Senator HRUSKA. This is the only phase of our judicial process which is not subject to review. In fact, we are the only civilized Nation that does not extend review—not preview, review—of the amount of the sentence, and that is kind of hard for some of us to accept.

Judge NEAHER. I understand that, Senator. That is why I am on your side on the basic principle of appellate review. My point is, I indicated, the more practical one of how do we deal with what will probably turn out to be an automatic appeal in practically every case? I would say there is not a convicted defendant who does not feel, perhaps, that he did get a raw deal, even though it is the right deal. That is somewhat of a problem in a district, or indeed in a circuit such as ours, in the second circuit, where we have such a tremendous criminal caseload. As I pointed out, we alone in the eastern district, as of the latest statistics, have over 1,000 pending criminal cases, more than even our gigantic neighbor the southern district of New York has.

Now, of course it does not affect the district judges. I am thinking of the appellate judges there, who are thoroughly overburdened.

Senator HRUSKA. It is felt that as this proceeding would develop, and with the passage of time the courts would develop an attitude toward it and a way of dealing with it and reducing it to practicality in a very workable form. If there is such a flow of appeals that are purely dilatory and without substance, the kind that we find reaching the Supreme Court, for example, in terms of thousands per year—just as a matter of form you apply for a writ of certiorari—if that would develop, the Congress is still going to be in business presumably, and they can say all right, it will apply to those 2 years or more, 3 years or more. But we would like, some of us would very much like to overcome the backward status of this Nation, the only civilized country in the world that grants an appeal on every case other than this.

We respect each other's positions. I respect you for yours.

Judge NEAHER. You have won me over on the question of appellate review.

I believe that covers my three practical points, and I shall take another look at chapter 36, on the question of the Youth Corrections Act, and perhaps state my views in an additional letter to you or counsel if I have any different views.

[The prepared statement of Hon. Edward R. Neaher follows:]

PREPARED STATEMENT OF EDWARD R. NEAHER

I thank the Subcommittee for this opportunity to comment upon the sentencing provisions of the Bill S. 1, which proposes to codify, revise and reform Title 18 of the United States Code. Although I am a member of the Second Circuit Committee on Sentencing Practices, the views I express are entirely my own. I have, however, discussed them with my colleagues on the Bench in the Eastern District, and my views reflect that discussion. It might be appropriate to note in this connection that the Eastern District of New York, as

of the time of the 1970 census, embraced a population in excess of 7½ million people. That number has undoubtedly increased in the past five years. This large and growing population inevitably contributes to the substantial increase in the filing of criminal cases in our district. According to the latest report of the Director of the Administrative Office of the United States Courts, released at the March 1975 meeting of the Judicial Conference of the United States, the Eastern District of New York was third in the nation in criminal cases pending December 31, 1974. The first and second were respectively the Southern and Central Districts of California. The judges of our district therefore do have considerable practical experience in sentencing. My comments grow out of that experience and are focused upon the three points which follow.

1. SUSPENSION OR DELAY OF EXECUTION OF SENTENCE

Section 2104(a) provides that a term of probation commences on the day it is imposed "unless otherwise ordered." The last clause recognizes the traditional power exercised by sentencing courts to suspend or delay the execution of a sentence. There appears to be no comparable expression of the court's authority in Chapter 23, which provides for terms of imprisonment. While §2305(a) states the time when a sentence to a term of imprisonment commences, it does so only in terms of the date the defendant is received in custody. Ordinarily, a defendant is required to surrender immediately after sentence to the custody of the United States Marshal for transportation to prison unless he is continued on bail pending an appeal or surrender is stayed for other reasons.

Under present practice, the court may delay the date of surrender for reasons which require such consideration, such as illness in the defendant's family, an impending wedding of a son or daughter, or other humane considerations. While it may not be the intention of S. 1 to interfere with the court's discretion in this regard, I note that the Probation Committee of the Judicial Conference of the United States recommended that a prior version of S. 1 be redrafted "to provide that the court may suspend or delay the execution of a sentence to imprisonment." I am in accord with that suggestion and recommend that § 2305(a) be revised in parallel with § 2104(a), relating to probation.

There is an additional reason for continuing such authority in sentencing courts, even when a defendant is placed on probation. I recognize that S. 1 adopts the basic proposal of the National Commission that probation be treated as a sentencing alternative rather than as the "suspension" of some other sentence. I am in strong accord with that philosophy. But I reflect the views of my fellow judges in the Eastern District who believe there are times when the threat of a suspended specific term of imprisonment hanging over the head of a defendant, in the event he violates a condition of his probation, is a strong deterrent to his straying from the path of good conduct. Not infrequently, therefore, sentences in our district specify that the defendant shall be sentenced to a term of years of imprisonment, execution of the sentence to be suspended during a period of probation.

I understand that the National Commission urges that judges first consider probation as a positive sentencing alternative before thinking about imprisonment. The treatment of sentencing in S. 1 certainly reflects this, and as I have indicated, I am in strong accord with that idea. But I believe that approach will not be subverted by permitting judges to continue the present practice, even when they impose a sentence of probation.

I note that under § 2103(a) it is provided that the court impose as a mandatory condition the requirement that the defendant not commit another federal, State or local crime during the period of probation. I believe that condition will have more meaningful effect if coupled with a specific term of imprisonment to take effect if the defendant violates such a condition. I recommend, therefore, that §2103(a) be amended to provide that the court may also provide that a specified term of imprisonment shall take effect upon the violation of the mandatory condition. This, of course, is not intended to dispense with the revocation hearing provided in §2105. As I have indicated, it is simply an attempt to provide a probated defendant with an additional incentive to keep out of trouble.

2. OMISSION OF YOUTH CORRECTION ACT

Present Title 18, United States Code, contains in Chapter 402 the provisions of the Federal Youth Correction Act, §§5006, *et seq.* Sentencing of youthful offenders and young adult offenders under that Act is a frequent occurrence in our district. Youthful offenders range in age from 18 to 22; young adult offenders from 22 to 26 years old. There are statistics showing that those two age groups account for a large, if not the major percentage of crime committed in our district and State, and quite possibly in the nation as a whole. The purpose of the Youth Correction Act, as I have no doubt you are well aware, was to provide a special kind of correctional treatment for offenders in those age categories. Where it was felt that incarceration was necessary, special youth correction centers have been provided to insure that contact with older, hardened offenders would be avoided. Moreover, a young defendant sentenced under that Act, whether to commitment or probation, could look forward to the possibility that if he successfully completed the program, he could apply for a certificate which would automatically erase his conviction.

I note that the Youth Correction Act provisions are not part of S. 1. I understand that this resulted from the view of the National Commission that such provisions were unnecessary, since the sentencing court would be empowered to recommend that a young offender be committed to special facilities to be maintained by the Bureau of Prisons. The National Commission in its proposed Federal Code, however, made specific provision in §3203 for youth offenders, which it specified as those under the age of 22 at the time of conviction. I find no equivalent provision in S. 1. Moreover, I note that the Probation Committee of the United States Judicial Conference recommended that the 22-year age limit of the National Commission be changed to 26 years, which conforms to the present Youth Correction Act provision for "young adult offenders."

S. 1 contains a complete section on the treatment of juvenile offenders under the age of 18. It also provides in §3808 for the expungement of criminal conviction records in the case of persons who have been found guilty of possessing drugs. There are no comparable provisions for those between the ages of 18 and 22 in S. 1. I have sentenced many youthful and young adult offenders who have been involved in the importation of drugs. Many of them had had no prior criminal record and it would appear that while on trips abroad they acted impulsively in stuffing marijuana or hashish into their suitcases when they were returning to the United States. Yet they had to be charged with a felony. When such convicted persons have successfully completed a period of correctional treatment, it would seem to me tragic to have them stigmatized for the rest of their lives by a criminal record acquired under such circumstances. I therefore recommend that the Committee consider some form of special treatment for young offenders and for expungement of records upon successful completion as provided in the present Youth Correction Act.

3. APPELLATE REVIEW OF SENTENCES

Section 2005 of S. 1 provides for appellate review of sentences imposed by the district courts. I have no doubt the Committee is aware of the divergence of opinion among judges, both trial and appellate, as to the need or desirability of such review.

In our Eastern District, we have what I call a form of pre-review of sentences before they are imposed. I refer to our sentencing panel procedure, sometimes called "collegial sentencing." Briefly described, the sentencing judge sits down with two fellow judges designated to act as conferring judges for a particular month. The three judges review the same presentence report and the two conferring judges each fill out a form stating their respective recommended sentence. At the time of the panel conference, the three judges discuss the recommendations and the sentencing judge considers them prior to the imposition of sentence. Of course, the conferring judges do not see the defendant and have no opportunity to hear what he may have to say in mitigation of sentence or otherwise at the time it is imposed.

The chief advantage of the collegial method is that the resulting sentence inevitably has to take into account the views of the two other judges as to an appropriate sentence. A study of the results of such conferences over an extended period of time was made by the Federal Judicial Center. It was the

conclusion of that study that in approximately 60% of the sentences imposed, there was substantial uniformity on the type of sentence imposed. Of course, that means that in 40% there probably was disparity, or to put it another way, lack of uniformity. Nonetheless, as Dean Goldstein of the Yale Law School recently noted at our Second Circuit Sentencing Institute two years ago, excesses are minimized and judges tend to reduce the extremes of their sentencing disparities by collegial sentencing.

To return to appellate review as provided for in S. 1, I would readily acknowledge that sentence preview is not the same as sentence review. Obviously, there are many districts in the United States where it would be impossible to assemble three judges to sit down and discuss some sentence. I am in favor of appellate review to insure a means of correcting excessive sentences but am in accord with the suggestion made by the Committee on the Administration of the Criminal Law of the United States Judicial Conference. The leading point in that suggestion is that three years imprisonment be the minimum appealable sentence. As I read S. 1, in the form in which it came to me, an appeal would be permitted for a prison sentence of one year and a day. While all things are relative, I cannot view such a sentence so extreme as to require appellate review. I would respectfully urge the three year limitation recommended by the Judicial Conference Committee.

Senator HRUSKA. Returning to sentencing, as one does say that in order to be appealable, that is subject to review, the sentence must be at least one-fifth of the maximum before review is in order. If it is less than that, then there is no condition. So there is some protection there. It was for that purpose.

I would like to keep down the volume if it threatens to be overwhelming. That is inserted for that purpose.

Thank you very much for coming, Your Honor.

Judge NEAHER. I appreciate the opportunity.

Senator HRUSKA. Our next witness is also one who has appeared before us before, Jack C. Landau. He is with the Reporters' Committee for Freedom of the Press. His byline is well known in larger circles. We welcome you once again for coming before us.

Mr. LANDAU. We have a rather long statement that we have submitted for the record.

Senator HRUSKA. We have your statement, and it will be printed in the record. I know it is going to be useful because your previous analysis was very good, historically, as well as for current application. Can you highlight it for us? We have a meeting of the full committee at 10:30, so we are going to have to hurry along here. We want you to have plenty of chance.

STATEMENT OF JACK C. LANDAU, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Mr. LANDAU. I would like to point out that Mr. Fred Graham and I, who worked on this, both wanted to appear, but Mr. Graham is covering the Connally trial and, unfortunately, for this appearance, the judge is giving his directions to the jury right now, so Mr. Graham was not able to come.

I think, Senator, we are back this year with the same complaints we made to you last year that S. 1 is not substantially different than S. 1400, but if it is put into law in its current form, it is going to severely restrict the current ability of the public to learn about

Government policymaking decisions, Government reports, and even Government crime by establishing these new types of criminal censorship.

Of course, we are most concerned specifically with the receiving of stolen property, theft, and fraud provisions that automatically make a news reporter criminally liable for obtaining or publishing any Government information without the official approval of the Government.

The second provision is one——

Mr. ROTHSTEIN. Excuse me, could you identify the sections?

Mr. LANDAU. Yes. One would be the net that was established by sections 1301, 1731, 1733, 1734, and 1523.

Senator HRUSKA. May I suggest that you said "any disclosure of information;" that is not what section 1301 says. Read the language of the first sentence.

Mr. LANDAU. Yes, sir. "A person is guilty of an offense if he intentionally obstructs, impairs, or perverts a Government function by defrauding the Government in any manner."

Senator HRUSKA. That is far from "any information." It has to be something that defrauds the Government, and it has to obstruct or impair the Government. Do we want Government employees to proceed with anything and everything they want to do, including defrauding our Government, obstructing and impairing Government functions?

We thought the committee touched a good nerve here.

Mr. LANDAU. Well, sir, in the Ellsberg prosecution, as you may remember, Mr. Ellsberg was indicted on charges of defrauding the Government, which was basically the same.

Senator HRUSKA. There was no statute to cover that, so he was left free.

Mr. LANDAU. I believe he was left free because of that incident.

Senator HRUSKA. There was another reason why he went free, but there is no statute now that is comparable to section 1301.

Mr. LANDAU. He was indicted under a fraud statute, and let me read to you the Government's trial brief in the *Ellsberg* case. This is from the Justice Department trial brief in the *Ellsberg* case:

> Both the documents—that is the Pentagon papers—and their contents are the property of the United States and remain its property until they are released by the Government. The content of such documents is itself Government property apart from the Government's ownership of the sheets of paper. To be convicted of receiving stolen property it only need be shown that the defendant obtained possession of or some measure of control over the property.

They alleged in the indictment, the fraud section of the indictment—unfortunately, I did not bring the whole indictment with me—that he defrauded the Government out of its powers to control the release of this information, and this is a very old line of cases that go all the way back to *Haas* v. *Hinke*.[1] Mr. Hass was indicted in 1910 for defrauding the Government of its power to release this information. This is not a new concept that the Justice Department has come up with. We find it incorporated here in such a way that it authorizes a blanket prosecution anytime the Government decides to waive its clause by saying to the newspaper, that is our information and you cannot publish it without our approval. You are defrauding us of our rights to release Government information.

[1] 216 U.S. 462 (1910).

Senator HRUSKA. You indicated that there are other sections besides 1301 bearing on this point. If so, what are they?

Mr. LANDAU. 1731 is a theft provision that incorporates this same doctrine. You are receiving our property that was taken from us without authorization.

Senator HRUSKA. Our property that defrauds us?

Mr. LANDAU. That is right, the Government. Receiving stolen property is in the same concept. You are receiving property that has been taken from us without authorization.

Senator HRUSKA. What other section are you referring to?

Mr. LANDAU. That is section 1733, sir.

Senator HRUSKA. You take exception to that because of its unlimited scope, is that correct?

Mr. LANDAU. Yes, sir. We take exception to it because the entire thrust of the Ellsberg prosection rests on the assumption that this is Government property, and the definition of Government property in the new act, in S. 1, while it has been changed a little bit from S. 1400, still permits a prosecution for Government property without any monetary value. That is clearly designed to be information, sir.

Senator HRUSKA. In order to make this colloquy meaningful, let the record show at this point the text of S. 1, section 1733, entitled, "Receiving Stolen Property," and subsections (a) and (b) of that section.

[The information referred to follows:]

SECTION 1733. RECEIVING STOLEN PROPERTY

(a) Offense.—A person is guilty of an offense if he buys, receives, possesses, or obtains control of property of another that has been stolen.

(b) Affirmative Defense.—It is an affirmative defense to a prosecution under this section that the defendant bought, received, possessed, or obtained control of the property with intent to report the matter to an appropriate law enforcement officer or to the owner of the property.

Senator HRUSKA. Very well, what other section have you had in mind?

Mr. LANDAU. The six sections that I cited to you are, sir, the sections which would recodify the law in such a way as to permit the Government under various provisions, fraud, theft, receiving stolen property, executing fraudulent scheme, and the new provision, intercepting correspondence, which would permit the Government to prosecute a newspaper reporter for receiving Government information right on its face.

Senator HRUSKA. Their is another section, however——

Mr. LANDAU. We know what it was designed to do; obviously, it was designed to stop people from receiving stolen jeeps and other tangible Government property of some value to the Government, but we have to live with a document the Justice Department has evolved in the *Ellsberg* case, which it has not repudiated, as far as we know, and that doctrine is that the Government owns its own information, therefore, may prosecute people for obtaining it.

Senator HRUSKA. Of course, there is a more specific section on the subject, section 1124, where the offense is—and I will let the record show the text of section 1124, subsection (a).

[The information referred to follows:]

SECTION 1124. DISCLOSING CLASSIFIED INFORMATION

(a) Offense.—A person is guilty of an offense, if, being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant, he communicates such information to a person who is not authorized to receive it.

Senator HRUSKA. There the penalty is visited upon the person who communicates the information of the defined nature to a person who was not authorized to receive it, but the person who receives it is not within that function.

Mr. LANDAU. That is the second area, that is the national security area, and I believe that that section also permits a blanket criminal prosecution for receiving national security——

Senator HRUSKA. You would have to point to the exact language on that point because that is not my recollection of it, and I participated in writing the section.

Mr. LANDAU. Perhaps, we can discuss that, sir, for a moment. "A person is guilty of an offense if, knowing that national defense information may be used to the prejudice or safety or interest of the United States——

Senator HRUSKA. What section is that?

Mr. LANDAU. Section 1122; "or to the advantage of a foreign power, he communicates such information to a person he knows is not authorized to receive it." Therefore, a news reporter may be prosecuted for publishing national defense information if he reasonably knows that the information may be used to the prejudice of the United States or to the advantage of a foreign power. I think that it is fairly well known in relations between the United States and hostile powers, sir, that virtually any information from the State Department or Defense Department that is embarrassing to the United States politically will certainly be used by a foreign power in such a way which is prejudicial to the interests of the United States.

Senator HRUSKA. Section 1122, the text can appear also at this point in the record.

[The information referred to follows:]

SECTION 1122. DISCLOSING NATIONAL DEFENSE INFORMATION

(a) Offense.—A person is guilty of an offense if, knowing that national defense information could be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he communicates such information to a person who he knows is not authorized to receive it.

Senator HRUSKA. Two points can be made. Item one: violation of that subsection is only against the person who discloses the information. Item two: it relates to national defense information. Since the first duty of a nation is to survive, we do not like to see national defense information broadcast indiscriminately, freely and fully. We like to define what national defense information is and keep it classified. We believe that is a pretty good section.

Mr. LANDAU. Well, sir, as to your first point. When a newspaper publishes the information, it is disclosing. This is not directed at just the Government employee. There is no limitation in section

1122 on just a Government employee. It says, person, he is guilty. Second, on the definition of national security, sir, the definition in the statute is:

* * * military capability of the United States or an associated nation, military planning or operations of the United States, military communications of the United States, military installations of the United States, military weaponry, weaponry development, or weaponry research of the United States, intelligence operations activities, plans, estimates, analyses, sources, or methods of the United States, intelligence with regard to a foreign power.

As Senator Hart pointed out to Mr. Maroney in last year's hearing, sir, there is not a story that appears in a newspaper any day out of the Defense Department nor State Department that would not fall under this definition.

Senator HRUSKA. I just consulted the staff here, and I am informed that it is a virtual repetition of what we have now in the present statutes, together which some modification which were drafted into it as a result of Supreme Court decisions. We would like to stand by that, because the burden is certainly on those who challenge it to show us that it has not served us well.

Mr. LANDAU. Under the existing espionage statute, which is the one I think that staff may be referring to, "it is a crime to obtain defense information with intent or reason to believe that the information is to be used to the injury of the United States."

Senator HRUSKA. In the present statute?

Mr. LANDAU. You must intend to injure the United States. You must intend to aid a foreign power. There is no intent in the new statute. It says, "may be used to the prejudice." Therefore, for example, when the New York Times published the Pentagon papers, the Justice Department could not have said at that point that the New York Times intended to harm the United States. The New York Times thought it was helping the United States by publishing that information. But under the existing statute, all the Justice Department has to show is that some third party will use that information in a way that is prejudicial to the United States.

Senator HRUSKA. What number did you say that section was?

Mr. LANDAU. You asked me to compare the existing statute, 18 U.S.C. 793, which is the existing espionage statute, with the recodification proposal in S-1, sir.

Senator HRUSKA. That is the one oriented to intent?

Mr. LANDAU. Yes. S-1 would eliminate the intent to injure, and replace it with very vague language which says, "may be used to the prejudice of."

Senator HRUSKA. Section 1122, of course, reads this way: "A person is guilty of an offense if, knowing that the information may be used to the prejudice or safety" of the country—knowing is substituted for intent. We will make note, however, of your point, and we will recanvass it.

Mr. LANDAU. As I say, I think there is a clear difference between publishing something that you think may help the public of the United States to know about it, on the one hand, and not intending to harm the United States, which is under the current statute. But on the other hand, publishing something where you reasonably know that some foreign power is going to use it for political purposes

to injure the United States, and it is not an offense that you intended to harm the national interest.

Senator HRUSKA. The reason that we put knowing in S–1, is that the present statute does not say with intent to be used to the injury of the United States. What it says in its full text is this: "that it will be used with intent or reason to believe that the information is to be used to the injury of the United States." We eliminated intent, but put reason to believe in its place. I believe that if somebody, as a newspaper reporter or as a citizen, would want to put it in the newspaper or on a billboard, that they have broken the Code of the United States—and here is the key to it—by publishing that. There is reason to believe, in the mind of any reasonable person, that that is done with injury to the public interest. It is that kind of a thing that we get into.

Mr. LANDAU. Now, sir, I believe you referred earlier to section 1124, which does have the exculpatory provision in it.

Senator HRUSKA. I was reading from section 793, that applies to national defense. That is right.

Mr. LANDAU. There is section 1123, which follows in this section, which says:

> A person is guilty of an offense if, being in unauthorized possession or control of national defense information, he engages in conduct that causes its communication to another person, who is not authorized to receive it, or fails to deliver it promptly to a proper Federal official, who is entitled to receive it.

Here we have one more step down the line. Here there is not even the maybe prejudiced to the interest of the United States.

Senator HRUSKA. That is right. To whom is it directed? Is it directed to the newspaper, or to the disloyal?

Mr. LANDAU. 1123 is directed to every person. A person is guilty of an offense if, being in an unauthorized possession or control of national defense information * * * —Mr. Hirsh, for example, on the CIA— . . . he engages in conduct that causes its communication to another person. In our language, he publishes it. Or, he fails to deliver it promptly—I assume there they even ask for his notes, and say, give us back our information. There is not any exculpatory provision in 1123. There is in 1124.

Senator HRUSKA. Very well. Your point is noted, and again, we will recanvass that. We thank you for your suggestion.

Mr. LANDAU. Would it be improper, Senator, to suggest perhaps that Congress, in some way in this legislation, not permit any criminal prosecution against the news media for obtaining government information, unless they conform to what is the existing doctrine in *Near* v. *Minnesota*, and the Pentagon Papers case; that there be a clear and present danger, or a direct, immediate or irrevocable danger of national security. I think that most people would agree that the criminal law is, as a deterrent, as much of a prior restraint as an actual injunction, and it would seem to us extremely reasonable if the Congress would consider conforming the criminal provisions, which are available under this law against the news media, to the *Near* doctrine; and just say quite simply that you cannot prosecute a newspaper reporter for republishing government information, unless it poses a clear and present danger to the national security, rather than this almost libel law that says whole categories of information are automatically subject to the criminal prosecution without any evidentiary showing whatsoever that it is going to cause any danger to the national security.

Senator HRUSKA. Very well. What is your next point?

Mr. LANDAU. I only have one final comment. We do think that the law does also add some rather new penalties against government officials, government employees, who want to give information to the press, especially information which might indicate that the government itself is breaking the laws of Congress and the Constitution. There are, as you know, several new provisions in the bill which impose penalties on Government employees for giving out, without Government authority, Government information. But there appears to be no interest so far in the bill in trying to encourage and protect conscientious Government employees who come to the press and say, the Government is breaking the law.

Senator HRUSKA. Mr. Landau, that is not quite true, is it, if we consider the provisions for administrative channels through which challenges are not only admissible, but which are actually encouraged. But if an employee of the Government sees something that he, in his judgment, thinks is irregular or dishonest or unlawful, the recourse is not to break his pledge and his loyalty to his Government. It is to express his loyalty to his Government, and that is not to go to the newspapers and make charges that will be very irresponsible coming from someone on the inside, would be given great circulation and credibility when they should not. There are ways that he can appeal, and he can make his complaints known to his superior. If his immediate superior is involved, he can complain to the superior's superior, and when a judgment is made by the head of that agency, it then can be appealed to the Interagency Appellate Council. And is that not the way to go about it, instead of allowing someone, who is probably not well equipped to judge what is wrong, illegal or corrupt—is that not a better way to do it, running it through the hands of the people who are in a better position to judge, and who can give it a degree of objectivity which a disgruntled employee perhaps would not be able to do?

It was the judgment of the committee, and also of those who have been in this work for a long time, that that is a better way of doing it than having that moment of glory when his name will be on the front page at least once. And is it not a great injustice and hardship on those who are not guilty, inasmuch as this administrative procedure has been developed, and can work well and is working well, that was established first by administrative order, and now we seek to put it in the statute? What comment would you have on that?

Mr. LANDAU. Well, sir, we have not had much experience with it. I suppose I can only talk from my past experience to say that this appellate intergovernmental review board did not disclose to us that the CIA may have been illegally monitoring people domestically. But the newspapers did it. This Appellate Council did not disclose to us the Watergate corruption, but the press did. This Appellate Council did not disclose to us the My Lai massacre. The press did. I think we may be somewhat cynical about the efficacy of Government sitting in judgment on itself to decide what the public should know, when it involves the Government committing crimes, sir.

Senator HRUSKA. On that point, you speak of the efficacy of procedures where the Government speaks on the Government. The Government is not monolithic. It is not a person. There are many persons involved. There are many dedicated public servants who have devoted their life to their job. Let us not be too anxious to say, Government upon Government, because it is from individual to individual, and they are charged with semijudicial and semiadministrative responsibilities. What is the alternative to say, Government against Government, Government upon Government, and therefore inefficacy? What is the alternative—to put it on the front page of a paper, at the instance of some employee ill equipped to judge the illegality or the corruptness of something, because he probably has supervision of a small segment thereof. Yet the employee unilaterally judges something as corrupt and therefore a number of Government official who may be charged with corruption on the front page of the paper on something perfectly groundless. And that is not efficacy either.

Mr. LANDAU. You are referring mainly to the provisions, I gather, 1123 and 1124?

Senator HRUSKA. Subsection (c), that is correct.

Mr. LANDAU. That provide for a government official to seek declassification of national security information he wants released. But I think that it may be somewhat unrealistic to take a government official—and I agree with you that they are hard-working and dedicated—who see classified information which is going to embarrass his agency head; I find it hard to believe that the average government employee is going to risk his job security by saying to the Director of the CIA, I want declassified the information that you are illegally monitoring the citizens of this country. I find that highly unrealistic. He is not going to risk his career to publicly fight for declassification of something that might embarrass a Cabinet officer.

Senator HRUSKA. On the declassification, there are standards and provisions for it, and we have to take it as it goes. We cannot say, let us discard it. Declassification is abused, therefore we will abolish it. That is essentially the position that you advance, and I do not think you will find acception of that concept.

Mr. LANDAU. Could we turn to section 1524? That does not involve security. That merely says—

> A person is guilty of an offense if in violation of a specific duty imposed upon him as a public servant, or a former public servant, or by a regulation, rule or order issued pursuant thereto, he disclosed this information to which he has had access only in his capacity as a public servant that had been provided to the government by another person other than a public servant acting in his official capacity.

Now, it seems to me that first provision, unless I misread it, really says to every government official, any information that you obtain in your official capacity, you shall not release, or you will be prosecuted. There is nothing about classified information, there is nothing about national security information. The conscientious government official in the Department of Health, Education, and Welfare, or in the White House, or in the Treasury, who wants to give to a newspaper reporter information that his boss may be breaking the law, or that the Treasury Department or HEW is violating secretly

its own public policy statements, is immediately prosecutable. I think, sir, that the Congress would want to encourage government officials to come forward with information which, at least, reasonably——

Senator HRUSKA. They do, indeed. But they do not encourage them to walk to the editorial rooms of media, radio, or TV, to do it. They have channels which are established. They are well-defined. They are as objective as you can get until you go to court. But you can go to court under these procedures. That is the point of these things. If the alternative is to do away with these classifications, give any employee, any official, the right to disclose anything on the grounds that he thinks it is corrupt and dishonest, and is possibly embarrassing but should be disclosed, then you do away with classification. Or are you prepared to say we should do away with it?

Mr. LANDAU. I am not talking about the classification statute. I am talking about 1524.

Senator HRUSKA. You are reading from 1524, are you not?

Mr. LANDAU. Have I misread it? That has no national security limitation in it, does it?

Mr. ROTHSTEIN. That provision originates with title 18, section 1905. I would like you to discuss the differences.

Mr. LANDAU. I do not think I have prepared it.

Mr. SMITH. There is a possibility that it is broader in some respects and narrower in some respects; 1524 is not new. It was in the October committee print because we got a complaint from one of the agencies that we repealed 1905.

Mr. LANDAU. I think I know what you are talking about. It is my understanding—perhaps I am wrong—that this was the trade secret provision that was put into the act when the old Commerce Department started investigating consumer problems in the late 1940's, and one of the great problems the private companies had was that they did not want to give the government trade secrets, because they thought that they might be released, so they made it a crime to release these trade secrets.

Senator Hruska, is that not the derivation of it, sir? I do not think this provision relates here, as this provision does, to confidential statistical data, sources of income, profits, losses, expenditures, which is drawn in the current law for trade secrets. This is just a flat prohibition on any information or any type whatsoever given to the government in its official capacity, sir.

Senator HRUSKA. When you say it is a flat prohibition, to what section are you referring?

Mr. LANDAU. Section, 1524, sir. S. 1, 1524.

Senator HRUSKA. That relates only to public servants or former public servants that are governed by statute. What is wrong with that—if an employee has statistics in his possession as any employee or as a former employee if the statute say that this is confidential, are you going to say that an employee should have the right to go over and above that statute?

Mr. LANDAU. All I am saying, sir, is that the existing law to which your aide referred is limited to the trade secret question. It was specifically put in to encourage companies to give their trade

secrets to government, so the government could monitor the quality of their product; 1524 is substantially broader and just says a person is guilty if he discloses information to which he has had access only in his capacity as a public servant.

Senator HRUSKA. Information not authorized by law—you ought to read the whole thing—not authorized by law for disclosure.

Mr. LANDAU. Are you suggesting then that unless there is a specific statute prohibiting disclosure that government officials are free to release all government information?

Senator HRUSKA. No, I am not. You were trying to paraphrase and discuss section 1905, and 1905 does not refer to everything, any information. It says to the extent not authorized by law, any information coming to him by reason of his employment.

Mr. LANDAU. The way I read it, by statute, regulation, or rule, or order. I believe that most Federal agencies have regulations or rules that say you may not disclose information without the approval of the Secretary or a superior. If we perhaps could rely on Congress to specify, that would be one thing, but Congress is delegating to the Secretary of every Cabinet department the power to say what information may not be released, and a corollary that the government employee is automatically prosecutable for releasing the information.

Mr. SUMMITT. Do you not have to read into it the condition on page 117, lines 3, 4, and 5? This is very narrowly drafted. If it is too broad, if you want to drop the reference to regulations, something like that, that is one thing. But there is all kind of information coming to government possession that it is important to protect for a lot of reasons.

Senator HRUSKA. Mr. Landau, you have made several very good points here, and the record will furnish us with the list of them, and we will go back and forth among these sections to see where, and I believe you will find in some instances the new draft will tighten it up a good deal and overcome some of the objections in the present law.

Mr. LANDAU. May I make one more point, Senator?

Senator HRUSKA. If you have, as a result of any of the discussion this morning, any additional thoughts or citations you would like to furnish us, we would be glad to receive them. That is why we have these hearings, and we are glad you spent so much time as you did preparing for them and for also coming here.

So if you can do that, we would appreciate it very much.

The full committee does have a meeting, and I am called into executive session.

Mr. LANDAU. May I just take 1 minute more of your time, sir?

Senator HRUSKA. Surely.

Mr. LANDAU. To bring your attention to something which I think is disturbing perhaps since Watergate and perhaps you might concur.

That is, we would wonder whether this committee might consider giving some type of attention to including some type of proof by government law, which would clearly make it a Federal crime for any employee of the government to knowingly or recklessly make

public statements which are false or which contain substantial misrepresentation of fact, including omissions of important facts.

There is substantial case law for this proposition, starting back with *Hass* v. *Hinckel*, which is a 1910 prosecution against a government official for giving false information.

The recent Campaign Reform Act, as you know, has a new provision which I believe makes it a crime to place an advertisement which misrepresents the voting record of your opponent, and the recent indictment against Governor Kerner, I believe, accuses him of defrauding the people of Illinois by giving out false information in office.

In addition, there is also the current provision in section 1001 of the current code that makes it a crime for any person to willfully falsify, conceal, or cover up by any trick, scheme, or device all material facts which is in the jurisdiction of a government department.

More importantly, Senator, a great many reporters feel that Watergate has shown that the press is enormously vulnerable and the readers are enormously vulnerable to intentional lying by the government, the kind of lies that cause people to give money to political parties, or not to political parties, or give money to particular or not to particular candidates, and Congress has shown in the past that it does have the statutory power to protect from misrepresentation, to protect the consumer from misrepresentation, from people who do business in interstate commerce.

It has power—it has in the past—to protect government from being lied to by the citizens, and we would hope that perhaps some consideration would be given to protecting the citizens from being lied to by the government.

Thank you, sir.

[The prepared statement of Jack C. Landau follows:]

PREPARED STATEMENT OF FRED P. GRAHAM AND JACK C. LANDAU

1. INTRODUCTION

My name is Jack C. Landau. I am a working news reporter employed as the Supreme Court correspondent of The Newhouse Newspapers. I am accompanied by Fred P. Graham, a working news reporter employed as the Supreme Court correspondent of CBS News. Mr. Graham and I are here today as individual reporters in our capacities as members of the Executive Committee of The Reporters Committee for Freedom of the Press.

We thank the Subcommittee for this opportunity to testify on certain freedom-of-information features of the Federal Criminal Code Reform Act of 1975, S-1, introduced by Senator McClellan.

The Reporters Committee is the only legal defense and research organization in the nation exclusively devoted to protecting the First Amendment and freedom-of-information interests of the working press.

The organization premise of the Committee is that the constitutional interests of working news reporters, editors and photographers may be different from the interest of other institutions concerned with preserving First Amendment rights to freedom of the press and freedom of speech.

The Committee was formed during an open meeting at Georgetown University in March 1970 in response to the threat posed by the Justice Department's subpoena policies. It is funded mainly by grants from a few major media organizations.

Because we have faith that the Congress wishes to protect and encourage First Amendment guarantees, we believe that Congress should strongly oppose the new press censorship principles incorporated in the Criminal Code Reform Act.

2. SUMMARY OF REPORTERS COMMITTE'S VIEWS ON THE CRIMINAL CODE REFORM ACT AS IT AFFECTS THE WORKING PRESS

It is abundantly clear that S. 1 is an unwise and unconstitutional proposal which could be used to silence the type of aggressive news reporting which produced articles about the Pentagon Papers, the My Lai massacre, the Watergate cover-up, the CIA domestic spying, the FBI domestic spying and other government misdeeds: news reporting which has been embarrassing to some persons in the government and which has depended in whole or in part on government-compiled information and reports frequently supplied to the press by present or former government employees without government authorization.

Quite simply, S–1, if enacted, could severely restrict the current ability of the public to learn about government policy-making decisions, government reports and government crime by establishing three new types of criminal censorship which would:

(1) Make any news reporter automatically liable for criminal prosecution for "receiving stolen property," "theft" and "fraud" against the government for merely possessing or publishing the contents of any government report without official permission, and;

(2) make any news reporter automatically liable for criminal prosecution for receiving and publishing virtually any type of "national security" information without government authorization or clearance; and

(3) by making any present or former government employees automatically liable for criminal prosecution if they give to the press, without the approval of their superiors, any classified information about government officials who secretly violate federal law, who lie to the public about the secret actions of their agencies, or who secretly take action contrary to official Administration policy.

In seeking these criminal sanctions against the press, S-1 is based on the pernicious theory that Congress should declare for the first time that the government and not the citizens owns government information; and that the government may restrict the press and the public from learning about information collected by public employees supposedly for public purposes.

S–1 would mean, if enacted, that the only time a reporter would be legally free from the threat of a federal prosecution as the result of publishing government information would be when the information came to him from a government hand-out—precisely the type of censorship system which the First Amendment was designated to eliminate.

3. THE OFFICIAL SECRETS PROVISIONS OF S–1

What disturbs this Committee is that the Congress would consider a new net of criminal laws which could be used against the press in such a way that, should the Watergate cover-up or the Pentagon Papers have occurred with S–1 in effect, it would have been substantially more difficult for the press to have reported these two events.

In fact, what concerns us is that S–1 appears to be based on the premise that the Watergate cover-up never happened. One of the most distressing official actions in the Watergate scandal, for example, was the repeated and intentional lying by high government officials to the press, and therefore to the public. Based on the misrepresentations of the President, the Vice President and other members of the government, news reporters and news organizations unwittingly helped to deceive voters and taxpayers.

But, nowhere in this Act do we see any interest by Congress in attempting to protect the public from a repeat performance of the intentional or reckless lies which government officials gave out during the course of the Watergate scandal.

A second feature of the Watergate cover-up was the great difficulty the news media had in finding government employees who were willing to risk their jobs to give to the media and to the public information which, on its face, raised a substantial suspicion that the government itself was violating the laws of Congress and the Constitution or raised a substantial suspicion that the secret acts of government conflicted with publicly announced policy.

All through the Act we find provisions which could penalize government employees for giving out, without the authority of their superiors, government information and which could penalize the press for publishing information.

But nowhere in this Act do we find any proposal which would insulate the conscientious government official from any imposition of criminal liability if he gave classified information to the media which raised a reasonable suspicion that the government itself was engaged in some type of official corruption; or would insulate the conscientious news reporter from prosecution for publishing—without government approval—information about government crime or other secret acts of government agencies.

It is our conclusion therefore that this bill might encourage government officials to secretly break the law and to lie to the public because they would know that the press would find it more difficult than under present law to obtain the evidence of government misdeeds.

SUMMARY—OTHER PROVISIONS—ARREST RECORDS, GAG ORDERS, PRISON ACCESS, AND CONFIDENTIALITY

We also feel that Congress in exercising plenary jurisdiction over the federal criminal system, could do much—should this Subcommittee wish to act—to make more available to the press and the public important information about the criminal justice system, particularly (1) the availability of federal arrest and conviction records; (2) the availability of information in federal pre-trial and trial proceedings, including the removal of the threat of criminal contempt against the news media for violating gag orders and (3) the availability of information about the correctional process. And because a great many disputes about confidentiality of news sources arise in the context of federal grand jury proceedings and criminal trials, we are suggesting a procedural proposal to this Subcommittee, which, we think, might eliminate a great deal of the unconstitutional and unfair harassment to which investigative reporters have been subjected to recently because they insist on protecting their confidential news sources.

4. S–1 WOULD AUTOMATICALLY AUTHORIZE PROSECUTIONS AGAINST THE PRESS FOR FRAUD, THEFT, RECEIVING STOLEN PROPERTY, TAMPERING WITH A GOVERNMENT RECORD, ETC., MERELY FOR OBTAINING ANY TYPE OF GOVERNMENT INFORMATION WITHOUT GOVERNMENT APPROVAL

A. Background—The Pentagon Papers litigation

Prior to 1971 it would have been difficult to accuse the government of intending, for the first time, to apply "theft," "receiving stolen property" and "fraud" penalties against a news reporter for merely receiving government information. But, unfortunately, we now have what we believe is overwhelming evidence that the Administration believes it can prosecute the news media for obtaining unauthorized government reports. This novel legal censorship assault conflicts sharply with both American constitutional tradition—that the government reports belong to the public—and specifically with the incorporation of these constitutional principles in the 1909 Copyright Act[1] and the 1966 Freedom of Information Act.[2]

Until 1971, the Federal Government had never suggested that a newsperson could be prosecuted for "theft," "receiving stolen property" or "fraud" for publishing a government report. Then, during the oral arguments before the United States Court of Appeals for the District of Columbia in the case of *U.S. v. Washington Post* (The Pentagon Papers)[3] the Solicitor General made the remarkable statement that the government's ownership rights in the Pentagon Papers were similar to the ownership rights of Mrs. Hemingway in an Ernest Hemingway manuscript—that is to say, the Justice Department put forth the original and pernicious doctrine that the executive branch has a common law proprietary interest (or a common law copyright) in government reports.

Mr. Griswold repeated this argument in a somewhat more modest form in the Supreme Court. Fortunately, neither court was responsive to the Justice Department's claim.[4]

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[1] Copyright Act, 17 U.S.C. § 1 et seq.
[2] Freedom of Information Act, 5 U.S.C. § 552.
[3] 446 F. 2d 1327 (D.C. Cir. 1971).
[4] *New York Times v. United States*, 403 U.S. 415 (1971).

B. The Ellsberg prosecution

But the government did not give up. Later in 1971, it indicted Anthony Russo and Daniel Ellsberg on charges of conspiring to receive stolen government property—"studies, reports, memoranda and communications which were things of value to the United States of the value in excess of 100." In addition, the indictment accuses the defendants of an equally novel crime—"to defraud the United States * * * by impairing, obstructing, and defeating its lawful government function of controlling the dissemination of * * * government studies, reports, memoranda and communications." [5]

Thus, those news reporters who, for *The New York Times, The Washington Post, the Boston Globe* and *The St. Louis Post-Dispatch*, obtained the Pentagon Papers were, under the government's theory in the Ellsberg case, subject to prosecution for "receiving stolen property," "theft" and "fraud."

The government's trial brief in the Ellsberg case stated its position succinctly: Both the documents and *their contents* are the property of the United States and remain its property until they are * * * released by the Government. *The content of such * * * documents is itself Government property* quite apart from the Government's ownership of the sheets of paper on which it is recorded."

The government trial brief adds: "To be convicted of "receiving stolen property it need only be shown that the defendant obtained possession of or some measure of control over the property * * * " [6]

However, the Justice Department realized that there was both a conceptual and legal problem with attempting to classify as a government property the facts about government decision-making contained in reports paid for by and of interest to the public.

The legal problem was that the current statute states that the property must be of a value of $100 or more [7]—a value which it might be difficult for the government to assert if the information belongs to the public to begin with—and a conceptual problem as to whether government information, in fact, belongs to the government in a proprietary sense.

C. S–1400 and S–1 claims of government ownership of government facts

Therefore, in the original S–1400, the government added a new definition of government property to clearly cover government reports by including as government property: "* * * intellectual property or information by whatever means preserved * * *." [8]

This Committee, appearing before this Subcommittee, protested that, by including intellectual property, the Justice Department was clearly attempting to lay the foundation to prosecute the news media in order to get around the problems it faced in the Ellsberg prosecution.

Now we see that new S–1 has eliminated the "intellectual property" definition and has replaced it by stating that a newsperson can be guilty of "theft" if he "uses * * * a record or other document owned by, or under the care, custody, or control of, the United States * * * regardless of its monetary value." [9]

Our view of the Justice Department's intent in S–1400 to prosecute newspersons for receiving unauthorized government information was confirmed in a remarkable interview conducted by Morton Kondracke, a reporter for *The Chicago Sun-Times*, with Ronald L. Gainer, deputy chief of legislation for the Justice Department and the chief draftsman for that section.

According to Mr. Kondracke's story, the Justice Department's original proposal in S–1400 which has been incorporated into S–1 would even subject a newsman to a "receiving stolen property" prosecution if he, without authorization, obtained facts from a government report verbatim over the telephone.

The only federal attempt so far to prosecute a newsman for receiving unauthorized government facts has been the arrest of Mr. Leslie Whitten of the Jack Anderson Column by the FBI for his receipt and possession of several boxes of reports compiled by the Bureau of Indian Affairs. There was no allegation by the government that Mr. Whitten participated in the breakin, but only that he possessed the reports. The government declined to seek an indictment and the case was dropped.

Only last month, the Federal Reserve was reported to have ordered an FBI investigation into the release to the magazine, *Consumer Reports*, of consumer

[5] Indictment at 2, *United States* v. *Russo*, (C.D. Cal. 1971).
[6] *Id.*, Brief for the Prosecution at 29, 33.
[7] 18 U.S.C. § 641.
[8] S. 1400, § 111, 93d Cong., 1st Sess. (1973).
[9] S. 1, § 1731, 94th Cong., 1st Sess. (1975).

interest rates supplied to the federal reserve by a number of banks around the country. Because the F.B.I. can only investigate possible violations of federal criminal law, we can only surmise that—as in the Leslie Whitten case—the F.B.I. is claiming that it is a crime to publish government information.

The Justice Department has, unfortunately, not been alone in claiming it can prosecute the news media for receiving government information without permission.

Both the State of California and the State of New Hampshire have already attempted to adopt the Justice Department approach, and we fear that other states may attempt to do this in the future.

Like the Justice Department, California has recently claimed that a news reporter and an editor can be convicted for receiving stolen government property when the property consisted of a photographic copy of a list of state civil service employees acting as undercover narcotics agents. The editor, Arthur Glick Kunkin of *The Los Angeles Free Press*, and the reporter, Gerald R. Applebaum, were convicted, and the conviction was upheld by the appellate division of California.[10] The conviction was reversed by the California Supreme Court on technical evidence grounds. The Supreme Court did not reverse the reasoning of the Court of Appeals that the government can prosecute a newspaper for receiving stolen property.[11]

In New Hampshire, state officials prosecuted a newspaper reporter for republishing the contents of a letter sent by a citizen to the Governor alleging graft in local government. Based on an allegation that the information in the letter was the property of the government, the reporter was arrested. The case was later dismissed.[12]

It should be clear that the receipt of government information and its publication by the news media in the public interest is constitutionally immune under the First Amendment and can not be subject to the blanket threat of criminal prosecution merely because the government does not want the public to know what the report contains. This is prior restraint in its most ancient form—an ability to criminally punish publication *regardless of content* and *regardless of the effect* of publication upon the welfare of the nation. In fact, the use of blanket criminal penalties—of theft, receiving stolen property, fraud and misuse of a government document—to stop publication of news—regardless of the content—employs the original prior restraint tool which the British monarchy used in the criminal libel laws to punish publication of any information which displeased the King.

We have always permitted criminal and civil penalties stemming from the effect of the published information—such as the criminal obscenity or civil libel laws—but never for the publication itself. (Cf. *Near* v. *Minnesota*).[13] If then the press can only publish what the government says it can publish, the press ceases to be an independent institution operating for the benefit of the public and is converted into a government propaganda tool supinely accepting without question the information which the government decides it may publish.

We start then with the premise that "the Congress shall make no law abridging the freedom of the press." And we think that numerous provisions of S–1 violate that concept. We should also like to remind the Committee that Congress was specifically ordered in Article I—not just to be neutral—but to actively encourage the free flow of information and ideas to the public: "To promote the Progress of * * * useful Arts, by securing for * * * Authors * * * the exclusive Right to their respective Writings * * *" (Article I, Section 8).

Furthermore, we have always believed that the freedom of the press guarantee includes a penumbra of constitutional rights, including the right of a news reporter to freely associate and receive information from all segments of the population, including government employees (Cf. *NAACP* v. *Button*).[14]

There are dozens of important cases which uphold the doctrine that the government can have no proprietary ownership interests in governmental reports. (Cf. *Public Affairs Press* v. *Rickover*,[15] *Pearson* v. *Dodd*,[16] *U.S.* v. *First Trust Co. of Saint Paul.*)[17] The latest is Judge Richey's decision in *The*

[10] *People* v. *Kunkin*, 24 Cal. App. 3d 447 (1972).
[11] *People* v. *Kunkin*, 9 Cal. 3d 245, 107 Cal. Rptr. 184 (1973).
[12] *State* v. *Norris*, (Laconia, N.H. Dis. Ct., April 5, 1973).
[13] 283 U.S. 697 (1931).
[14] 371 U.S. 415 (1963).
[15] 284 F. 2d 262 (D.C. Cir. 1960).
[16] 410 F. 2d 701 (D.C. Cir. 1968).
[17] 251 F. 2d 701 (D.C. Cir. 1958).

Reporters Committee v. *Sampson*[18] in which he ruled that most of President Nixon's papers and tapes belonged to the people and not to the former President.

In addition, there is the strong line of cases defending the public's right to be informed of news. This right, even more than the personal right of a public official to be protected from defamation, is certainly a more ancient and strongly rooted right than the right of the government to own information. (Cf *New York Times* v. *Sullivan*,[19] *Associated Press* v. *Walker*[20] *Rosenbloom* v. *Metromedia, Inc.*,[21] *Cox Broadcasting* v. *Cohn*,[22] *Gertz* v. *Robert Welch, Inc.*).[23]

Then, there is the specific right to republish government information contained in the 1909 Copyright Act. 17 U.S.C. Sec. 1 et. seq. which provides "No copyright shall subsist * * * in any publication of the United States government, or any reprint, in whole or in part, thereof * * *"

We respectfully suggest that the Department of Justice approach which is incorporated into this bill—permitting a criminal prosecution against a newsman for republication of a government document based on a claim of government ownership—would completely void the 1909 Copyright Act and most of the Freedom of Information Act. Certainly the freedom which the Copyright Act gives the press to republish government information is a meaningless right if a newspaper can be criminally prosecuted for exercising its republication rights under the Copyright Act. The Freedom of Information Act requires the government to prove specific information should not be released. It would be an anomoly to criminally prosecute a reporter for receiving stolen government information which could be obtained under the Freedom of Information Act.

Against the Constitution, the case law and the statutes, what does the Justice Department offer as its justification? *Hass v. Hinkle*,[24] a 1910 case in which three cotton speculators were accused of bribing a Department of Agriculture employee in order to obtain advance information of cotton futures and also to have false cotton future information given out to defraud the general public.

We note that the Court severely limited the *Hass* case in the unanimous opinion by Chief Justice Taft in *Hammerschmidt* v. *U.S.*[25] in 1924, in which he said that fraud against the government could certainly be used to prosecute non-government employees who use false government reports in a conspiracy involving "trickery * * * bribery of an official, deceit and false pretenses." The government has chosen to ignore Chief Justice Taft and to rely mainly on the *Hass* opinion bolstered by *Dennis* v. *U.S.*,[26] in 1966. But here again, the Dennis case involved the filing with the government of false information in order to obtain free government services, very much as if one filed a false credit report to obtain a government loan.

It seems that the Justice Department has adopted an unreasonable interpretation of two Supreme Court cases in order to cut off from the public all unauthorized government information by analogizing good faith reporting of government studies and reports with a couple of cotton profiteers in 1910 and a labor racketeer in 1966.

PARTICULAR PROVISIONS OF S–1 AUTHORIZING PROSECUTIONS AGAINST THE PRESS FOR FRAUD, THEFT, RECEIVING STOLEN PROPERTY, ET CETERA, FOR PUBLISHING GOVERNMENT INFORMATION, WITHOUT GOVERNMENT PERMISSION

(1) *"Section 1301 Obstructing a Government Function by Fraud* "(a) Offense—a person is guilty of an offense if he intentionally obstructs, impairs, or perverts a government function by defrauding the government in any manner."

As we have explained above, the Justice Department has stated that the government has the exclusive right to control the release of government information and that releasing government information without its approval is, in the opinion of the Justice Department, defrauding the government of its lawful function of controlling the release of its own information.

Example: A newspaper or television station publishes a government report showing that the White House had an "enemies list." Under the Justice Department view, this would clearly be defrauding the White House of its lawful function of controlling the release of its own information.

(2) *Section 1731. Theft* (a) Offense—A person is guilty of an offense if he obtains or uses the property of another with intent * * * to appropriate the property to his own use or to the use of another person."

This crime carries the penalty of seven years in prison if the property "regardless of its monetary value" is "a record or other document owned by, or under the care, custody, or control of, the United States."

(3) *Section 1733. Receiving Stolen Property* (a) Offense—a person is guilty of an offense if he * * * receives, possesses, or obtains control of property of another that has been stolen."

As we have demonstrated above, one of the main legal barriers to government prosecution of the press for receiving stolen government information has been the requirement, under present law, that it have a monetary value, a requirement which is eliminated in S–1 specifically by stating that the government property does not have to have any value.

And subdivision "d" defines the property back to any government property regardless of its value.

Example: A newspaper or television station publishes a document showing that the CIA has a list of persons it has wiretapped or subjected to other harassments. And the reporter knows that the document has been taken without authorization, or even stolen, by a government employee from his agency's files. Clearly the reporter would be "obtaining control of property of another that has been stolen," and appropriating it for his own use and under the Justice Department theory could be prosecuted for theft or receiving stolen property.

(4) *Section 1734. Executing a Fraudulent Scheme* (a) offense—a person is guilty of an offense to defraud if he engages in conduct with intent to execute such scheme or artifice * * *"

Example: Once again, this would mean, in terms of the Justice Department prosecutions against Dr. Ellsberg, that a reporter agreeing ahead of time to accept government information—even if the plan was never completed—would be guilty of executing a fraudulent scheme.

Section 1344. Tampering with a Government Record (a) Offense—a person is guilty of an offense if he * * * conceals * * * or otherwise impairs the integrity or availability of a government record."

Example: A newspaper reporter is given a government document showing F.B.I. wiretapping which he uses to write a news story. Clearly, he would be impairing "the availability of a government record" and could be prosecuted under S–1.

(5) *Section 1523. Intercepting Correspondence* (a) Offense—a person is guilty of an offense if he intentionally * * * reads private correspondence to another person knowing that such contents were obtained * * * without the consent of the sender or the intended recipient." This applies to private correspondence which is "mail" or "is being transmitted over the facilities of a communications common carrier."

Without any further explanation in the statute, we could easily see a news reporter being prosecuted for being given a copy of a letter of "private correspondence" indicating a government contract pay off or for publishing the contents of private correspondence which was improperly removed by a news source.

OFFICIAL SECRET PROVISIONS

Having already subjected the press to the blanket threat of automatic criminal prosecution for receiving stolen property and fraud for publication of any government report regardless of its content, S–1 adds an additional thumbscrew by asking Congress to change current law and to subject the press to automatic criminal prosecution for "espionage" "disclosing national defense information" and "mishandling national defense information" for the publication of virtually any government information involving "national defense."

The existing espionage statute (18 U.S.C. 793) only makes it a crime to obtain "defense" information "with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." Furthermore, Sections 793 and 794 both specifically in the statute and by court interpretation have been aimed at conventional

[18] Consolidated in *Nixon* v. *Sampson*, No. 74–1533, (D.D.C. January 31, 1975).
[19] 376 U.S. 254 (1964).
[20] 388 U.S. 130 (1967).
[21] 403 U.S. 29 (1971).
[22] No. 73–938 (U.S. Sup. Ct. March 3, 1975).
[23] 418 U.S. 323 (1974).
[24] 216 U.S. 462 (1910).
[25] 265 U.S. 182 (1924).
[26] 384 U.S. 855 (1966).

saboteurs interested in "a sketch, photograph, blueprint, map, model, instrument * * * writing or note."

Thus, the existing law requires a clear "intent" to substantially harm the national security.

This, of course, was the great stumbling block for the Administration in the Pentagon Papers case. S–1 clearly attempts to rewrite the existing espionage statute and the Pentagon Papers decision by making it a crime for a news reporter to engage in "disclosing national defense information" (*Sec. 1122*).

"(a) Offense—A person is guilty of an offense if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he communicates such information to a person he knows is not authorized to receive it. Thus, a news reporter may be prosecuted for publishing "national defense information" if he reasonably knows that the information "may be used to the prejudice" of the United States "or to the advantage of a foreign power."

It is a well-known fact, in the relations between the United States and hostile foreign powers, that virtually any information from the State Department or the Defense Department that is embarrassing to the United States politically will certainly be used by a foreign power in a way which is prejudicial to the interests of the United States and to the advantage of the foreign power.

Take for example the recent disclosure that the CIA may have been involved in plans to assassinate persons in foreign countries or that the CIA was engaging in domestic spying. Does anyone doubt that the reporter who published that information could easily be "used to the prejudice of . . . the interests of the United States."

The blanket nature of this Official Secrets Act is compounded by the definition of national defense information, which includes, as Senator Hart correctly pointed out in the hearings last year, virtually any information which is published every day on the front page of every newspaper in this country; that is, "military capability of the United States or of an associate nation * * * military planning or operations of the United States * * * military communications of the United States * * * military installations of the United States * * * military weaponry, weapons development or weapons research of the United States * * * intelligence operations activities, plans, estimates, analyses, sources or methods of the United States * * * intelligence with regard to a foreign power * * * communications intelligence information or cryptographic information * * *"

A third difficulty with the statute is that it is not even a defense—as it was in the Pentagon Papers litigation—that the information had previously been published in the news media based on informed sources in the American government or by named officials of a foreign government. The statute specifically precludes the defense of prior publication based on confidential sources or the Prime Minister of a foreign nation, because it limits the defense to "information that has previously been made available to the public pursuant to the authority of Congress or by the lawful act of a public servant."

For example, the story in the Jack Anderson column about the United States tilting toward India would be no defense to a subsequent prosecution against another newspaper for publishing exactly the same "national defense information."

"Sec. 1121—Espionage: A person is guilty of an offense, if, knowing that national defense information may be used to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power, he * * * obtains or collects such information, knowing that it may be communicated to a foreign power * * *"

Here of course, publication in a newspaper or by a television station would obviously result in communicating the information to a foreign power. We would assume that the government, in this situation, would use the lesser felony of disclosing national defense information, but there would be nothing under this Act to bar a government prosecution against a newsperson for "espionage" for publishing information out of the State Department, the CIA, or the Defense Department, which, because it was embarrassing to the government, could be "used to the prejudice of the * * * interests of the United States."

Sec. 1123—Mishandling Defense Information "A person is guilty of an offense if * * * being in unauthorized possession or control of national defense information he, * * * engages in conduct that causes its * * * communication to another person who is not authorized to receive it; or * * * fails to deliver it promptly to a public federal official who is entitled to receive it."

A news reporter, for example, publishes information on cost overruns or corruption in Defense Department contracts, or changes in policy in State Department negotiating attempts in the Middle East, and he is automatically subjected to the threat of prosecution because he is "in unauthorized possession * * * of national defense information;" and because he published it, he has caused "its communication to another person who is not authorized to receive it."

And if, in fact, the government makes a demand on him to return the information—even if it is a Xerox or is in the form of notes because he interviewed a government official, he is subject to prosecution a second time because he "fails to deliver it promptly to the federal public servant who is authorized to receive it."

Conclusion: We think that the Congress ought to, in every possible way, encourage the press to inform the public about the way its government operates in all areas, whether it be the Department of Health, Education and Welfare, the Department of Justice or the Departments of State and Defense. Certainly there is presumption that information which the government withholds is based on a reasonable justification in the public interest. But once a news reporter obtains information about Watergate or about Vietnam or about the Middle East or about the SALT talks or about thalidomide, then, under our system of laws, the government has the burden of proving in a criminal prosecution that the publication of the information possess a "clear and present danger" to some overriding and compelling national interest.

Reporters should not be faced with possible jail terms for publishing information the government has not released. Reporters should not face jail terms for publishing any "national security information" regardless of its content.

In the Pentagon Papers case, Dean Griswold told the United States Court of Appeals that the Constitution did not authorize the courts to "second guess" President Nixon's determination that the publication of the Pentagon Papers would harm the national securtiy.

THE SUPREME COURT DISAGREED

S–1 would, in effect, void the Pentagon Papers decision. It would permit the government to criminally punish any reporter for publishing any "national defense information" based on the untested and self-serving conclusions of the Executive Branch. Our Committee cannot believe that the Congress will authorize any such blanket Official Secrets Act to be imposed upon the public of our nation.

The only standard which we believe would be acceptable to the working reporters and editors would be a standard that would conform the federal criminal law to the prior restraint doctrines of *Near* v. *Minnesota*[27] and *New York Times* v. *U.S.*[28] because, after all, a criminal law operates just as much as a prior restraint on publication as an injunction barring the publication itself. Therefore we would suggest that this whole section on national security, as it applies to members of the public and the press who obtain "national defense information" should only be operative if the government can prove beyond a reasonable doubt that publication of the information would pose a "clear and present danger" to the national security of the nation, or would pose a "direct, immediate and irreparable injury" to the national security of the nation.

S–1'S RESTRICTION ON THE RIGHT OF GOVERNMENT EMPLOYEES TO GIVE TO THE CONGRESS, TO LAW ENFORCEMENT AND TO THE PRESS INFORMATION ABOUT GOVERNMENT CORRUPTION, GOVERNMENT MISREPRESENTATION, ET CETERA

In addition to constructing new criminal penalties against the press for publication of any government information without permission, and for publication of any national defense information, S–1 also discourages government employees from exercising the constitutional right of all citizens to give in-

[27] *Near* v. *Minnesota*, 283 U.S. 697 (1931).
[28] *New York Times* v. *U.S.*, 403 U.S. 415 (1971).

formation to the press of public importance, including evidence that the government officials themselves are breaking the laws or, are lying to the public. It has done this in various ways.

"*Sec. 1124—Disclosing Classified Information* "(a) Offense—A person is guilty of an offense, if, being or having been in authorized possession or control of classified information, or having obtained such informaiton as a result of his being or having been a federal public servant, he communicates such information to a person who is not authorized to receive it."

"It is not a defense to a prosecution under this section . . . that the information was not lawfully subject to classification at the time of the offense." The government official who believes that he has evidence that a C.I.A. or F.B.I. or White House official is breaking the law; or evidence that government officials are issuing public policy statements about relations with the Soviet Union which, in fact, secretly the government is contracting in diplomatic negotiations, should be certainly encouraged to give to the public this type of information. Perhaps, we would have heard about the so-called Houston Plan, or the CIA domestic spying much earlier if the government did not have as an axe over the honest civil servant's head the ability to criminally prosecute him, fire him under various regulations, and to otherwise destroy his reputation. Certainly, as newspersons, we believe that the Congress should encourage government employees to come forward with information which contradicts the public statements of high government officials or which shows that these officials may have engaged in illegal conduct. We have had enough experience in recent years to indicate that we cannot trust the public statements of many of our officials on foreign affairs and national defense policies.

This statute does just the opposite. It threatens a public spirited public servant with jail for attempting to inform the public about this type of news, and offers an additional shield of silence to the dishonest or corrupt public official.

Sec. 1523—Intercepting Correspondence "(a) Offense—A person is guilty of an offense if he intentionally * * * intercepts, opens, or reads private correspondence without the prior consent of the sender or the intended recipient; or * * * discloses, or uses, the contents of private correspondence to another person knowing that such content were obtained without the permission of the sender or the recipient." Here, once again, the public spirited civil servant—who sees a letter from or to a high government official which indicates a political payoff or conflict of interest, or any other type of law violation, or which raises a flat contradiction with the public statements of the public official, is discouraged—is specifically threatened with criminal prosecution if he makes this information public to "any other person" including a news reporter or a Congressman.

Sec. 1524—Revealing Private Information Submitted for a Government Purpose "(a) Offense—A person is guilty of an offense if, in violation of a specific servant by a statute, or by a regulation, rule, or order issued pursuant thereto, he discloses information, to which he has had access only in his capacity as a public servant, that had been provided to the government by another person, other than a public servant acting in his official capacity, solely in order to comply with * * * a requirement of * * * employment, or * * * a specific duty imposed by law imposed upon such other person."

Now here, of course, we have the classic case of the corrupt contract or the payoff for a government grant. The information, of course, would be supplied to the government by "another person other than a public servant" and it would be supplied in order to comply with "a specific duty imposed by law" in government contracts.

We would think that Congress would wish to encourage public servants to come forward when they have evidence of corruption in the expenditure of public monies, not to penalize them by sending them to jail. In addition, this provision silences the public servant forever because it applies to "a former public servant" who obtained the information "as a federal public servant." Therefore, even civil servants who are loyal to the system—but who get disgusted because they discover corruption and quit—are silenced from coming to the news media and complaining about the behavior of their superiors.

Sec. 1301—Obstructing a Government Function by Fraud (a) Offense—A person is guilty of an offense if he intentionally obstructs, impairs, or perverts a government function by defrauding the government in any manner." Under the Justice Department's theories in the Ellsberg prosecution, certainly a government civil servant can attempt to defraud his superior out of his function of controlling the release of public information.

We have tried respectfully to show this Subcommittee that these provisions which restrict the access of public servants to the news media would only aid those officials who are interested in hiding from the public evidence of their own misconduct. We would urge the Congress to draft this legislation in such a way as to encourage this type of information to be brought forward and not, as this legislation is now drawn, to put even more severe obstacles in the way of citizens and taxpayers who have a right to know how their government is operating.

CONFIDENTIALITY

As this Committee is aware, the question of forcing a newsperson to reveal confidential news sources in connection with a criminal proceeding being conducted by a grand jury or a court is perhaps the most sensitive legal issue which working news reporters deal with today. As this Committee knows, there have been several proposals for federal shield laws in order to solve this problem,[20] but there is no uniform agreement among the news media as to what kind of substantive or affirmative protection Congress ought to give.

Some members of the media believe in the so-called absolute shield law, which would prohibit a newsman from being forced to disclose any unpublished information in any proceeding. Some believe in the so-called qualified shield law which would permit some unpublished information to be disclosed in some types of proceedings. Some newspersons argue against any shield law on the grounds that implementation by Congress of the protcetion contained in the First Amendment would themselves imply the ability of Congress to limit the First Amendment. While this Committee has testified in favor of an absolute shield law, for the purposes of this testimony, we make no substantive recommendations.

However, it is one thing to say that Congress will leave to the inherent Article 3 powers of the courts their power to impose contempt upon a newsperson for his refusal to disclose a confidential source. It is quire another, as is contained in S-1, to authorize a federal court to issue a criminal contempt citation against a newsperson who "disobeys or resists a writ, process, order, rule, decree, or command of a court" to disclose a confidential news source.

We would therefore respectfully submit to the Subcommittee that it, under its power to control the federal criminal law, remove the statutory power of the federal courts to hold a newsperson in contempt for refusing to disclose the source of unpublished information obtained during his news-gathering activities. This would remove federal statutory authority for the contempt prosecutions. We would further suggest that the Congress bar the federal government, via the Attorney General, from prosecuting such a claim on behalf of the court. This would leave the court in a common law position of enforcing its own decrees without the help of the federal government. We suggest this because we have little confidence, based on past experience, that the federal government's attitude toward the protection of confidential news sources is in any way consistent with the First Amendment guarantees.

Sect. 1311—Hindering Law Enforcement—(a) Offense—A person is guilty of an offense if he interferes with, hinders, delays, or prevents, the discovery, apprehension, prosecution, conviction, or punishment of another person, knowing that such other person has committed a crime or is charged with or being sought for a crime, by * * * concealing him or his identity."

As this Subcommittee is well aware, one of the most common methods of investigation reporting is to actually interview persons, frequently on a confidential basis, who have evidence of a crime, and who may themselves have participated in a crime.

The disclosures in the Watergate scandal, for example, were based in large part upon persons who had participated in the cover-up. There is reason to believe that the disclosures of the CIA surveillance and of the FBI surveillance came from members of those agencies who themselves had some part

[20] See, e.g., S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S. 1128 and S.J. Res. 8, all 1st Session 93rd Congress, 1973.

in what seems to have been illegal activity. Recent disclosures of corruption in the Immigration and Naturalization Service seem to have been based, in some part, on persons who may have been peripherally or directly engaged in the process of permitting illegal aliens to come across the border in violation of the laws. And the frequent disclosures of commercial favoritism by various government agencies, including the favored treatment given to the International Telephone and Telegraph Company in its merger with the Hartford Fire Insurance Company, show that more frequently than not, the best information about government misbehavior may come from persons inside or outside government who have been involved in the crimes, but who for one reason or another wish the public to know what has happened.

This section of the criminal code would be clear authority to prosecute a newspaper reporter criminally for his refusal to aid law enforcement in the "discovery" or "apprehension" of "another person knowing that such a person has committed a crime or is charged with or being sought for a crime by * * * concealing him or his identity."

Furthermore this section provides that it is not a defense to a prosecution under this section that the record document or other object which the reporter has, indicating that the person interviewed has committed a crime, "would have been legally privileged." This would appear to imply that a reporter could not claim that his notes, which identify the informant, would be privileged under any reading of *Caldwell* v. *U.S.*[30] or subsequent cases in the federal courts which have protected reporters confidential sources.[31] This particular statute seems to be a blanket authorization to prosecute a reporter who refuses to disclose a confidential source when that source has been involved in any way in a conspiracy to break the law.

Sec. 1333—Refusing to Testify or Produce Information—(a) Offense—A person is guilty of an offense if * * * in any other official proceeding, he * * * refuses to answer a question after a federal court or federal judge * * * has directed him to answer and advised him that his failure to do so might subject him to criminal prosecution," meaning criminal contempt.

Here again we have an affirmative congressional authorization to prosecute a reporter under the federal criminal statutes if he wishes to protect a confidential news source. The effect of this statute may be somewhat mitigated by Subdivision (a) "Affirmative defense—It is an affirmative defense to a prosecution under this section that the defendant was legally privileged to refuse to answer the question or to produce the record, document, or other object."

However, we would point out to the Congress, that under the *Caldwell* case, there is a substantial question as to whether the press is "legally privileged" in federal criminal proceedings to refuse to identify confidential news sources, and to refuse to produce notes of confidential information given by informants.

We would hope that the Subcommittee would consider inserting in this bill an affirmative defense to all of these various provisions which could be utilized against a newsperson seeking to protect the identity of confidential sources or other unpublished information obtained during the legitimate course of news-gathering. As this Subcommittee knows, one of the biggest stumbling-blocks to the passage of a shield law has been opposition in the Congress to giving a privilege in libel proceedings. As libel is a civil proceeding, we can see no substantial Congressional objection to giving the press an affirmative defense to refuse to produce confidential sources in response to any use of the federal criminal law powers.

SHIELD LAW

Another solution to the confidentiality problem would be to permit a newsperson—subpoenaed to give information in any federal criminal proceeding—to plead the shield law of the state.

Because there are 26 states which have passed shield laws, this would make uniform the protection in the state and federal proceedings and would not permit federal grand juries and judges to undermine the protection offered to a newsperson by his own state legislature.

[30] 408 U.S. 665 (1972).
[31] *Baker* v. *F & F Investment Co.*, 470 F. 2d 778 (8d Cir. 1972); *Democratic National Committee* v. *McCord*, 356 F. *Supp.* D.D.C. 1973); *Bursey* v. *United States*, 466 F. 2d 1–59 (9th Cir. 1972).

In criminal trials governed by Rule 26 of the Federal Rules of Criminal Procedure—which conform to Rule 26 in the Proposed Rules in S-1—federal courts generally will not apply state law on the privilege of a witness, *United States* v. *Woodall*,[32] through one Circuit has held to the contrary, *Love* v. *United States*.[33] Rule 26, however, by its terms is not applicable to grand jury proceedings, and neither the Supreme Court nor any other federal court has previously decided the question of whether or to what extent a privilege embodied in state law is binding on a federal court in the context of a grand jury proceeding.

In the most closely analogous context—a proceeding to enforce an IRS summons in an investigation likely to lead both to criminal prosecution and civil liability, see *Donaldson* v. *United States*[34]—the privileges established by law, at least insofar as they are not in conflict with any established federal law or public policy, are controlling. *Baird* v. *Koerner*,[35] *United States* v. *Cromer*,[36] *United States* v. *Ladner*.[37] No federal law or policy requires disregard of a newsman's privilege under state law. Indeed the Supreme Court in *Branzburg* v. *Hayes*,[38] while refusing to create "a virtually impenetrable constitutional shield, beyond legislative or judicial control," to protect newsmen's sources, strongly indicated that a state newsman's privilege law *should* be respected in federal courts:

There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light on the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that Congress is limited in its powers to bar state courts from responding in their own way, construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

The response of Congress thus far has been very much the same. The New Federal Rules of Evidence, as passed by Congress, leave "the law of privilege in its present state * * * H.R. Rept. No. 93-650, 93rd Cong., 1st Session, p. 8. The rationale was "that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason."

The lack of any federal law or policy *against* protection of the confidentiality of news sources is in sharp contrast to the strong state policies in favor of such protection within their respective boundaries. No fewer than twenty-six states have enacted legislation affording some measure of protection against compelled disclosure of newsmen's sources, and eleven of those statutes have been enacted or broadened within the past five years. One federal court of appeals, discussing two of these state statutes (Illinois and New York), recently stated that they "reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment * * *," *Baker* v. *F & F Investment Co.*[39]

Allowing federal courts to override a state shield law in the context of grand jury proceedings will effectively nullify the attempts by the state legislatures to protect this paramount public interest" within their respective borders. The premise of shield laws—that an assurance of confidentiality will encourage the flow of information to the public and advance the cause of truth—is undermined by any substantial exceptions to the applicability of the privilege.

Almost any crime committed in the United States today raises, at least at the initial stage of the investigation, the possibility that a federal law may have been violated, and a federal grand jury investigation or trial may be initiated. A refusal to apply a state shield law in a federal grand jury proceeding or trial, therefore, will effectively negate the purpose of the privilege in every situation where a potential news source has information involving possible criminal conduct.

[32] 438 F. 2d 1317 (5th Cir. 1970) (*en banc*), *cert. denied*, 390 U.S. 985 (1972).
[33] 386 F. 2d 260 (8th Cir. 1967), *cert. denied*, 390 U.S. 985 (1972).
[34] 400 U.S. 517, 534–535 (1971).
[35] 279 F. 2d 623, 632 (9th Cir. 1960).
[36] 483 F. 2d 99, 101 (9th Cir. 1973).
[37] 230 F. Supp. 895, 896 (S.D. Miss. 1965).
[38] 408 U.S. 665 (1972).
[39] *Baker* v. *F & F Investment Co.*, 470 F. 2d 778 (2d Cir. 1972).

GAG ORDERS

A second issue which is increasingly concerning the press is the increase in the use of gag orders to restrict the press from covering criminal justice proceedings. A great deal of this confusion is the result of the Supreme Court's silence on the subject in view of the implications of *Sheppard* v. *Maxwell*.[40]

The lack of guidance by the Court in regard to the implications of *Sheppard* has encouraged a sharp increase in the issuance of these restrictive orders against the news media, especially in the past two years. The scope of the litigated orders ranges from conventional gag orders covering court personnel to such bizarre actions as excluding the press from reporting public record pretrial judicial proceedings,[41] sealing all records of all cases filed in a court of Public Record,[42] barring publication for six months of the names of public witnesses,[43] hearing a secret witness,[44] forbidding publication of a change of plea in open court,[45] forbidding publication of a defendant's prior criminal indictments,[46] forbidding publication as to any opinion as to innocence of guilt,[47] hearing two secret witnesses,[48] forbidding memory sketches of an open court proceeding,[49] sealing off an entire criminal trial,[50] limiting news media coverage to a single pool reporter,[51] banning publication of a public jury verdict,[52] and requiring reporters to sign an agreement not to report parts of a public trial proceeding as a condition for admittance into the courtroom.[53]

There have also been orders directed toward third parties restricting all access to defendants,[54] witnesses,[55] and potential witnesses[56] and voiding a criminal indictment because the news media republished public information distributed by the Food and Drug Administration.[57] As a result of all this confusion, reporters have frequently been held in contempt[58] and sometimes even fined and jailed.

The confusion has confounded the courts as well. Even judges trying similar cases in the same court have reached different results. For example, defendants in the Watergate cover-up case were forbidden to talk to the press by order of Chief Judge Sirica of the United States District Court for the District of Columbia.[59] But a trial order issued by Judge Gesell of the same court in the Watergate-related trial of former White House aide Dwight Chapin authorized the defendant to "communicate with the press as he chooses."[60] One news organization has broken an order decreed invalid on

[40] *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).
[41] *State* v. *Sperry*, 79 Wash. 2d 69, 483 P. 2d 608 (1971), *cert. denied sub. nom. McCrea* v. *Sperry*, 404 U.S. 939 (1971).
[42] *Charlottesville Newspapers, Inc.* v. *Berry*, Nos. 740463 and 740464 (Va. Sup. Ct., June 19, 1974).
[43] *Sun Co.* v. *Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (1973).
[44] *Midgett* v. *McClellan*, No. 71-1076HM (D. Md., June 12, 1974).
[45] *State* v. *Payne*, No. 74-7F (Mantee Cty., Fla., Cir. Ct., April 4, 1974).
[46] *United States* v. *Schiavo*, Nos. 73-1855 and 73-1856 (3d Cir., August 8, 1974).
[47] *People* v. *Green*, Nos. L28145F through L28150 (San Francisco, Cal., Mun. Ct., May 9, 1974).
[48] *United States* v. *Bloemaker*, No. S-CIV-73-80 (S.D. Ill., March 26, 1974).
[49] *United States* v. *Columbia Broadcasting System*, 497 F. 2d 102 (5th Cir. 1974).
[50] *Oliver* v. *Postel*, 30 N.Y. 2d 171, 331 N.Y.S. 2d 407, 282 N.E. 2d 306 (1972).
[51] *State* v. *Dauber*, No. 6855 (Marshall, Ind., Cir. Ct., April 11, 1973).
[52] *Wood* v. *Goodson*, 485 S.W. 2d 213 (Ark. 1972).
[53] See the Brunswick, Maine *Times Record*, April 23, 1973.
[54] *United States* v. *Tijerina*, 412 F. 2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *United States* v. *Mitchell*, Crim. No. 74-110 (D.D.C., filed March 1, 1974); *Hamilton* v. *Municipal Court*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168, *cert. denied*, 396 U.S. 985 (1969).
[55] *United States* v. *Mitchell*, Crim. No. 74-110 (D.D.C., filed March 1, 1974).
[56] *Hamilton* v. *Municipal Court*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168, *cert. denied*, 396 U.S. 985 (1969).
[57] *United States* v. *Abbott Laboratories*, No. 3807 Crim. (E.D. N.C., filed December 17, 1973), *rev'd*, No. 74-1230 (4th Cir., filed October 2, 1974).
[58] *United States* v. *Columbia Broadcasting System*, 497 F. 2d 102 (5th Cir. 1974); *United States* v. *Dickinson*, 465 F. 2d 496 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973); *Phoenix Newspapers* v. *Superior Court*, 101 Ariz. 257, 418 P. 2d 594 (1966) (contempt reversed by Ariz. Sup. Ct.); *State* v. *Meek*, 9 Ariz. App. 149, 450 P. 2d 115, *cert. denied*, 396 U.S. 847 (1969); *Wood* v. *Goodson*, 485 S.W. 2d 213 (Ark. 1972), (contempt reversed by Ark. Sup. Ct.); *Farr* v. *Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972); *In re Ithaca Journal News, Inc.*, 292 N.Y.S. 2d 920 (1968); *State* v. *Sperry*, 79 Wash. 2d 69, 483 P. 2d 608 (1971), *cert. denied sub. nom.* (contempt reversed by Wash. Sup. Ct.).
[59] *United States* v. *Mitchell*, Crim. No. 74-110 (D.D.C., filed March 1, 1974).
[60] *United States* v. *Chapin, Crim.* Case No. 990-73 (D.D.C., filed February 28, 1974).

appeal and yet has been held in contempt of the invalid order in *Dickinson* v. *U.S.*[61] while another appellate court has upheld a newspaper's right to violate an invalid gag order.[62]

Some members of the media have felt they ought to obey gag orders, even when they directly forbid publication of editorials and stories about a particular case, in flat contradiction of the doctrine of *Near* v. *Minnesota*.[63]

Today, no one in the news media, in the bar or on the bench, knows what the law is and we respectfully submit that the Congress, as a matter of public policy, has an opportunity to resolve the growing conflict.

We think of course that any order against the press prohibiting publication of any information relating to the criminal justice process is an unconstitutional prior restraint under the doctrine of *Near* v. *Minnesota*.[64] However, we also believe that the Supreme Court may find that there are rare instances when these orders may be justified; and for that reason we would not ask the Congress in the Federal Rules of Criminal Procedure for the United States district courts to bar all orders of whatever nature under any circumstances. We would, however, suggest to the Congress that it may be able to offer a solution to this problem by giving the press a procedural due process guarantee in the issuance of any orders which restrict publication about the criminal justice process.

In 1972, this Committee conducted a survey of most of the significant media gag order cases, and this study revealed the rather startling fact that in no single litigated case that was surveyed had there been a semblance of procedural due process afforded to the parties most affected—the news media. That is, in no case were the media given notice, an opportunity to be heard or the chance to present evidence in advance of an order restricting their coverage of public proceedings.

Therefore, we would suggest to the Congress that they bar the federal courts from holding any newspaper in contempt of any order barring publication of information about federal criminal trials if the order has not been published and if the news media has not been published and if the news media has not been given an opportunity to present evidence on its behalf, to obtain written findings of fact and to appeal on an extracted basis before the order goes into effect.

Perhaps the most controversial development in this field occurred in the Dickinson case when the United States Court of Appeals for the Fifth Circuit ruled that a newspaper in Baton Rouge was properly held in contempt because it violated a gag order which the Fifth Circuit subsequently found was invalid under the First Amendment.[65] We would hope that the Congress, under its powers to control the use of criminal contempt and under its power to control the federal rules of criminal procedure, would attempt to settle the gag order situation insofar as it applies to federal criminal proceedings by drafting a provision which would prohibit the execution of any contempt order against the news media and it has been heard on appeal and the automatic voiding of the contempt citation if the appellate court finds that the underlying order was itself invalid under the statutes of the United States or the Constitution.

OTHER ACCESS PROBLEMS TO THE CRIMINAL JUSTICE PROCESS: ARRESTS

Another problem which the news media is now being faced with is a growing move under the guise of privacy, to seal arrest records. Proposals were submitted by former Senator Ervin to limit the availability of public arrest and conviction records. There is a regulation which has been published but not implemented by the Law Enforcement Assistance Administration, and there are numerous court decisions in cases filed by individuals seeking to seal their arrest records.

The most notable of these cases has occurred in the District of Columbia in *Murphy* v. *Sullivan*[66] in which the United States Court of Appeals has ordered

[61] *Dickinson* v. *United States*, 414 U.S. 979 (1973).
[62] *State* v. *Sperry*, 79 Wash. 2d 69, 483 P. 2d 608 (1971), *cert. denied sub. nom.*
[63] *Near* v. *Minnesota*, 283 U.S. 697 (1931).
[64] *Id.*
[65] *Dickinson* v. *United States*, 414 U.S. 979 (1973).
[66] *Murphy* v. *Sullivan*, 478 F. 2d 938 (D.C.D. 1973).

the expungement of the identities of thirteen thousand persons arrested in the May Day demonstrations and the identities, when known, of the policemen who arrested them.

It is the position of this Committee that the most fundamental power of the state is to deprive a person of his liberty and that the act itself of depriving a person of his liberty should always be a matter of public record regardless of whether the act itself is subsequently declared unconstitutional or whether the act is subsequently declared invalid for other reasons such as lack of evidence for prosecution, death of the witness, or just a mistake in law.

The advantages of maintaining public access to arrest records are obvious, especially to arrests which are subsequently dismissed. They may be dismissed because the law enforcement officer was subjected to undue political pressure to drop the arrest. They may be dismissed because the law officer was bribed. The arrested person may be a public figure now, or he may be a public figure in the future, and it certainly would be of interest to the public to know that he was arrested and the circumstances under which he was able to have the arrest dismissed. It is the position of this Committee that the news media and the public must have free access to records which indicate the deprivations of liberty of a citizen and that these records should contain at least the minimum information indicating conformity with the probable cause requirements of the Fourth Amendment the identity of the person who was arrested, the location where he was arrested, the charge he was arrested upon, the person who arrested him and the complaining witness.

We would hope, in view of the extensive litigation in the courts on this subject, that the Congress would find it appropriate in these Federal Rules to insure for the public by some affirmative statement that records of arrests with warrants and arrests without warrants (and searches with warrants and without warrants) shall forever be a matter of public record for any citizen to inspect at his will.

ACCESS TO CONVICTION RECORDS

We would raise a similar suggestion with reference to Section 527, the proposed amendment in S–1 to the Judicial Procedure Act relating to conviction records. That section authorizes the Attorney General to maintain in the Department of Justice "a repository of records and convictions and determinations of the validity of such convictions." We are, however, disturbed by Subdivision (c), "Records maintained in the repository shall not be public records, but certified copies of the records" and they "may be furnished for law enforcement purposes on the request of a court, law enforcement officer, or officer of a facility for the confinement of convicted offenders * * *"

We cannot understand why a public record on file in a United States District Court should not be available upon request from the Justice Department if the Justice Department maintains a certified copy of such record. The Justice Department is a public agency and certainly it should be able to use the certified copies of records for its own purposes. But under the statute the public is denied the benefit of the Justice Department file. However, any law enforcement agency whether it be federal, state or local, can simply query the Justice Department on how many convictions it has on file for Mr. X. and the local county police chief can obtain the information and yet the local newspaper cannot. We can see no reason for denying to the public or the press the benefits of the collection and collation system maintained in the Justice Department at public expense and not giving the press the same access to certified copies of public records that this statute would give to any local police chief or court.

ACCESS TO FEDERAL CORRECTION INSTITUTIONS

As this Subcommittee knows, the correctional institutions in this country are the subject of a great deal of controversy and public interest because the public depends so much on the correctional facilities to rehabilitate convicted offenders.

However, the Subcommittee must be aware that prisons are probably the least reported and least understood public institutions in the country because traditions have developed which have denied news reporters any effective access to the institutions. This tradition of internal secrecy was furthered recently by the Supreme Court when it held in the cast of *Washington Post* v. *Saxbe*[67] by a vote of 5 to 4 that the news media had no constitutional right to have confidential interviews with inmates.

The news media, of course, considers the confidential interview with a particular inmate to be the most effective way to obtain information about a prison system. Inmates who are interviewed in the presence of prison officials are likely to be less than candid about conditions because of the ease of physical retribution and the power that prison officials have over their early release on parade.

Thus, while the Supreme Court has said that the news media has no constitutional right to talk to the inmate nor does the inmate have a constitutional right to talk to the news media, the Congress certainly has the power to require the Federal Bureau of Prisons and any state prisons receiving Federal funds interviews between news reporters and inmates during normal working hours and under normal prison conditions.

S–1 has given extensive consideration to the organization of the Federal Bureau of Prisons in Chapter 38. But unfortunately, we see no provision for confidential interviews or other news media access to the prison system in order to inform the public how these vital institutions are operating to rehabilitate our convict population. We would respectfully hope that the Subcommittee would take the opportunity that it has in issuing rules and regulations for the Federal Bureau of Prisons to affirmatively require the prison administrators to permit confidential interviews.

In the Supreme Court case of *Washington Post* v. *Saxbe*[68] a 5–4 majority agreed with the Federal Bureau of Prisons that interviewing a particular inmate would make him a "big man" and would encourage him to be a leader of internal prison disorders, and therefore the Court permitted the Bureau to bar all confidential interviews.

However, several states have policies of permitting confidential interviews and their prison administrators believe that permitting inmates to talk to the press in fact decreases internal tensions inside penal institutions because it offers the inmate the opportunity to get his dissatisfaction and criticisms out to the public. We would hope that this Subcommittee would believe that for the good of the inmate, for the good of the prison administrators and certainly for the good of the public which is bearing the extraordinary cost of these institutions that the Congress would take this opportunity to encourage the freest flow of information about prison institutions within the limitations imposed by the penal setting.

CONCLUSION

We know that this has been a rather long statement about S–1, and certainly there are many provisions, such as the question of news media access to pre-trial discovery information, news media ability to get at parole information records, and other features of the bill which are of great interest. However, we believe that this statement is long enough and this Committee would, upon the invitation of the Subcommittee, be pleased to co-operate in any further way and to offer to this Subcommittee its expertise on legal problems which now concern the press in its desire to inform the public about the type of society we live in. We thank you.

Senator HRUSKA. That is fine. Again, I say your appearance here is very much appreciated. You have doubly enriched our record with your first appearance and your appearance this morning.

Thank you for the comprehensive memorandum that you left with us.

The committee will take a brief recess, and it will be resumed at the order of the Chair.

[A recess was taken.]

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[67] *Washington Post* v. *Saxbe*, U.S. Supreme Court Case No. 73–1265.
[68] *Id.*

Senator HRUSKA. The subcommittee will come to order.

We will now hear from Mr. Robert Pirtle, who has submitted a statement which we will put in the record in its totality.

Mr. Pirtle, you may now proceed to highlight it so that we can abide by the time limitation which are forced upon us.

[The prepared statement of Mr. Robert Pirtle follows:]

PREPARED STATEMENT OF MR. ROBERT PIRTLE

Mr. Chairman and Honorable Subcommittee Members: This statement is being filed on behalf of the Colville, Lummi, Makah and Suquamish Indian Tribes whose reservations are situated in Washington, the Metlakatla Indian Community whose reservation is situate in Alaska, and the Northern Cheyenne Indian Tribe whose reservation is situate in Montana.

Like most of the Indian tribes in America today, our tribes have been making steady progress year by year in modernizing and expanding the operation of tribal government to the end that our reservations will be well governed and the lives of all reservation residents improved. In the process, we have modernized our governmental systems, expanded our governmental programs, upgraded the quality of our staff personnel and made use of every source of technical knowledge available to us.

We have learned from hard experience that long disuse of governmental power has in many cases resulted in the usurpation of this power by local state and county units of government. Often the assertion of tribal rights of self-government have been met by ridicule and opposition from non-Indians unfamiliar with the law governing the rights of Indian tribes. But we are committed to the principle of self-government or "home rule" in accordance with the President's enunciation of our new national Indian policy made in the historic speech to Congress on July 8, 1970:

". . . Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

"This, then, must be the goal of any new national policy toward the Indian people; to strengthen the Indian's sense of autonomy without threatening his sense of community."

This policy of Indian self-determination has now been embodied in the Indian Self-Determination and Education Assistance Act, Public Law 93-638 (S. 1017) on January 4, 1975. In Section 2 of the Act, Congress finds that "the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons." And in Section 3 of the Act, Congress declared its policy to be the following:

"The Congress declares its commitment to the maintenance of the Federal Government's unique relationship with and responsibility to the Indian people through the establishment of a *meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people* in the planning, conduct, and administration of those programs and services." (Emphasis supplied).

We believe we have the full support of the United States government in our efforts toward achieving a real self-determination including revitalization of our Law and Order Codes and our court systems.

It is for that reason that we think it would be tragic if your Subcommittee were to act upon federal criminal legislation in a way which inadvertently dealt a damaging and perhaps fatal blow to our efforts at home rule. We applaud your effort to modernize the existing federal criminal laws through S. 1 as we applauded the effort of the 93rd Congress. Many provisions of S. 1 will be of benefit to Indian tribes everywhere. However, we wish to address ourselves to those provisions which we think would create a serious invasion of sovereign governmental rights of Indian tribes.

1. S. 1 WOULD NEEDLESSLY EXPAND FEDERAL CRIMINAL JURISDICTION OVER INDIANS AND INDIAN RESERVATIONS

S. 1 includes 33 new crimes not included in the existing Federal Criminal Code and, as drafted, would make them applicable to all Indians on all Indian reservations. Time has not permitted that we analyze each of the newly added 33 crimes, but experience dictates that because of the special status of American Indians and Indian tribes, activities which are properly criminal if performed by non-Indians might be appropriately performed by Indians because of cultural or sociological factors and might even be protected by treaty agreements. The status of Indian reservations as "distinct political communities", *Worcester* v. *Georgia*, 6 Pet. 515 (1832); *Williams* v. *Lee*, 358 U.S. 164 (173), dictates that an in-depth analysis be made of the 33 crimes to determine which if any are properly applicable to Indians and Indian reservations.

We urge that S. 1 not be enacted in its present form because of its needless expansion of federal criminal jurisdiction over Indians and Indian reservations. We also urge that field hearings be held to develop a factual background regarding these 33 crimes with emphasis on existing law enforcement and judicial systems on Indian reservations and their ability to deal with the subject matter involved.

2 S. 1 WOULD NEEDLESSLY ASSIMILATE ALL STATE LAW INTO FEDERAL CRIMINAL JURISDICTION OVER INDIANS AND INDIAN RESERVATIONS

Section 1863 of S. 1, entitled "Violating State or Local Law in an Enclave" is the revised version of The Assimilative Crimes Act, 18 U.S.C. § 13 which is a part of the existing Federal Criminal Code. Section 1863 provides, in effect, that a person is guilty of a crime as a matter of federal law if his conduct violates the law of the state in which the Indian country is situate *even though his conduct does not violate the Federal Criminal Code otherwise.* This Section, operating through Section 203(a)(3) which defines the special territorial jurisdiction of the United States as including "the Indian country, to the extent provided under section 685 of the Criminal Justice Reform Act of 1975 (25 U.S.C. ——)" results in an enormous expansion of federal criminal jurisdiction. The net effect is to make every state law sanctioned by criminal penalties applicable in all Indian country in the United States. This result is a major change in existing law and is exactly contrary to the will of Congress expressed in Public Law 90-284, the Indian Civil Rights Act of 1968 (62 Stat. 696).

The present state of the law is the following: 18 U.S.C. Section 1152 provides that the Federal Criminal Code, including the "Assimilative Crimes Act" (18 U.S.C. Section 13) applies in Indian countries with the following major limitation:

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

No such limitation appears in Section 203(a)(3).

Further, in the Indian Civil Rights Act of 1968, 62 Stat. 696, Congress responded to the unanimous plea of American Indians to stop further encroachment of state laws in Indian country. A close examination of the almost 1280 pages of testimony elicited by Senator Ervin reveals that state law on Indian reservations has been a disastrous failure ever since it first began with the enactment of Public Law 83-280, 67 Stat. 588, in 1953. Section 406 of Public Law 90-284 requires the consent of a majority of the adult Indians in any Indian country *prior* to acquisition by the state of civil and criminal jurisdiction within the Indian country.

To allow a massive encroachment of state criminal law into Indian country through the back door of revision of the Federal Criminal Code with S. 1 as presently drafted, would frustrate the will of Congress expressed in the Indian Civil Rights Act and betray not only our tribes but all Indian people in the United States.

3. S. 1 WOULD NEEDLESSLY EXPAND STATE CRIMINAL JURISDICTION OVER INDIANS AND INDIAN RESERVATIONS

The Major Crimes Act, 18 USC Section 1153, vests federal courts with jurisdiction over 13 major crimes committed on Indian reservations by Indians against the person or property of other Indians or other persons. This federal jurisdiction is exclusive of state jurisdiction but is *not* exclusive of tribal jurisdiction.

Section 205 of S. 1, however, entitled "Federal Jurisdiction Generally Not Preemptive" provides in subsection (a) that unless expressly provided, the existence of federal jurisdiction over an offense does not preclude state or local government from exercising criminal jurisdiction over the same offense.

This provision would again make every state law sanctioned by criminal penalties applicable in all Indian country in the United States. But in this case the jurisdiction would lie in state courts rather than in the federal courts. Thus the end result would be a wholesale application of state law and state criminal penalties in Indian country as a concurrent federal and state matter.

The failure of Section 205 of S. 1 to preclude state jurisdiction would again frustrate the will of Congress expressed in the Indian Civil Rights Act and betray the American Indian people.

Further, as Senator Ervin and this Subcommittee discovered in hearings preliminary to the Indian Civil Rights Act of 1968, state and local governments act in a very heavy-handed fashion in enforcing criminal laws on Indian reservations. The statement of the United States Supreme Court in *United States* v. *Kagama*, 118 U.S. 375, 30 L. Ed. 228, 6 S. Ct. 1109 (1885) applies with equal force in 1975. That statement is:

"Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

State jurisdiction on Indian reservations is a one-edged sword that cuts in the direction of prosecution of Indians accused of crimes but does not cut in the direction of protecting Indian lives and property. We are now taking part in a computerized nationwide process of gathering evidence of the flagrant misapplication of state criminal laws to Indians and Indian property in Indian country to present to the United States Senate to support our effort to amend Public Law 83-280. It behooves this Subcommittee and the entire Congress to wait until that study is completed before enacting any legislation which would expand the application of state criminal laws in Indian country.

4. S. 1 WOULD VIOLATE TRIBAL SELF-DETERMINATION BY DECREASING TRIBAL CRIMINAL JURISDICTION

The question whether an Indian tribe has jurisdiction over non-Indians who commit offenses in Indian country is not finally determined by the United States Supreme Court. States invariably take the position that Indian tribes do not have jurisdiction over non-Indians for any purpose, but their conclusion does not withstand analysis.

Enactment of the Major Crimes Act of 1885 did not constitute a withdrawal of tribal jurisdiction over felonies named therein but, instead, established concurrent tribal and federal jurisdiction. This conclusion is borne out by the decision of the United States Supreme Court in *Keeble* v. *U.S.*, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), in which the Supreme Court held that an Indian prosecuted under the Major Crimes Act of 1885 is entitled to a jury instruction on lesser-included defenses. The Supreme Court held that such an instruction would not expand the reach of the Major Crimes Act of 1885 or constitute an infringement on the residual jurisdiction of Indian tribes. This conclusion of the United States Supreme Court is consistent only with the notion of concurrent tribal and federal jurisdiction on Indian reservations respecting both felonies named in the Major Crimes Act of 1885, other felonies, and misdemeanors.

Supporting this conclusion that Indian tribes have criminal jurisdiction over non-Indians on their reservations is the decision of the Federal District Court for the Western District of Washington in *Oliphant* v. *Schlie*, No. 511-73C2 dated April 4, 1974. In *Oliphant*, tribal law enforcement officers of the Suquamish Indian Tribe arrested Mr. Mark Oliphant for a criminal charge on the Port Madison Indian Reservation. In a habeas corpus proceeding in federal court, Mr. Oliphant attacked the jurisdiction of the tribe. The federal judge noted that Indian tribes have all the powers of any sovereign state except those specifically taken away by the Congress, citing *Worcester* v. *Georgia*, 31 U.S. 515 (1832) and denied the petition. The case is now on appeal to the Ninth Circuit Court of Appeals.

Enactment of Public Law 83-280 in 1953 did not constitute a withdrawal of tribal criminal jurisdiction but, instead, established concurrent tribal and state jurisdiction. We recognize that the concept of full tribal jurisdiction over all offenses committed on Indian reservations is one which may trouble many persons and may be considered a novelty by others. However, all tribes have experienced the serious frustration of tribal government as a result of their inability to enforce their laws over violators on their reservations who are non-Indians. The offenses most troublesome to Indian tribes are normally misdemeanors and may consist of willful disobedience of tribal hunting and fishing laws, or refusal to abide by tribal zoning and building code regulations. It is vital to the functioning of tribal government that they have the same authority to enforce their laws over all persons within their boundaries regardless of race.

Perhaps there will be those who will claim that this conclusion leads to unjust treatment. To those persons we answer that the federal government will surely fulfill its duty in prosecuting those accused of committing felonies within the compass of the Major Crimes Act of 1885, and that regarding remaining offenses, our tribal judges are entitled to as much confidence as is accorded local magistrates in any town or village through which one happens to be passing in the United States. Our tribal judges are in fact subject to repeated training in tribal judges schools and seminars operated by the Bureau of Indian Affairs and the National American Indian Court Judges' Association. Additionally, the Indian Civil Rights Act of 1968, Public Law 90-284, guarantees all persons a bill of rights substantially similar to that of the United States Constitution.

It would be tragic if the 94th Congress, in a worthy effort to revive the Federal Criminal Code, inadvertently destroyed an inherent tribal right which has fallen into disuse but which is now being vigorously exercised by Indian tribes in their effort to govern their reservations properly. The Subcommittee should be aware that Indian tribes operate under tribal law and order codes carefully drawn to preserve the rights of all persons and that wherever such laws affect non-Indians, they have been carefully examined by the Bureau of Indian Affairs and its solicitors for constitutionality.

In no case do the treaties, executive orders, or statutes involving our tribes yield up to the federal or state governments authority over offenders on our reservations. We think the legal principle is clear and should remain inviolate that Indian tribes must be recognized by Congress as having inherent authority to try offenses committed by all persons within the boundaries of their reservations.

Even though Section 205(a)(2) of S. 1 attempts to preserve the rights of Indian tribes to exercise their own jurisdiction in Indian country, the manner in which that section is phrased and keys into other sections already discussed, is likely to lead both federal and state courts to conclude that Indian tribes do not have criminal jurisdiction over non-Indians on their reservations. This is especially so since the Indian Civil Rights Act of 1968, Public Law 90-284, limits punishment meted out by tribal courts to six months' imprisonment and a $500 fine. If S. 1 is enacted in its present form, both state and federal courts will be strongly persuaded to find that Indian tribes retain neither felony nor misdemeanor jurisdiction over non-Indians on their own reservations and, at most, misdemeanor jurisdiction over Indians on their reservations.

5. THE JAY TREATY OF 1794, 8 STAT. 116

We would like to call the Subcommittee's attention to what may be an oversight in S. 1, Section 1211, entitled "Unlawfully Entering the United States as an Alien." The Subcommittee should be aware that the Jay Treaty of 1794, 8 Stat. 116, which is still in effect, authorized Indians from Canada and the United States to pass freely back and forth across their common border.

In the publication Treaties In Force on January 1, 1970, compiled by the Treaty Affairs Staff of the Office of the Legal Advisor, Department of State, a footnote to the listing to the Jay Treaty indicates that Article III, "so far as it relates to Indians" is one of the three Articles of the Treaty which appears to remain in force. Accordingly, to avoid any implication that S. 1 would overrule or repeal that Jay Treaty, we suggest the addition of the following proviso to Section 1211:

"Provided that nothing herein shall affect the rights of Indians under the Jay Treaty with Canada of 1794, 8 Stat. 116."

6. STATE CRIMINAL JURISDICTION AND THE INDIAN CIVIL RIGHTS ACT

Finally, we must protest Section 685(a) of S. 1 entitled "Juisdiction over Offenses Committed in the Indian Country." Essentially this statute is reenactment of Section 2 of Public Law 83-280, the statute that first allows states to assume jurisdiction over Indians and Indian reservations.

We call the attention of the Subcommittee to one of the basic precepts of our American form of government, namely, that the legitimacy of any government derives from the "consent of the governed." This concept was foremost in the minds of the members of this very Subcommittee when it recommended enactment of the Indian Civil Rights Act of 1968 which required consent by a majority vote of adult Indians prior to any further state assumption of jurisdiction over Indian country.

We respectfully submit that the Congress should make clear that all states presently exercising Indian jurisdiction, as well as states which seek to do so in the future, should be subject to the consent requirements of the Indian Civil Rights Act of 1968. We think it is wholly inappropriate and unfair for those states that have heretofore assumed jurisdiction to be able to deprive Indians of home rule without their consent while other states, not yet having acted, must first secure the consent of the Indian tribes before assuming such jurisdiction.

7. SPECIAL INDIAN COUNTRY JURISDICTION

The law governing criminal violations in Indian country is extremely complex, involving state, federal and tribal jurisdiction, and does not lend itself to simple analysis. Sociological and cultural factors on Indian reservations are very different from those in even nearby non-Indian communities. These factors, together with the trust relationship between the United States and Indian tribes, and Congress' policy of fostering Indian self-determination, require that careful thought and planning precede any major change in criminal jurisdiction in Indian country.

A national effort is now under way to amend Public Law 83-280 to require that all states exercising Indian jurisdiction must do so only upon consent of the Indian people. Senator James Abourezk introduced S. 1328 on March 12, 1975 for that purpose. Senator Abourezk has scheduled hearings on S. 1328 before the Subcommittee on Indian Affairs of the Senate Interior and Insular Affairs Committee on June 23 and June 24, 1975.

On January 2, 1975, Congress enacted Public Law 93-580, 88 Stat. 1910, to provide for establishment of the American Indian Policy Review Commission. The Commission has now been appointed and is in the process of initial organization. We suggest that the Commission must be given an opportunity to make the comprehensive review of conduct of Indian affairs mandated in Public Law 93-580 in conjunction with Congress' proceeding upon S. 1328 if the matter of criminal jurisdiction in Indian country is to be resolved in an intelligent fashion.

Accordingly, we propose that S. 1 be amended by the addition of a new subsection 203(d) entitled "Special Indian Country Jurisdiction" based upon existing 18 U.S.C. Section 1153. We also suggest that S. 1 be appropriately amended to maintain the status quo in Indian country until a thorough-going study can be made of the newly added 33 crimes in S. 1 and the need for amending Public Law 83-280.

We thank the Subcommittee for the opportunity given to our representatives to appear before it to testify and we request permission of the Subcommittee to file a more extensive legal analysis of S. 1 to be included in the record of hearings upon the Bill by the Subcommittee.

Mr. PIRTLE. Thank you, Senator. I will be brief.

I speak today, Senator, on behalf of the six tribes in whose behalf I have submitted a written statement. Also I speak on behalf of Mel Tonasket, who is President of the National Congress of American Indians and who was unable to be here today.

As pointed out in the statement that we have submitted, Senator, we would like to argue that S. 1, as presently drafted, has one major flaw with respect to criminal jurisdiction in Indian country. The major flaw is that S. 1 constitutes a large expansion, both State and Federal, of criminal jurisdiction.

The problem stems in part from the difficulties of dealing with the very complex jurisdictional problems in Indian reservations in which you have a tripartite criminal jurisdiction which is partly tribal, partly State, and partly Federal. Any attempt to deal with the difficulties leads to serious problems in terms of concepts of overlapping jurisdictions, checkerboarded areas and the like. There is currently a major drive that is being pursued by all Indians in the country to amend Public Law 83-280, the act that first allowed States to take jurisdiction in Indian reservations in 1953. I am participating in that, and leading the fight, so to speak, is Senator Abourezk, who has introduced S. 1328 into the Senate, a bill designed to correct some of the tragic wrongs that have been done to our Indian people. I will be working with Senator Abourezk and his staff all afternoon today.

Just to be very short, Senator, Section 203(a)(3) of S. 1 is a section that defines the special territorial jurisdiction of the United States in a way that differs from current law. Whereas today there is no jurisdiction over crimes committed by Indians against other Indians or other persons of their property, there is no such limitation in the special territorial jurisdictional definition in S. 1. That means in part that the Assimilative Crimes Act now brings into play every State law to which there is a criminal sanction, and makes it—the crime committed—a crime as a matter of Federal law in Federal courts.

That is not the State of the law today. That constitutes a major change and, we think, a major flaw in S. 1.

I will not go into——

Senator ABOUREZK. Mr. Chairman, may I just interrupt?

I did not quite understand what you said. You said the assimilative crimes statute takes care of every crime that is not delineated in the now 13 or 14 major crimes acts. Is that correct?

Mr. PIRTLE. It is a little bit complicated because you have three statutes that you have to put together.

Senator ABOUREZK. I do not mean that.

I just want to try to understand what your statement was a minute ago. I honestly did not understand what you said.

Mr. PIRTLE. I think I can explain it by saying that section 1152 makes the Federal Criminal Code apply in Indian country, and section 1153 is the Major Crimes Act and it says, it specifies—let me turn to section 1152, Senator. Section 1152 is the act that now makes the Federal Criminal Code apply in Indian territory.

Senator ABOUREZK. That is the Assimilative Crimes Act?

Mr. PIRTLE. The Federal Criminal Code includes the Assimilative Crimes Act; so section 1152, that makes the entire code apply to Indian country. You then look at section 13—that is the Assimilative Crimes Act—which makes any act that is not a Federal crime but is a State crime, henceforth a Federal crime in Indian country.

Senator ABOUREZK. You went on to say there was serious flaw in S. 1. That is the part I do not understand.

Mr. PIRTLE. The serious flaw is this. Under the present state of the law, section 1152 says the Federal Criminal Code does not apply to offenses committed by one Indian against the property of another Indian or another person; or where the offender has been punished by the local law of the tribe; or finally in cases where by treaty stipulation exclusive jurisdiction over such offenses is given to the tribe itself. In those situations, which are numerous and very important, the Federal Criminal Code does not apply, and therefore the Assimilative Crimes Act does not apply. Therefore State laws which make certain offenses crimes do not apply. That should certainly be preserved.

Senator ABOUREZK. In your opinion, the flaw in S. 1 is that it does not preserve tribal jurisdiction?

Mr. PIRTLE. It does not preserve tribal jurisdiction; it does not preserve Federal jurisdiction exclusively in certain areas. It brings in a great deal of State law that we think should not be applicable.

Senator ABOUREZK. Now I understand.

Mr. PIRTLE. We also think that S. 1 makes a major expansion of Federal criminal jurisdiction itself because it includes some 33 new crimes that are suddenly forced upon the Indian people. Some of these may well involve acts which, committed by non-Indians are properly offenses, but which, committed by Indians, should not be. In other words, there are certain cultural factors, sociological factors, and treaty guarantees to Indians, such that things which they do may not properly be considered crimes, some things having to do with their religion and other things. I will not get into that because that gets into very close detail and I know our time is limited.

I would suggest that what needs to be done is a very deep analysis of the jurisdictional problems on Indian reservations and the present difficult state of the law, and that S. 1 should, at the very minimum, preserve the status quo until this effort is done, and that the major effort of the Congress should be amending Public Law 83-280 and trying to establish proper criminal restrictions.

Senator HRUSKA. May I ask a question on the portion of your statement in which you make this proposition, that instead of applying the entire Criminal Code to Indians—I am paraphrasing now, trying to get the thrust of your statement—instead of applying the entire Federal Criminal Code to Indians, we should examine whether each crime is appropriate to Indians or in conflict with their customs and religion, and then take that into account in making S. 1—the balance of S. 1—applicable.

Instead of putting the burden on S. 1, should not the burden be with you and you could give us a list of those things which are contrary or in conflict with customs and religions, or whether or not the crime is appropriate to Indians, and then come here and

say, these are not good. These things which are included in S. 1 are not good as to Indians because they are contrary or in conflict, and we ask special treatment.

Would not that be a better approach to this process?

Mr. PIRTLE. Senator, I do think that that kind of a task has to be undertaken. The question is who should undertake it.

I represent six tribes, four in the State of Washington, one in Montana, one in Alaska. There are very different kinds of factors that have to be considered with respect to Indians generally. In the Southwest there are some very different situations.

We have now established the Indian Policy Review Commission. I would think that Commission would be exactly the instrument of Congress which should have a look into this entire problem and come up with recommendations to Congress. It seems to me that is a prime task for that Commission.

Senator HRUSKA. It puts quite a burden on us on just how we go about it. Here we have a Nation of 213 million people and we devised the Criminal Code for them; then should we put a provision in there:

> However, if any of these provisions are in violation of Indian law or in conflict with their customs and religion, they will not apply.

That is quite an order. It is very difficult. I do not know how that would be received. It would be so vague, it would be so difficult. It might not meet constitutional limitations according to the very nature of it.

Do you have some suggestions?

Senator ABOUREZK. I would like to suggest, Senator Hruska—in a sense, I agree with the witness—that the Judiciary Committee of the Congress ought not to just blanket any reservations with another system of penalties for or offenses that may or may not be according to Indian traditions.

I would just like to tell the chairman what my efforts, as Chairman of the Indian Affairs Subcommittee of Interior and as Chairman of the new American Indian Policy Review Commission, are in this line. We do intend to undertake a study of Indian jurisdiction in the Policy Review Commission. We intend to assign one of the task forces to that job. The final report of the Commission will be out within 2 years' time according to the law, and we expect to meet that deadline quite easily.

Second, I have introduced a bill which in some cases would repeal Public Law 83-280, the State Jurisdiction Assumption Law, and in other cases would strictly define Indian jurisdiction by limiting who has jurisdiction over what. As an effort, the bill I have introduced—S. 1328 is the number given the bill—it is an effort to undertake a dialog and debate on the limits of Indian jurisdiction which we hope, in the Indian Affairs Subcommittee, to get underway within a very stort time, within a month for the initial hearings and initial study of that.

So, what I would like to request of the subcommittee and the Judiciary Committee is that the Judiciary Committee maintain the status quo over Indian law. There is no need to immediately change Indian law because things are moving along good in some places

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and pretty rocky in some other places with what existing Indian law we have. But there is no immediate change required. The Commission that I talked of and the Indian Affairs Subcommittee of the Interior will be doing this. So, I would just add that you associate my remarks with Mr. Pirtle's in asking the Judiciary to maintain the status quo.

Senator HRUSKA. Of course, we went through all of these things at the hands and very dedicated and extensive efforts of Senator Ervin. We have an Assimilative Act in this area.

How are we going to unweave it? That takes some doing, does it not?

Mr. PIRTLE. It does, Senator, but we can help you do it. I think we could come up with proper provisions to do that.

Senator HRUSKA. Well that will be part of our job, to consider the attempt you are making in your bill, Senator Abourezk, and find out if that is practical. If it is going to result in violence to the overall picture here, that will probably not be desirable either, and leave voids that may be even more undesirable than we have proposed in S. 1.

That would be a factor that we would have to take into consideration.

Mr. PIRTLE. That is very true, Senator. If I may summarize, and then I want to give Mr. Hovis the microphone.

First, the jurisdictional situation is very complex on Indian reservations, and a great deal of it is unresolved at the present time and in the process of resolution in various courts.

Second, Senator Abourezk's bill, S. 1328, which proposes to amend Public Law 83-280, when carefully worked through the Indian Policy Review Commission and its procedures, will result in a good, integrated, overall plan for jurisdiction, both criminally and civilly on Indian reservations.

I think the committee should keep in mind that the end result to be achieved is so important that it should not be glossed over at this time by an attempt which is not fair and not enought in depth.

I would be happy to offer our services to your committee to preserve the status quo of the law in S. 1, until Senator Abourezk and that Commission can complete its work.

Senator HRUSKA. That is a very generous offer and it would be activity in the field that would be very helpful to the committee.

We have consulted the best authorities we could find in formulating what we have included in S. 1. In due time, Senator, we will get into the bill you have, and also the position which you have expressed support for that has been given to us by the witness.

Mr. PIRTLE. Thank you, Senator.

Senator ABOUREZK. I would like to offer to this particular subcommittee, in a joint responsibility in this area, that we should at least hold hearings together.

Senator HRUSKA. I think you will find cooperation at the highest levels of the committee. However, if we are going to be asked to hold this bill in abeyance until we solve the problems of the Indian rights, we will consign this bill to the ash can, because that is going to be a long process.

The big question, it seems to me, Senator, will be can we set aside these problems in some sensible and satisfactory way to allow the rest of the bill to go forward because of the pressing need for it?

And, if anything has come from the last 12 years of effort for codification of the Federal law, we ought to have some respect for the conclusion that we have reached.

Senator ABOUREZK. Senator, on page 45 of the bill, S. 1, I think there is one section, subsection (3) that includes Indian country as special territorial jurisdiction. That might be amended to say "Offenses in Indian country shall remain under the status quo," or some other language appropriate to the bill.

Senator HRUSKA. Subparagraph (3)?

Senator ABOUREZK. Yes. I think that might accomplish, very simply, what we want to accomplish. And that is, to maintain the status quo and to allow us to go on with our more indepth study.

Senator HRUSKA. That is a good suggestion. Let us consider it when we go into a markup session.

Senator ABOUREZK. We may get the advice from Mr. Pirtle.

Senator HRUSKA. Could you give us a memo on that particular point?

Mr. PIRTLE. I would be happy to, Senator.

Senator HRUSKA. That would be very helpful.

[The information referred to follows:]

ZIONTZ, PIRTLE, MORRISSET, ERNSTOFF & CHESTNUT,
ATTORNEYS AT LAW,
Seattle, Wash., July 17, 1975.

Re Indian Amendments to S. 1.

Mr. PAUL C. SUMMITT,
Chief Counsel, U.S. Senate, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, New Senate Office Building, Washington, D.C.

DEAR PAUL: In accordance with my promise to Sen. Hruska at the time I testified at the last hearing and our discussions when I was in Washington last month, I enclose a draft of the Indian Amendments to S. 1 which should be inserted into the Bill. My idea was to take the Committee Amendments which you and Dennis Thelan worked out and conform them both to the position of the National Congress of American Indians and the National Tribal Chairmen's Association regarding Amendment of P.L. 83-280, and in keeping with what I perceive to be the feeling of the Indian community on the whole concerning a number of individual points. Consider the following:

1. *Sec. 1217(c):*

You will note that I have changed the wording in this subchapter to conform to the original language of the Jay Treaty. It is interesting that nowhere in the legislative history of 8 USC § 1359, the statute embodying Article III of the Jay Treaty, is there any explanation for the constricted language of 8 USC § 1359.

2. *Sec. 685(a)(4):*

You will note that we reincluded subsection (4) which is certainly needed in the definition of "Indian country" to include trust allotments outside Indian reservations but in the ceded territory of the tribes.

3. *Sec. 685(d):*

As you can see, I have eliminated negligent homicide, maiming, aggravated battery, terrorizing, reckless endangerment, kidnapping, aggravated criminal restraint, aggravated property destruction, criminal entry, trafficking in stolen property and receiving stolen property from this subsection since the inclusion of all those crimes would greatly expand the present law. If you examine the definitions of those statutes, you will see, time and again, that they encroach on tribal sovereignty in ways which should not be done lightly but only after a thorough-going study.

4. *Sec. 685(e):*

The language of this subsection has been cleaned up since the intent is to make subsections (c) and (d) inapplicable not only to Indian country within the six states named in subsection (f)(1), but areas of Indian country in other states which was assumed under section 6 or 7 of P.L. 83-280.

5. *Sec. 685(f)(3):*

Again, this subsection has been cleaned up as was Sec. 685(e) above.

6. *Sec. 685(g)-(j):*

These subsections (g through j) provide for the reacquisition by the United States of criminal jurisdiction assumed by any state pursuant to one of the acts enumerated. These subsections represent the desire of the National Congress of American Indians and the National Tribal Chairmen's Association and, as you know, resulted from the National Convention on Public Law 280 which was held in Denver on February 23-24. See S. 2010.

7. *Sec. 686:*

Subsections (a) through (f) represent reenactment of the present liquor statutes regarding Indian country. Subsection (c) is a reenactment of 18 USC § 1161, and you will notice that I have added a paragraph preserving tribal liquor ordinances already adopted by Indian tribes, certified by the Secretary of the Interior, and published in the Federal Register pursuant to 67 Stat. 586. This is necessary to prevent Indian tribes who have already acted from having to begin anew.

8. *Sec. 698:*

This section which would repeal the Act of July 2, 1948, 25 USC § 232, should be deleted since not all New York State jurisdiction over Indian tribes should be removed automatically. Rather, New York Indian tribes should act pursuant to Sec. 685(g).

9. *Sec. 698:*

In subsection (1) I provide for changing the maximum penalty of tribal courts of "six months or a fine of $500" to "one year or a fine of $10,000." Such an amendment would make tribal courts much more effective.

10. *Sec. 698(2):*

This subsection amends Sec. 403(a) of the Indian Civil Rights Act, 25 USC § 1323(a) by deleting references to Public Law 83-280 and inserting instead all of the acts whereunder states acquired criminal jurisdiction in Indian country enumerated in Sec. 685(g), see page 7.

Paul, I would appreciate your advising me at your earliest possible convenience concerning the addition of these amendments to the Committee Draft of S. 1. If you have any questions, please advise me.

Very truly yours,

ROBERT L. PIRTLE.

Enclosures.

AMENDMENTS TO S.1

1. "§ 203. Special Jurisdiction of the United States

"(a) *Special Territorial Jurisdiction.*—The special territorial jurisdiction of the United States includes:

"(3) the Indian country, as defined in section 685(a) of the Criminal Justice Reform Act of 1975 (25 U.S.C. ——);

2. "§ 205. Federal Jurisdiction Generally Not Preemptive

"(a) *In General.*—Except as otherwise expressly provided, the existence of federal jurisdiction over an offense does not, in itself, preclude:

"(1) a state or local government from exercising its concurrent jurisdiction to enforce its laws applicable to the conduct involved;

"(2) an Indian tribe, band, community, group, or pueblo from exercising its concurrent jurisdiction in Indian country to enforce its laws applicable to the conduct involved; or

3. "§ 1217 General Provisions for Subchapter B

"(a) *Definitions.*—As used in this subchapter:

"(1) 'alien', 'application for admission', 'border crossing identification card', 'entry', 'immigration officer', 'passport', 'United States', 'immigrant visa', and 'nonimmigrant visa' have the meaning prescribed in section 101 of the Immigration and Nationality Act, as amended (8 U.S.C. 1101), and 'alien' includes an alien 'crewman' as defined in that Act;

"(2) 'fraud' includes conduct described in sections 1301(a) and 1343(a)(1)(A) through (E).

"(b) *Proof of Materiality.*—To the extent that materiality is an element of an offense described in sections 1211 through 1215, the provisions of section 1345(b)(2) that apply to section 1343 (making a False Statement) apply also to such sections.

"(c) *Exception*—Nothing in this subchapter shall be construed to affect the right of Indians dwelling on either side of the boundary line between the United States and Canada, freely to pass and repass the borders of the United States.

4. Title II—Technical and Conforming Amendments.

Part T—*Amendments Relating to Indians, Title 25, United States Code*

Sec. 685. Jurisdiction Over Offenses Committed in the Indian Country.—

(a) As used in this section, the term "Indian country" includes

(1) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and including any right-of-way running through a reservation;

(2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without a State; and

(3) all Indian allotments, the Indian titles to which have not been extinguished, including any right-of-way running through such an allotment; and

(4) all land outside the limits of any Indian reservation, the title to which is held in trust by the United States for any Indian tribe, band, community, group, or pueblo.

"(b) Except to the extent specifically set forth in this Act, nothing herein is intended to diminish, expand, or otherwise alter in any manner or to any extent Federal, State, or tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act.

"(c) Except as provided in subsection (d) of this section, the general laws of the United States as to the punishment of offenses within the special jurisdiction of the United States shall not extend to offenses committed by one Indian against the person or property of another Indian or to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case in which, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

"(d) Any Indian who commits against the person or property of another Indian or other person any of the following felony offenses as defined in title 18, United States Code, namely, Murder (section 1601), Manslaughter (section 1602), Rape (section 1641), Sexual Assault (section 1642), Sexual Abuse of a Minor (section 1643), Arson (section 1701), Burglary (section 1711), Robbery (section 1721), Theft (section 1731), or incest shall be subject to the same law and penalties as all other persons committing any of the above offenses within the special jurisdiction of the United States. As used in this section, the offense of incest shall be defined and punished in accordance with such laws of the State in which the offense was committed as are in force at the time of such offense. In the event of a criminal prosecution of an Indian for one or more of the foregoing offenses, this subsection shall not be construed to preclude a finding of guilty of a lesser included offense of such offense or offenses.

"(e) The provisions of subsections (c) and (d) of this section shall not be applicable within the areas of Indian country listed in subsection (f)(1) nor to any areas of Indian country subject to state criminal jurisdiction in any state which assumed such criminal jurisdiction pursuant to Section 6 or 7 of the Act of August 15, 1953 (67 Stat. 588).

"(f)(1) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

STATE AND INDIAN COUNTRY AFFECTED

Alaska.—All Indian country within the State, except that on Annette Islands the Metlakatla Indian Community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.

California.—All Indian country within the State.

Minnesota.—All Indian country within the State, except the Red Lake Reservations.

Nebraska.—All Indian country within the State.

Oregon.—All Indian country within the State, except the Warm Springs Reservation.

Wisconsin.—All Indian country within the State.

"(2) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

"(3) The areas listed in subsection (f)(1) and areas of Indian country subject to state criminal jurisdiction in any state which assumed such criminal jurisdiction pursuant to Section 6 or 7 of the Act of August 15, 1953 (67 Stat. 588), are excluded from the special jurisdiction of the United States described in Section 203 of Title 18, unless the United States has reacquired jurisdiction pursuant to Section 685 of this Act.

"(g)(1) In any case in which, pursuant to the provisions of Sections 2, 6, or 7 of the Act of August 15, 1953, 67 Stat. 588, the Act of February 8, 1887, 24 Stat. 390, the Act of May 8, 1906, 34 Stat. 182, the Act of June 25, 1948, 62 Stat. 827, the Act of July 2, 1948, 62 Stat. 1224, the Act of September 13, 1950, 64 Stat. 845, the Act of August 8, 1958, 72 Stat. 545, the Act of April 11, 1968, 82 Stat. 78, or the Act of November 25, 1970, 84 Stat. 1358, or court decisions, any area of Indian country or person therein is subject to state criminal jurisdiction or law, the Indian tribe affected is authorized to adopt resolutions indicating its desire (1) to have the United States reacquire all or any measure of such criminal jurisdiction and to have all or any measure of the corresponding criminal law of the state no longer applicable, and (2) to determine whether tribal criminal jurisdiction or law shall be concurrent with all or any measure of federal or state criminal jurisdiction or law.

"(2) Any such resolution shall be adopted by the tribal council or other governing body of such tribe, or shall be adopted by the initiative or referendum procedure contained in the tribal constitution and bylaws; provided, however, that if the tribal constitution and by-laws contain no initiative or referendum procedure, the resolution may be adopted by majority vote of the eligible voters who are enrolled members of the tribe residing on its reservation in a referendum election upon a petition signed by at least 25% of the eligible voters of the tribe who are enrolled members residing on its reservation.

"(3) Ninety days following receipt by the Secretary of the Interior of any such resolutions adopted in accordance with the provisions of this Act, the resolution shall be effective unless the Secretary of the Interior has within that period formally disapproved the resolution for the reason that (1) the tribe has no applicable existing or proposed law and order code, or (2) the tribe has no plan for fulfilling its responsibilities under the jurisdiction sought to be reacquired or determined.

"(4) Whenever the resolution shall become effective, (1) the United States shall reacquire, in accordance with the provisions of the resolution, all or any measure of such criminal jurisdiction in such area of Indian country or parts thereof occupied by the tribe, and all or any measure of the corresponding criminal law of the State shall no longer be applicable therein, and (2) tribal criminal jurisdiction or law shall, in accordance with the provisions of the resolution, be concurrent with all or any measure of federal or state criminal jurisdiction or law.

"(5) Upon disapproval by the Secretary of any such resolution, the Secretary shall immediately assist the tribe under subsection (j) hereof in preparation of a law and order code or plan, and when such inadequacies are alleviated, the Secretary shall approve the resolution. In the event of disapproval by the Secretary of any such resolution, the tribe affected may appeal the disapproval to the Federal Court for the District of Columbia in which original jurisdiction for any such appeal is hereby vested, and the Secretary shall have the burden of sustaining his findings upon which the resolution was disapproved.

"(h) No action or proceeding pending before any court or agency of any State immediately prior to the reacquisition or determination of jurisdiction pursuant to this Act shall abate by reason thereof. For purposes of any such action or proceeding, such reacquisition or determination of jurisdiction shall take effect on the day following the date of final determination of such action or proceeding.

(i) Section 6 of the Act of August 15, 1953 (67 Stat. 588) is hereby repealed, but such repeal shall not affect any cession of jurisdiction validly made pursuant to such section prior to its repeal.

"(j)(1) The Secretary of the Interior is authorized and directed to establish and implement programs to improve law enforcement and the administration of justice within Indian reservations and Indian country.

"(2) In implementing such programs the Secretary is authorized to make grants to, and contracts with, Indian tribes, to implement programs and projects to

"(a) determine the feasibility of federal reacquisitions of jurisdiction and determination of jurisdiction over such Indian country or parts thereof occupied by such tribes, including preparation of law and order codes, codes of criminal procedure, and establishment of plans for fulfilling tribal responsibilities under the jurisdiction sought to be reacquired or determined;

"(b) establish and strengthen police forces of the tribes, including recruitment, training, compensation, fringe benefits, and the acquisition and maintenance of police equipment;

"(c) establish and improve tribal courts in order to assure speedy and just trials for offenders, the appointment, training and compensation of qualified judges, and the appointment, training and compensation of qualified Indian prosecution officers, and the establishment of competent legal defender programs;

"(d) establish and maintain correctional facilities and establish and strengthen correctional personnel departments, including recruitment, training, compensation, and fringe benefits.

5. Sec. 686. Application of Indian Liquor Laws.

(a) *Intoxicants Dispensed in Indian Country.*—

(1) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

(2) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler or storekeeper, attache, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian.

(3) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reser-

vations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(b) *Intoxicants Possessed Unlawfully.*—Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(c) An Indian tribe having jurisdiction over Indian country, as defined in Section 685(a) of this Act, may adopt ordinances concerning dispensing, possession, and use of liquor in Indian country over which it has jurisdiction, in conformity with the laws of the State in which the Indian country is located, the provisions of subsections (a), (b), (d), (e) and (f) hereof notwithstanding. Such ordinances shall be certified by the Secretary of the Interior and published in the Federal Register.

Nothing in this subchapter shall alter the effectiveness of ordinances heretofore adopted by Indian tribes, certified by the Secretary of the Interior, and published in the Federal Register pursuant to the Act of August 15, 1953, (67 Stat. 586).

(d) *Liquor Violations in Indian Country.*—If any superintendent of Indian affairs, or commanding officer of a military post, or special agent of the Office of Indian Affairs for the suppression of liquor traffic among Indians and in the Indian country and any authorized deputies under his supervision has probable cause to believe that any person is about to introduce or has introduced any spirituous liquor, beer, wine, or other intoxicating liquors named in Section 686(a) and (b) of this title into the Indian country in violation of law, he may cause the places, conveyances, and packages of such person to be searched. If any such intoxicating liquor is found therein the same together with such conveyances and packages of such person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and one-half to the use of the United States. If such person be a trader, his license shall be revoked and his bond put in suit.

Any person in the service of the United States authorized by this section to make searches and seizures, or any Indian may take and destroy any ardent spirits or wine found in the Indian country, except such as are kept or used for scientific, sacramental, medicinal, or mechanical purposes or such as may be introduced therein by the Department of the Army.

In all cases arising under this section and Sections 686(a) and (b) of this title, Indians shall be competent witnesses.

(e) *Intoxicating Liquor in Indian Country as Evidence of Unlawful Introduction.*—The possession by a person of intoxicating liquors in Indian country where the introduction is prohibited by treaty or Federal statute shall be prima facie evidence of unlawful introduction.

(f) *Conveyances carrying liquor.*—Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture.

6. Sec. 687. Destroying Boundary and Warning Signs.

Whoever knowingly destroys, defaces, or removes any sign erected by an Indian tribe, or a Government agency (1) to indicate the boundary on an Indian reservation or of any Indian country as defined in Section 685 of this Act, or (2) to give notice that hunting, trapping, or fishing is not permitted thereon without lawful authority or permission, is guilty of an offense under Section 1703 of title 18, United States Code.

7. Sec. 688. Hunting, Trapping, or Fishing on Indian Land.

Notwithstanding the provisions of Section 1713 of title 18, United States Code, whoever, without lawful authority or permission, knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either is held by the United States in trust or is subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for

Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, is guilty of a Class B misdemeanor; and all game, fish, and peltries in his possession shall be forfeited.

Sec. 695. Section 6 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450d) is repealed.

Sec. 696. Section 105(j) of the Indian Self-Determination Act (25 U.S.C. 450i) is amended by deleting "sections 205 and 207 of title 18" and inserting in lieu thereof "sections 9104 and 9106 of title 5."

Sec. 697. Section 10(c) of the Act of April 19, 1950 (25 U.S.C. 640(c)), is amended by deleting "sections 102 to 104, inclusive, of the Revised Statutes, and inserting in lieu thereof "sections 103 and 104 of the Revised Statutes of the United States and sections 1332 and 1333 of title 18, United States Code."

Sec. 698. The Act of April 11, 1968 (25 U.S.C. 1301 et seq.), is amended as follows:

(1) Section 202(7) (25 U.S.C. 1302(7)) is amended by deleting "six months or a fine of $500" and inserting in lieu thereof "one year or a fine of $10,000."

(2) Section 403(a) (25 U.S.C. 1323(a)) is amended by deleting "section 1162 of title 18 of the United States Code," section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section", and inserting in lieu thereof "sections 2, 6, or 7 of the Act of August 15, 1953, 67 Stat. 588, the Act of February 8, 1887, 24 Stat. 390, the Act of May 9, 1906, 34 Stat. 182, the Act of June 25, 1948, 62 Stat. 827, the Act of July 2, 1948, 62 Stat. 1224, the Act of September 13, 1950, 64 Stat. 845, the Act of August 8, 1958, 72 Stat. 545, the Act of April 11, 1968, 82 Stat. 78, the Act of November 25, 1970, 84 Stat. 1358, Sec. 685(f) of the Criminal Justice Reform Act of 1975, or court decisions.

Senator HRUSKA. Our next witness will be Mr. James B. Hovis, who has given us a very extensive treatment of the subject he deals with. His statement will be placed in the record in its totality.

Mr. HOVIS. Mr. Chairman, I would like to request that the staff and the committee look at that appendage very closely. It is a report that has been done by a professor from the University of Washington, making a total overview of the effect of Public Law 83-280 in the State of Washington, and all the citations and all of the material therein.

And it also deals with the effect of Public Law 83-280 and the status of Public Law 83-280 in every State in the United States. I think it would be helpful to have it all in the record.

Senator HRUSKA. Very well, you will find we are very liberal in these things.

[The prepared statement of James B. Hovis follows:]

STATEMENT OF YAKIMA INDIAN NATION

SUMMARY STATEMENT

While S-1, introduced January 15, 1971, is more sensitive to the special problems in Indian Country than it's predecessors, it still leaves much to be desired. The Yakima Indian Nation, must therefore object to its passage in its present form and does request that the Judiciary Committee amend S-1.

S-1 would extend the entire federal code of enclave laws— from murder to disorderly conduct—to Indian Country without regard to the laws of the Indian Tribe or the wishes of the sovereign Indian Nations involved. We suggest an amendment to cover this area.

While Section 205(a)(2) states that jurisdiction of the tribes or states shall not be pre-empted, it does not make clear that this bill does not increase the present jurisdiction of states or tribes nor does it make clear that tribal and state jurisdiction is concurrent. We suggest an amendment to cover this area.

S-1 does not provide an "exception clause" as contained in 25 USC 1152, so as to prohibit actual double jeopardy where an Indian has been punished by the local law of the tribe.

In order to prevent double and triple jeopardy, this clause should be retained and expanded to include those punished by either tribal or state law. We suggest an amendment in this regard.

Section 685(b) (State jurisdiction over Indian Country) is simply a reenactment of 18 USC 1162. There are several objections to this approach. First, S–1 makes no provision for the retrocession of state jurisdiction, in whole or part, where state jurisdiction is not working and where the trible is capable of maintaining law and order. It fails to clear up the question of whether state jurisdiction in state assumption areas is exclusive or concurrent and whether states may assume jurisdiction without the consent of the tribes. Likewise, S–1 should make clear that state jurisdiction does not include the power to tax or regulate trust resources. We suggest amendments in this regard.

STATEMENT

A. Tribal consent should be required

The place of Indian tribes and nations in our federal scheme of things is a special area. They are dependent sovereigns who were to have, as regards their internal affairs, exclusive control of their destiny and their territorial reserved areas.

The reading of Chancellor Kent's Opinion in *Goodell* v. *Jackson*, 20 John 693 (N.Y. 1823) and Chief Justice Marshall's opinions in *Johnson* v. *McIntosh*, 8 Wheat 543, 5L. Ed. 681 (1823), *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L.Ed. 25 (1831) and *Worcester* v. *Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1823) together with the discussion of the status of Indians justice in Story's *Commentaries on the Constitution*. Vol. III Sec. 1101 and in Chancellor Kent's *Commentaries on American Law* (Vol. III, P. 382, 386), cannot lead anyone to other than the conclusion that at the time of the formation of our union, the Indian Nations or tribes took their place in our scheme of government as dependent sovereigns and as regards their internal affairs, were to have the exclusive control of their destiny.

Our Supreme Court continues to follow this rule of law. (For example, see *McClanahan* v. *Arizona State Tax Commission*, 411 US 164, 36 L.Ed. 2d 129, 93 Sup. Ct. 1257 (1973).

The Yakima Nation's treaty contains these promises and guarantees. Article 2 of the *Treaty of the Yakimas*, (12 Stat. 951), provides that the Yakima Reservation shall be "for the exclusive benefit of said confederated tribes and bands of Indians, as an Indian Reservation; nor shall any whiteman, excepting those in the employment of the Indian Department be permitted to reside upon said reservation without permission of the tribe and the superintendent or agent." Persons residing on the Yakima Reservation have given their implied consent to be subject to federal and tribal jurisdiction. The Yakima Nation has not given its consent to be subject to federal laws except as to matters within the commerce clause (Article I, §8 Cl. 3) of the United States Constitution,—matters regarding the administration of resources held in trust by the United States, or matters based on the dependency of this nation on the United States (See: *United States* v. *Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed 228 (1803) cited with approval in *McClanahan, supra*). Article 8 of the *Treaty with the Yakimas* (see appendix page 5), as compared with other concurrently executed treaties (see for example, Article 6 of the *Treaty with the Tribes of Middle Oregon* (12 Stat. 951, appendix page 7), provides that the Yakima Nation is not subject to federal laws as regards its internal matters. Likewise, the State of Washington, at the time of its formation, as required by Congress, disclaimed all jurisdiction over Indian lands in the State of Washington (Washington Constitution Article XXVI, appendix page 11). This article is mandatory (Article I. Section 29, Appendix, p. 11). Article XXVI of the Washington Constitution has not been amended as provided in Article XXIII. (See appendix, p. 11).

It is the contention of the Yakima Indian Nation that federal enclave jurisdiction should not, and cannot under treaties like the *Treaty with the Yakimas*, be impressed upon Indian tribes or nations without their consent.

We therefore suggest the following amendment be added to Section 103:

"This title shall not apply to Indian country, as defined herein, until such time as the consent of the Indian tribe, nation, band, community, group or pueblo, occupying the particular Indian country or part thereof which would be affected has been obtained and published in the *Federal Register*. Thirty days after such publication, this title shall apply to said Indian Country to the exclusion of any state assumption where the consent, in whole or part, of said Indian governing body has not been previously or concurrently given."

B. Clarify that title does not expand State or tribal jurisdiction and that this jurisdiction is concurrent

While Section 205(a)(2) states that jurisdiction of the tribes or states shall not be pre-empted, it does not make clear that S–1 does not increase present tribal or state jurisdiction and that state or tribal jurisdiction is concurrent. We believe that this will cause considerable litigation unless Congress clearly expresses itself. For example, here are a few of the present pending cases where state powers under authority of Public Law 83–280 is contended and resisted. Some of the cases now pending are *Omaha Tribe of Indians, et al* v. *Peters*, 383 F. Supp. 421, Appeal Docketed, 8th Cir. (whether the State has power to impose an income tax on reservation Indians pursuant to P.L. 280); *Russell Bryan, et al* v. *Itasca County*, No. 44947, before the Supreme Court for the State of Minnesota (whether the State has authority to impose a personal property tax on the mobile home of a reservation Indian); *The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al* v. *John C. Moe*, et al., Civil No. 2145, U.S.D.C, Montana, Missoula Division (Lawfulness of State sales tax on reservation sales by an Indian retailer to a Non-Indian consumer); *U.S.A.* v. *State of Washington*, Civil No. 3909, U.S.D.C. E.D. Wash. (filed July 18, 1973), (amended complaint filed October 4, 1974), (whether the State may impose its excise tax laws on transactions of tribally licensed retailers on the Yakima Reservation on their sales to Indians and non-Indians); *Confederated Tribes of the Colville Indian Reservation* v. *State of Washington*, Civil No. 3868, U.S.D.C. E.D. Wash. (filed May 17, 1973) (whether the State can impose taxes on Tribal and individual sales transactions; retail sales of cigarettes to Indians and non-Indians); *Quileute Indian Tribe, et al* v. *State of Washington*, U.S.D.C. W.D. Wash. (filed Dec. 19, 1974) (whether Quileute Tribe and individual members can carry on tribal functions, Indian economic enterprises and other activities free from state taxation); *U.S.* v. *Humbolt County*, Civil No. C–74–2526–RFP, U.S.D.C., N.D. California, (whether the State has authority to apply its zoning, building, sanitary and environmental laws to construction on the Hoopa Reservation).

On February 18, 1975, in two cases, (*Comenaut* v. *Burdman* 74–707 and *Tonasket* v. *Washington* 74–807); involving jurisdiction problems under Public Law 83–280, the Supreme Court refused to grant review. With all the present jurisdiction confusion, we suggest that this bill should be drafted so that it will not add to the confusion. We suggest the following amendment be added to Section 205:

(d) Nothing in this title shall be construed to increase the existing jurisdiction of a state, local government, Indian nation tribe, band, community, group or pueblo and it is provided that their jurisdiction shall be concurrent with the federal jurisdiction established by this title.

C. Triple jeopardy problem

It is possible that a person committing an offense under S–1, would be subject to double or even triple jeopardy unless this bill is amended. The following statement from *United States* v. *Lanza*, 260 U.S. 377, 67 L.Ed. 314 (1922) presents the problem.

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty not that of the other."

We do not believe that this committee would wish to subject an offender to prosecution by state, local, tribal and federal jeopardy where one of these governments has already punished the offender. Congress has previously provided in 25 U.S.C. 1162, that where a tribe has punished an offender, that the federal government shall not prosecute. This exception clause is omitted from S–1. We suggest that it should be retained and expanded and submit the following amendment as Section 694:

"This title shall not extend to offenses committed by a person in Indian Country, who has been punished by the law of an Indian Nation, tribe, community, group or pueblo or by a law of a state."

D. Provision for retrocession

It is in the field of state assumption of jurisdiction, that the greatest problem exists. State assumption of jurisdiction over Indian Country has in the main been a total failure. In most cases state jurisdiction in Indian country has resulted in law *without* order rather than law and order. (See Volume I. "The Impact of Public Law 280 upon the administration of Criminal Justice on Indian Reservations." *Justice and the American Indian*, appendix p. 13 and following. Also see *Indian Reservation Criminal Justice*, Task Force Analysis 1974-75, Bureau of Indian Affairs, (1975) presented for filing in the record of this committee).

Apart from Public Law 280—and a few similar statutes affecting Kansas, Iowa and New York—states do not have jurisdiction over reservation Indians, or over transactions between Indians and non-Indians (Except with the consent of the Indian) on Indian Reservations. Alaska, Arizona, California, Florida, Idaho, Minnesota, Montana, Nebraska, Nevada, Oklahoma, Oregon, Washington and Wisconsin have assumed at least some jurisdiction under Public Law 280. (Note: The Nevada legislature has voted to retroceed state jurisdiction). Under Washington Statutes (R.C.W. 37.12), provision is made for assumption of state jurisdiction by the Tribes petitioning the governor and the same chapter imposes, without Indian consent, state criminal and civil jurisdiction over all reservation lands for eight subject matter areas, and state criminal and civil jurisdiction over all nontrust lands. I have information regarding 22 tribes in Washington and 11 have petitioned for state jurisdiction and 11 have not. Three of these 11 petitioning tribes have obtained a Governors proclamation retroceeding jurisdiction in whole or part before the Washington State Attorney General ruled, the Governor could not retroceed without legislative action. Many of the Washington tribes under full or partial jurisdiction wish to remove themselves from state jurisdiction in whole or in part. The Yakima Nation wishes to remove itself from state jurisdiction. Even though the Governor proposed retrocession legislation, it failed to be enacted by the state legislature because of political problems.

At a conference held in Denver during the last week of February, a large number of tribal leaders met and with the approval of both the National Congress of American Indians and National Tribal Chairmans Association, pledged themselves to support legislation that would provide:

1. For the repeal of the Public Law 83-280 and other like acts.
2. That tribes are authorized to reacquire Federal and Tribal jurisdiction in whole or in part by action of governing body or referendum requested by a set percentage of resident members.
3. That tribes can by resolution clarify or establish that any jurisdiction a state retains in concurrent (and is not exclusive) with the jurisdiction in the same matters existing in the tribe and Federal government.
4. That reacquisition of Tribal and Federal jurisdiction shall be considered automatically approved unless the Secretary of the Interior shall, within ninety days formally disapprove the reacquisition and give his reasons therefore.
5. That the affected tribe may appeal any such disapproval to an appropriate Board of Appeals and thereafter to the Federal Courts.
6. That feasibility and implementation funding must be authorized.

Whatever laws are passed by Congress, we would find it hard to believe that it could be less productive of law and order than the present state assumption, partial, checker boarded system that prevails on the Yakima Indian Reservation, and we request that Congress take some action to bring some order to this mess created by the enactment of Public Law 83-280. As our reservation is checkerboarded with trust and non-trust (patented) lands, jurisdiction is presently dependent upon who holds title to the land. If the land is not trust, the state has assumed jurisdiction over almost all crimes. If it is trust the state has jurisdiction over eight undefined categories, i.e., "Compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children and operation of motor vehicles upon the public streets, alleys, roads and highways.

Law enforcement officers must use a tract book and determine title to see if they have jurisdiction. Then if it is trust lands, they must make a field determination of whether the crime fits into one of the eight categories. You lawyers on the committee would have a most difficult time in determining if you could, what fits into the category of domestic relations. It is not even defined in a law dictionary. How can one expect an untrained law officer to make this type of determination. It is even more difficult for a victim to determine where offenses should be reported. How would this committee like to be constantly getting the run around when you do report? The Washington assumption statutes, and the resulting system is so indefinite that it fails to give a person of ordinary intelligence notice of where he can get protection of his person and property and fails to give a person of ordinary intelligence notice of what conduct is forbidden by statute.

Also, where an offender is standing, determines whether or not he is entitled to certain civil rights. For example, if he is on trust property and not within the eight categories he is entitled to a grand jury, federal bail act and many federal protections. If he is not, then he is not entitled to these protections in state court. We believe this system fostered by the enactment of Public Law 83-280 does not meet constitutional standards. *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1925).

In *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) the Supreme Court again enunciated this void for vagueness rule:

"Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.'

"This ordinance is void for vagueness both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute . . . , and because it encourages arbitrary and erratic arrests and conviction."

The legislative power of Congress is contained in Article I of the Constitution and the judicial powers of Congress are contained in Article III. (appendix page 8). By the passage of Public Law 83-280, Congress purported to delegate both the United States' legislative and judicial function, as regards criminal and civil matters among Indians, to the states without the consent of the governing bodies of the tribes involved and without providing any standards for state assumption of either this legislative or judicial function. This delegation of unfettered discretion to Washington to make whatever laws it may think is needed to regulate crimes and civil matters regarding Indians and Indian lands and granting jurisdiction vested in federal courts to state courts over these matters is unconstitutional. Congress' power to legislate regarding Indian tribes is limited to that conferred by the commerce clause and under the national purpose reasoning contained in *United States* v. *Kagama*, 1 Cranch 137, 118 U.S. 375 (1803). In *Kagama*, the Supreme Court found that the protection of Indians constituted an exclusive national problem and referred to the practical necessity of withholding such power from the states:

"It seems to us that this (protection of Indians) is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They own no allegiance to the states and receive from them no protection. Because of the local ill feeling the people of the state where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court wherever the question has arisen . . .

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." (Bracketed material supplied. Emphasis Supreme Courts. See also *U.S.* v. *Thomas*, 151 U.S. 577 (1893) and *McClanahan* approval of *Kagama*.

It is this limited power that Congress has purported to delegate to the states. Such unfettered delegation of this limited legislative power is uncon-

stitutional *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). That this failure of states to provide protection for Indians, still exists is conclusively demonstrated by the appendix hereto and the hearings and records of this committee.

Also, since Article III, § 1 provides that "the judicial power of the United States, shall be *vested* in one Supreme Court and such inferior courts as the Congress may from time ordain and establish", this unfettered delegation of federal judicial power is likewise unconstitutional. Under Article III § 2, this judicial power shall extend to *all* cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made. This vested federal judicial power regarding jurisdiction over Indians cannot be delegated to state courts acting in the exercise of state jurisdiction. The unconstitutional action of the 83rd Congress should be corrected by this Congress enactment of retrocession of state jurisdiction.

To correct this error, we suggest the following amendment being new Section 695:

That (a) in any case in which a State, pursuant to the provisions of section 1162 of Title 18, United States Code, section 1360 of Title 28 United States Code, or the Act of August 15, 1953, Public Law 83-280, 67 State 588, and section 103(b) of the Act of April 11, 1968, respectively, acquired all or any measure of jurisdiction over criminal offenses committed by or against Indians, and which arise in areas of Indian country situated within such State, any Indian tribe occupying the particular Indian country or part thereof affected by such State assumption shall be authorized, acting through its tribal council or other governing body, to adopt a resolution indicating its desire (1) to have the United States re-acquire any or all of such jurisdiction, (2) to make the jurisdiction of the tribe, in whole or in part, coextensive with tribal jurisdiction as it was prior to such assumption of jurisdiction by such State, and (3) to provide that the jurisdiction of the tribe in any or all state retained jurisdiction shall be concurrent.

(b) Within thirty days following the receipt by him of any such resolution adopted in accordance with the provisions of this Act, the Secretary of the Interior, unless he finds the tribe involved is incapable of reacquiring jurisdiction, shall issue a proclamation (1) to the effect that the United States reacquires, in accordance with the provisions of such resolution, in whole or in part, its jurisdiction over such offenses in such Indian country or part thereof occupied by such tribe and affected by such state assumption, (2) to the effect that the jurisdiction of the tribe thereafter is coextensive with the tribal jurisdiction as it was prior to such assumption of jurisdiction by such state and (3) to the effect that any jurisdiction retained by the state is concurrent with tribal jurisdiction.

If the Secretary of Interior shall fail to approve or deny the reacquisition of federal and tribal jurisdiction within ninety days of the receipt of said resolution said reacquisition shall become effecitve upon the publication of said tribal resolution in a newspaper of general circulation in the state or states in which it is located.

The Secretary's findings that the tribe is incapable of reacquiring jurisdiction, in whole or in part, may be appealed to the appropriate federal district court and the Secretary shall have the burden of sustaining his finding.

(c) Within ten days following the issuance of such proclamation, the Secretary of the Interior shall publish such proclamation in the Federal Register. Effective upon the date of such publication, the United States and the Indian tribe shall exercise their respective jurisdictions as provided by such proclamation.

(d) Effective upon and after the date of such publication in the Federal Register, or newspaper of general publication where the Secretary has failed to act, all criminal laws of the United States and of such Indian tribe, in whole or in part which, on the date immediately preceding such date of publication, would have been applicable to such Indian country but for such assumption of jurisdiction by such State shall be applicable within such Indian country in accordance with the provisions of such proclamation.

Sec. 2. No action or proceeding pending before any court or agency of any State immediately prior to the reacquisition of jurisdiction by the United States pursuant to this Act shall abate by reason thereof. For purposes of any such action or proceeding, such reacquisition of jurisdiction by the United States shall take effect on the day following the date of final determination of such action or proceeding.

Sec. 3. The Act of August 15, 1953 (67 Stat. 588) is hereby repealed, but such repeal shall not affect any cessation of jurisdiction validly made pursuant to such section prior to its repeal.

APPENDIX

1. Treaty with the Yakima, 1855, 12 Stat. 951, 2 Koppler 524

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wishham, Shyiks, Ochechotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119° 10′,) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakima River called Tah-Mah-Luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians; the tract of land included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divido between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marekd out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent

and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3. *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, and also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4. In consideration of the above cession, the United States argee to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year; commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair and providing them with furniture books and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building acquired for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth aritcle of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. And *provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the folks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent.

Kamaiakun, his x mark; Skyloom, his x mark; Owhi, his x mark; Te-cole-kun, his x mark; La-hoom, his x mark; Me-ni-nock, his x mark; Elit Palmer, his x mark; Wish-och-kmpits, his x mark; Koo-la-toose, his x mark; Shee-ah-cotte, his x mark; Tuck-quille, his x mark; Ka-loo-as, his x mark; Scha-noo-a, his x mark; Sla-kish, his x mark.

Signed and sealed in the presence of—
James Doty, secretary of treaties,
Mie. Cles. Padosy, O.M.T.,
W. H. Tappan, sub Indian agent, W.T.,
C. Chirouse, O.M.T.
Patrick McKenzie, interpreter,
A. D. Pamburn, interpreter,
Joel Palmer, superintendent Indian affairs, O.T.,
W. D. Biglow,
A. D. Pamburn, interpreter.

2. Treaty with Tribes of Middle Oregon 1855, 12 Stat. 951, 2 Koppler 536

ARTICLE 7. The confederated bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no deprdation on the property of said citizens; and should any one or more of the Indians violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities; nor will they make war on any other tribe of Indians except in self-defence, but submit all matters of difference between them and other Indians to the Government of the United States, or its agents for decision, and abide thereby; and if any of the said Indians commit any depredations on other Indians, the same rule shall prevail as that prescribed in the case of depredations against citizens; *said Indians further engage to submit to and observe all laws, rules, and regulations which may be prescribed by the United States for the government of said Indians.* (at 12 Stat. 971)

3. Constitution of United States

ARTICLE I

§ 1. *Legislative powers*

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

§8. *Powers of Congress*

SECTION 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposes and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposes and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the seceral States, and with the Indian Tribes;

§ 10. *Restrictions upon powers of States*

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congres may from time to

time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of Admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a party; – to Controversies between two or more States; – *between a State and Citizens of another State;* between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

ARTICLE IV

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Constitution of the State of Washington

ARTICLE I

SECTION 29. *Constitution Mandatory.* The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

ARTICLE II

SECTION 22. *Passage of Bills.* No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be reorded thereon as voting in its favor.

ARTICLE XXIII

SECTION 1. *How Made.* Any amendment or amendments to this constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the

state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution, and proclamation thereof shall be made by the governor; Provided, that if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such (each) amendment separately. The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state.

ARTICLE XXVI

The following ordinance shall be irrevocable without the consent of the United States and the people of this state: –

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxations, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the Territory of Washington and payment of the same are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

Justice And The American Indian

Volume 1: The Impact of Public Law 280 upon the administration of Criminal Justice on Indian Reservations. Prepared by Professor Ralph Johnson of the University of Washington, under a grant obtained by the Yakima Nation for the National American Indian Court Judges Association. Reproduced hereto for the benefit of the Committee.

FOREWORD

In the forty years since passage of the Wheeler-Howard (Indian Reorganization) Act and the birth of Indian courts as we now know them, "the germ of future problems", then planted, has grown and multiplied. That germ—the confused and limited scope of Indian court jurisdiction—forms the core of this five-part study, made possible by a grant award from the Law Enforcement Assistance Administration of the Department of Justice.

This project set out with one clearly identifiable goal: to foster and stimulate thought and investigation by all appropriate parties towards the end of formulating and applying specific remedies to the pressing legal and judicial problems we discuss. We set out to accomplish our goal by attempting: 1) to reflect the concerns of those people who must live with the recurrent law and order problems on Indian reservations; and 2) to provide a vehicle for the expression of possible alternatives to the present system.

The first element of this program was accomplished through extensive interviewing. Over 500 Indians in more than 55 tribes were personally interviewed

during the course of this project. The second element required a decision to produce a set of documents which would be more than a mere restatement of current law. Legislative, judicial, and administrative alternatives to present methods have, therefore, been included. All were reviewed by knowledgeable persons prior to publication. We hope these alternatives will form the springboard for future discussion and action, whether they or similar proposals are adopted or not. Numerous points of view were, of necessity, included in this study in order to generate healthy discussion. The views and opinions in these documents, however, do not necessarily represent the position of the Yakima Indian Nation, the National American Indian Court Judges Association, or its members.

We believe the publications in this study will be valuable aids to Indian Court Judges and others in the criminal justice system. They are beginnings, not conclusions. How valuable they will prove will depend upon the actions of those who read them. The call is out. Let us hope it will be heard.

The Board of Directors,
National American Indian Court Judges Association.

Honorable Virgil Kirk, Sr., President
Chief Justice, Navajo Nation Judicial Branch
Window Rock, Arizona 86515
Honorable George R. Armstrong
Chief Judge, Ute Mountain Ute and Southern Ute Tribes; Chief Judge, Hopi Nation
Cortez, Colorado 81321
Honorable Henry Upchego
Chief Judge, Uintah and Ouray Ute Tribe
Ft. Duchesne, Utah 84026
Honorable Cranston Hawley, Vice President
Chief Judge, Ft. Belknap Indian Reservation
Harlem, Montana 59526
Honorable Lawrence Miller
Chief Judge, Shoshone and Arapho Tribes
Ft. Washakie, Wyoming 82510
Honorable Coquelle G. Thompson
Chief Judge, Confederated Tribes of the Warm Spring Reservation of Oregon
Warm Springs, Oregon 97761

PREFACE

The Impact of Public Law 280 upon the Administration of Criminal Justice on Indian Reservations is being published at a time when conditions have reached a point where the Indian community feels that political action is required to make it possible for civil and criminal jurisdiction to be returned to Indian tribes and the federal government from the states. Tribes feel that their very survival may be at stake and, therefore, seek to exercise tribal, civil and criminal jurisdiction, as may be limited by Congress, as one of their major attributes of sovereignty. The fact that some tribes are taking legislative and judicial actions to achieve these objectives is evidence of their strong feelings about this issue.

This paper was written in an attempt to find answers to two questions in this area: 1) How can the damage caused by termination legislation be undone? and 2) How can the policy of self-determination for the American Indian be effectively implemented? The history and present operational structure of state jurisdiction over Indian reservations serves to clarify the need for the remedies which are proposed. A separately-written background paper provides the perceptions of Washington State Indians about state assumption of jurisdiction. Important appendices offer for discussion some legislative guidelines and proposals on retrocession and related subjects.

It is hoped that this study will put the issues of state, civil and criminal jurisdiction in the perspective in which Indians view them and that a necessary outgrowth of this study will be both understanding and action on the part of state and federal governments. It is further hoped that this study will help to elicit the opinions of people throughout the country on this subject.

Although the State of Washington was selected for most of this study, it was not intended to single out Washington alone because like situations exist in

other states that have assumed civil and criminal jurisdiction over Indian tribes.

We are grateful to the many individuals and organizations who contributed their time and talents to this undertaking. To Ralph W. Johnson, who wrote this study, we are particularly thankful. A Professor of Law at the University of Washington in Seattle, Ralph Johnson's background in Indian law and Indian problems is impressive. He has taught courses in Indian law, including "Indian Legal Problems", at the University of Washington; and he has authored various articles on the subject including "The States versus Indian Off-Reservation Fishing: A United States Supreme Court Error" (Washington Law Review, 1972). He has served as an instructor for the National American Indian Court Judges Association Training Program since fall of 1972 and has authored a number of lessons in that program. He has met and worked with leaders of tribes throughout Washington State concerning state jurisdictions, Public Law 280, and other Indian legal matters. As an attorney with experience in the legal problems of Washington State Indians, his background is unmatched.

Prof. Johnson was assisted in background research by law students James E. Walsh III, Rod Peterson and Nicholas C. Newman, and by Philip La Cours, Frank S. LaFontaine, Leo LaClair, Earl R. McGimpsey, and Lloyd Pinkham. Material gathered by Gerald P. Boland and by Roderick Simmons appears in the appendices. David Kader helped with organization and editing. Comprehensive and insightful comments on earlier drafts of the study were made by Vine Deloria, Jr., Bill Wilson, and Mark D. Steisel. The background paper, "Indian Perceptions on Public Law 280 Jurisdiction" was written by the editorial staff from materials supplied by Judge Steisel. Judge Steisel was aided in this effort by Orville Olney, Laurita Olney, Gene Joseph and Philip La Course.

We would also like to acknowledge the efforts of organizations without which this project could not have been undertaken. The Law Enforcement Administration of the Justice Department made this study possible through an award to the Yakima Nation and the National American Indian Court Judges Association. The National Council on Indian Opportunity offered counsel and encouragement from the inception of the program. The Honorable George R. Armstrong, Chief Judge of the Ute Mountain Ute and of the Southern Ute Tribes and Chief Judge of the Hopi Nation, was the Project Director. He, along with the other members of the Board of Directors of the National American Indian Court Judges Association, served as the Steering Committee for the project, establishing policy and directing the efforts of the staff. Arrow, Inc., a Washington, D.C.-based, non-profit corporation, and its Executive Director, E. Thomas Colosimo, assisted with program management.

We would also like to recognize the efforts of the late Robert Jim. While Chairman of the Yakima Nation, he helped to initiate this program. His entire life was dedicated to furthering the Indian cause.

To all individuals who contributed to this publication, we extend a sincere thank you.

INDIAN PERCEPTIONS ON PUBLIC LAW 280 JURISDICTION

Introduction

The following report is an attempt to study the impact of Public Law 280 on the lives of the Indians of Washington State who have, for the past twenty years, been subject to state jurisdiction. While the operations of the system were examined objectively, our main concern was to provide Indian input on the subject. The result is a paper which deals mainly with the perceptions of Washington State Indians concerning state jurisdiction. Some comments regarding state, local, and federal actions subsequent to state assumption of jurisdiction over Indian reservations are included. It should be stressed that Washington State was chosen as the focal point of our analysis for illustrative purposes only. The problems related to Public Law 280 in the State of Washington are common to other states as well.

Jurisdiction analysis

Before we look at Indian attitudes concerning the jurisdictional system they must live with, it will be helpful if we outline the various forms of jurisdiction over Indian reservations which now exist in the State of Washington. Though it is neither uniform nor consistent, the jurisdiction can be divided into four basic categories. They are:

1. Partial Jurisdiction—The state has assumed jurisdiction over eight areas, including compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles upon the public streets, alleys, roads and highways. While the state has assumed jurisdiction over these eight areas on all Indian reservations, some tribes, such as the Yakima, Lummi, Makah, Spokane have retained their tribal courts to deal with all other matters. This situation does not extend to fee-patent lands on Indian reservations. The state exerts total jurisdiction over all such lands within the state.

2. Total Jurisdiction (with the exception of hunting, fishing, and trapping violations, which have been expressly exempted from state assumption by Public Law 280)—Most of the tribes in the state fall into this category. Some originally petitioned the state to take over all of their jurisdiction. A few tribes have retained their tribal courts, but these are limited to jurisdiction over hunting, fishing and trapping offenses. One tribe, the Colville, also asserts jurisdiction over non-Indians for hunting and fishing offenses.

3. Partial "de facto" Tribal Jurisdiction—This condition exists only at the Quinault Reservation, which would normally fall into category #1 (partial jurisdiction). The Quinaults, through a cooperative arrangement with the Greys Harbor County Court (in whose jurisdiction the Quinault Reservation lies), have regained jurisdiction over juvenile matters. In addition, the Quinaults have asserted jurisdiction as to tribal law over all individuals within their borders, including a twelve mile portion extending into the adjacent Pacific Ocean. The tribe has done so by virtue of the adoption of an implied consent ordinance incorporated into its recently revised tribal code. All persons who enter the area specified by the tribe are impliedly giving their consent to be subject to the laws of the Quinaults as a condition precedent to such entry.

4. No State Jurisdiction—The one federally recognized tribe in the State of Washington over which the state has not assumed civil and criminal jurisdiction pursuant to Public Law 280 is the Lower Elwah Tribal Community. This discrepancy arose because the Bureau of Indian Affairs purchased land for the Lower Elwah Tribe in late 1936 and early 1937 under the authority of the Indian Reorganization Act of June 18, 1934. This land was held in trust by the United States Government for the Lower Elwah Tribal Community. The Secretary of the Interior, on January 19, 1968, officially proclaimed this "purchased" land as the Lower Elwah Reservation. Since this reservation was not formed until after the enactment of Public Law 280 and Public Law 280 did not anticipate any future tribes being recognized, it is the official position of the Bureau of Indian Affairs that the federal government and the tribe have exclusive jurisdiction over the reservation. The tribe is now engaged in developing an effective law and order code and other ordinances for the reservation. The tribe has employed a tribal policeman who is considered a federal officer. He is charged with exclusive responsibility for law enforcement. The tribe recently established an Indian Court to provide for the fair and equitable application of the law.

A possible fifth category is exemplified by the Sauk-Suiattle Indian tribe. This tribe is one of the two in Washington which is federally recognized but has no land base upon which its tribal members reside. Instructions have not yet been given to the Western Washington Indian Agency on how to assist the tribe, which was only recently federally recognized. The tribe held interim elections and approved a constitution which is now being sent to the Secretary of the Interior for approval, pursuant to the Indian Reorganization Act. Pending approval, the tribe remains in a "vacuum state".

The Sauk-Suiattle have no reservation as such, but have received assurance that they will shortly receive land for use as a reservation. Upon receipt of the land the question of state jurisdiction will arise, as this tribe had not been recognized prior to state assumption of jurisdiction. Unlike the Lower Elwah Tribal Community, it will not have received its land until after state assumption of jurisdiction. If other groups, presently unrecognized, receive federal recognition in the future, more complications can be expected.

Our analysis of the categories of state jurisdiction shows that the dissatisfaction of the Indian people rises in proportion to the level of state jurisdic-

tions. For instance, there appears to be more dissatisfaction at Colville where there is total jurisdiction; less at Yakima where there is partial jurisdiction; and even less at Quinault where "de facto" tribal jurisdiction exists. Lower Elwah, which is under no state jurisdiction, complains only about lack of state health and social services to its members.

Past to present

This dissatisfaction which Indian people evidence is not a new feeling. Present attitudes of Indians toward the State of Washington can be better understood if something is known of the State/Indian relationship prior to state assumption of jurisdiction. Many Indians viewed official state policies as anti-Indian. State services to Indian citizens living on reservations were few. Many contend that few Indians held state jobs.

Police activities were considered particularly harsh and unfair. It was not uncommon for police to enter areas where they had no jurisdiction, such as Indian homes on reservations, to make improper searches and arrests. Indians also felt they were treated prejudicially when off the reservation. Indians were often detained or apprehended although their white companions were released. Many Indian men said they were invariably stopped by local police when they walked out of bars. Arrests, beatings and being held without charges often followed, they said. Police spot-checks immediately outside the reservation resulted in Indians frequently being stopped, while non-Indians were waved on through.

As a result of these activities, state and local police personnel were viewed by the Indian community more as harassers than as prosecutors. To this day, much of that feeling remains; most of the Indian population of Washington distrusts and fears outside police. Why that feeling continues to exist is the subject of the next section.

Present-day perceptions—methodology

In order to assess the present attitudes of Indians in Washington concerning state jurisdiction we employed the techniques of field interviewing, both formally and informally, and of distributing questionnaires. Interviewers, all American Indians, were selected on the basis of geographical origin. They were representative of the Yakima area, the Colville area, the Quinault-Olympic Peninsula area, and the Seattle-Everett area.

The interviewers distributed individually several hundred questionnaires. Because only forty (40) questionnaires were returned completed (some of the reasons for this are discussed later), formal interviewing with tape recorders and writing pads was attempted. This was found to retard candid communication. Therefore, more informal interviewing techniques were utilized. Though more successful in eliciting information, these methods made documentation difficult. In all, about 250 Indians from twenty tribes in Washington State provided us with some information. We also interviewed federal, state, and local judicial and law enforcement personnel. Interviewing and research took place during four separate field trips, the first lasting two months, the others of shorter duration. All activity stressed 'grass roots' information.

The results of our inquiry form a group of perceptions by Indians of state administration of criminal justice. The information below is an analysis of the 40 formal responses to our questionnaires and of the information gathered in the more informal interviews. It does not purport to be a scientific sociological study. However, we do believe it to be a valid expression of the cares of the Washington State Indian community regarding state jurisdiction of Indian criminal matters.

Findings

1. Very few Washington State Indians understand the jurisdiction which their tribes, their police and their courts have over criminal matters on the reservation. Members of tribes which have retained jurisdiction only over fish and game laws best understand their tribe's jurisdiction.

2. Members of tribes under partial state jurisdiction seldom responded without criticizing the state's mode of carrying out its jurisdictional responsibilities. The legality of state assumption of jurisdiction was also challenged.

3. About half of the Indians feel they are treated poorly or indifferent by state, county and local police. About a third categorize the treatment they receive as good or fair.

4. Inadequate services and over-enforcement, harsh treatment and discrimination (particularly at per capita payment times) are the major complaints against the state, county and local police.

5. About half of the respondents stated they personally have had law and order problems since the state has assumed jurisdiction over their tribes. Very few of these were satisfied with the outcome of the matter. Dissatisfaction stemmed from inaction or too slow response by authorities, alleged racial discrimination and alleged unfair treatment. Cases reported involved traffic problems, juvenile delinquency, thefts and family matters.

6. Indians feel they receive better treatment from, and are better understood by, Tribal or Bureau of Indian Affairs Police.

7. Juvenile matters are of greatest concern to most Indians. All law and order areas, traffic laws, narcotics and trespass and theft are of next greatest concern. Civil jurisdiction, police prejudice, domestic relations, family problems, fish and wildlife, death investigations, need for more police protection and regaining tribal jurisdiction are also important.

8. A majority believe they are not fairly treated by state, county and municipal courts. They believe non-Indian courts do not care about their problems.

9. A majority feel they are treater prejudicially because they are American Indians.

10. Very few Indians believe that authorities off the reservation understand Indians and their problems.

11. Almost unanimously, Indians favor a return of jurisdiction to the tribes.

Specific Complaints—The perception of 'outside' law enforcement officials as hostile and uncaring extends to the judicial branch as well. Indian communities pride themselves on their ability to solve the problems of their own people. Since the imposition of state jurisdiction there have been numerous complaints that problem-solving is more difficult, if not impossible. Every tribe visited expressed particular concern for its youth, but is often unable to exert any authoritative influence. Members of the Quinault Tribe stated that it was for their youth that they were going out on a limb and asserting full jurisdiction.

Some specific complaints of the Indian community concerning state jurisdiction can help illustrate why many tribes desire to regain jurisdiction over their own law enforcement and judicial affairs. These complaints are derived directly from field interviews of about 250 people from some twenty tribes in the State of Washington. We also interviewed state and local police, probation officers, and judicial officers.

Insufficient Local Police Coverage (For the purpose of this discussion the term "local police" shall refer to all off-reservation non-Indian police). This complaint was made by all who were interviewed. Reservation residents declared that local police are never around when they are needed and that many places, especially highly populated areas with a history of trouble, are seldom patrolled. Rural areas also receive little attention; those which have few non-Indian residents receive least. The number of unsolved robberies and break-ins seems to be increasing. When additional police are employed, they are detailed to patrol reservation areas only if those areas have a high percentage of non-Indian habitants. Reservation residents claim there is no effort to practice "preventive medicine"; few crime prevention programs are directed toward the reservation.

The counties have responded to charges of inadequate coverage in two ways: first, they say Indians receive the same services as non-Indians in the same area; second, the counties claim they cannot afford to provide such services as the Indians feel necessary. The State of Washington itself has admitted this deficiency as late as December, 1972.

"Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses committed on reservations. . . .[1]

The Colville Reservation, located in both Ferry and Okanogan counties, has initiated action in the financial areas. The Colvilles voluntarily contributed $26,800 per year, or a total of $160,800 from 1965 until 1971 to these two counties to help bear the costs of law enforcement. They also allowed the counties use of their tribal jail and gave other support. In August 1971, the

[1] State of Washington, *Comprehensive Plan for Law Enforcement and the Administration of Justice, January 1–December 31, 1973*. Washington State, Dec. 1972, p. 109.

tribe discontinued financial support and refused to make future payments because adequate police services were not being provided by the counties.

Response of Local Police—Our interviews revealed unanimous dissatisfaction with police responses to problems on the reservation. The Quinaults stated that failure of local police to come when needed, as well as their delay in arriving, made the local police "worthless". The same complaints were voiced in Lummi. At Yakima we were told, "When we call the outside police and they don't respond or take too long in arriving, we are forced to act ourselves. This is to keep the problem from becoming worse. In many cases we have no jurisdiction, but must act because no one else will." Most local law enforcement officers interviewed indicated that Indian problems on the reservation receive a low priority.

Specific Enforcement of the Law—We repeatedly heard the allegation, "I was stopped (arrested) just because of the color of my skin." There were numerous complaints that local police conduct road blocks, spot checks, etc., at places where mostly Indians pass. For instance, Indians said that almost all Indians are stopped but most non-Indians are waved on through at the entrance of the road leading to the Indian Health Service Hospital.

During tribal celebrations more police than are required appear at the celebration. The Indians feel they are being harassed. While these police are keeping surveillance on celebration areas, burglaries occur throughout the unprotected and unpatrolled portions of the reservation. It was also alleged that when monies are distributed to tribal members through tribal dividends or per capita payments the incidence of Indian arrests seems to rise.

Complaints about state policemen were widespread, mainly involving harassment. We were told of several incidents in which faultless Indian drivers were followed by state policemen for unreasonable distances, sometimes despite obvious violations committed by other drivers in the area.

The tenor of the reports and interviews indicates that Indian opinion of local and state police is very low. Most Indians do not consider these officials protectors. Some Indians consider the actions of these police officers as tantamount to extortion.

Distance—There were uniform complaints that the local authorities work out of offices too far away from reservations to render good service. The Makah Tribe is 73 miles from the county seat in Port Angeles. At Spokane, one county seat is 65 miles away, the other 40. At Colville, a similar situation exists. The distances at Quinault, Lummi, Kalispel and Yakima also cause serious problems. Because of these distances, much time is lost in responding to reservation complaints and with court appearances.

Understanding of Indians and Indian Problems—Lack of understanding by local authorities was a constant complaint. Likewise, many reservation residents do not understand the systems off the reservation. The tribal judges at Makah were particularly vocal on this point. Tribal members frequently contact them in order to find out what has happened in their off-reservation cases. Local officials rarely give explanations, even when asked. Many tribal judges spend much time investigating the outcome of county court matters in order to provide explanations to Indian parties in the cases.

The Swinomish Tribal Business Committee made comments which were echoed by leaders of other small tribes. The tribe petitioned for total state jurisdiction for financial reasons, the tribe being unable to afford the cost of law enforcement services. The law enforcement is better now, but not satisfactory. There is one Bureau of Indian Affairs trespass officer who spends part of one day at the reservation every two weeks. If the Swinomish could be funded to run their own law and order department they would do so. They would try to regain their jurisdiction because, they said, the local authorities do not understand Indians and some authorities don't even try.

Courts and Commitments—Many Indians are bitter over what they consider unfair treatment of Indians and Indian problems by the courts. A tribal police officer who is commissioned as a county sheriff stated that he cannot get convictions when he arrests non-Indians, but "when I bring in an Indian they throw the book at him". Officers of the Colville Reservation have filed over 800 complaints in the local county courts but have obtained only four convictions. County authorities have refused to serve legal papers on the reservation

because, they claim, it's too hard to find people. Tribal officials, however, never have this difficulty.

As reported earlier, the Greys Harbor County Court remands all cases involving Quinault juveniles back to the tribal court, under a cooperative arrangement with the tribe. Complaints were widespread about violations which had led to juveniles being removed from their families. There were charges that parents had not been informed when their children were scheduled to be in court or that they had been notified at the last moment. In some of these instances, county judges viewed the failure of the parents to attend as lack of concern for the children and the children were, therefore, removed from the home. Many Indians consider this "stealing" of children.

There were frequent complaints that County Court Judges do not explain defendants' rights to Indians. Indians also cite harsh sentences, claiming they receive greater punishment than non-Indians for the same offenses. In general, there appeared to be extensive distrust, hostility and frustration concerning local courts.

Quality of Local Law Enforcement—Tribal police officers were outspoken about the quality of law enforcement. Their greatest complaints concerned juvenile problems. One officer reported, "The juvenile situation is sad. There is one juvenile officer who covers about three or four counties. He seldom comes to the reservation and when he does he just scolds the kids and lets them off. The kids laugh in his face and then they laugh in my face because they know we cannot do a thing with them. When this juvenile officer leaves the reservation, I have to live with these kids." Others made the same complaint and lamented that there was no action taken by the local authorities on juvenile problems. "Sheriff's Officers release kids without holding them or doing anything. When we call them they come too late if they even bother to show up. We are getting a real hard time from kids who know we have no jurisdiction over them. Half of the time we don't let on that we have no authority over them because they would run wild."

Other officers reported, "State and County authorities do not enforce the laws. The problem has become worse since the state took over. The kids know we have no authority and make it hard for us. State officials will not even go onto deeded property where Indian families live, even though they have the authority to do so. The tribal police have to go there when the situation seems desperate. The tribal members don't trust the local police and courts, so they make complaints to the tribal court even when they know that the court does not have jurisdiction. All the tribal judge can do is give advice, but that's better than they get from the outside courts."

The specific problems we have discussed were examined in depth by the Colville Tribe. That tribe hired a survey team from Washington State University to study their law enforcement problems. The study was divided into two major phases:

(1) Examination of the arrest and court records of Okanagon and Ferry counties.

(2) Survey of the opinions of 85 Indians living on the reservation and of 132 non-Indians living both on and off the reservation.

After learning of this survey and examining its results, we interviewed the survey team for a better understanding of their findings. They admitted that they encountered much difficulty with the examination of the county records and that that portion of their work was inconclusive. With reference to the opinion sampling, they were convinced that their findings were representative.* Some of their findings are as follows:

Question. Generally speaking, when a crime is committed in this area, how hard do you believe the law enforcement officers try to solve the crime?

	Very hard	Quite hard	A fair amount	Only a little	Not hard at all
Indian percentage	18	14	33	18	27
Non-Indian percentage	20	36	29	10	6

*Percentages not totaling 100% were gained by rounding.

Question. Generally speaking, how would you rank local police for promptness, respectfulness, attention to complaints, and protection?

	Very good	Pretty good	Not so good
Promptness:			
Indian percentage	21	24	54
Non-Indian percentage	42	46	13
Respectfulness:			
Indian percentage	25	49	26
Non-Indian percentage	69	26	5
Attention to complaints:			
Indian percentage	21	24	54
Non-Indian percentage	40	46	14
Protection:			
Indian percentage	19	32	49
Non-Indian percentage	41	48	11

Question. Generally speaking, do you think the law enforcement officers in this area are doing an excellent, good, fair or poor job of enforcing the laws?

	Excellent	Good	Fair	Poor
Indian percentage	8	20	43	30
Non-Indian percentage	13	52	27	8

Of the Indians interviewed, 73% felt the police did a fair or poor job, while only 35% of the non-Indians agreed. Of the non-Indians, 65% believed the police did an excellent or good job, whereas 28% of the Indians felt that way. It must be remembered that all the Indians questioned lived on the reservation while the non-Indians interviewed lived both on and off the reservation.

In order for such a strong opinion to be present, there must be some problem with the present system which cannot be dismissed as imagined or without merit. Many investigators have tried to obtain specific data to buttress these opinions but this is difficult.

The record examination phase of the Washington State Survey did not substantiate the Colville's charges of racial bias on the part of local authorities. The tribe counters the survey results by stating that valid conclusions could not be attained merely by examining bare county arrest and court records.

A Bureau of Indian Affairs representative assigned to the Colville, and an individual with vast experience in the State of Washington, including probation work in Yakima County, has stated:

"1. Ten percent of the total population of Okanogan and Ferry counties (Indians) account for 50% of the total persons arrested by the two counties.

"2. The process of "two-counting" * by enforcement officials is much more prevalent as applied to Indian people than it is for non-Indian people. The process of "two-counting", no matter what the perceived justification, grossly affects the Indian's ability to post bail.

"3. A far greater proportion of Indians received combinations of fine and jail sentences than their non-Indian counterparts. Again, no matter what the categorical justification, it appears to me that, in reality, the Indian is being punished for being an Indian, and, secondly, for being poor. This concept is supported further by the much higher percentage of Indians who must serve jail sentences in lieu of paying a fine."

Social services

Public Law 280 was a step towards the eventual termination of the special relationship between the federal government and all Indian tribes and communities. By adopting a policy of termination, the federal government sought to discontinue federal services provided to Indians and Indian tribes. They theorized that terminating federal services would place Indians on an equal basis with all other citizens and force them into the mainstream of American life. To do so, special services, such as law and order, along with many social services, were discontinued; Indians were then forced to turn to the states rather than to the federal government.

*Citing an arrested person for more than one offense committed at one time; for example, being drunk and disorderly and disturbing the peace.

The State of Washington was a key state for the policy of termination. There were many Indian tribes located within Washington. Some of these tribes controlled vast lands and resources while others had little or no resources. Reservations had large non-Indian populations living within their exterior borders. In some cases, these residents outnumbered the Indians living there. Reservation land had fallen into non-Indian ownership. To the non-Indians the special services provided to Indians were impossible to comprehend. They rationalized that Indians received all they required from the federal government, supported by their tax dollars, and thus, that Indians need not work. The myth that all Indians receive a monthly support check from the federal government is still widely believed.

Yet, in assuming jurisdiction over the Indians within its borders, Washington State expressly promised to assume responsibility for providing social services to its Indian citizens. Despite this express assumption of responsibility, even a cursory look at available statistics [2] seems to indicate that Washington State is delivering fewer assistance benefits to its Indian citizens than to its non-Indian residents. Since Indians have a lower median age, educational level, and earnings level in the state, one might justifiably have expected the opposite to hold true.

Again, the incomplete figures available seem to indicate that Indians are incarcerated in state penal facilities at a greater rate than non-Indians. Conversely, they receive probation and parole at a lesser rate than do non-Indians. (The problems related to Indian probation have been recognized to the extent that the Indian Desk of the Law Enforcement Assistance Administration and the Indian tribes in the State of Washington are now evaluating a possible major program to deal with the problem.)

A detailed statistical study might well show that Washington State has not been discharging the duty it voluntarily took upon itself when it assumed jurisdiction over Indian reservations within its borders. The failure of the state to recognize its own failing in this matter, much less correct the situation, has, to a great degree, been responsible for the Indians' attitude toward the state.

Attitude of the Federal Government

If the reasons for Indian attitudes toward the state and toward state and local police have, in large part, been due to the attitudes of those in the state charged with responsibility for Indian problems, the same holds true for the federal government. The stance of the powers in Washington, D.C. regarding Public Law 280 has been as aggravating to Indians as the state's position.

A policy statement, in answer to the twenty questions propounded by the recent Caravan of Broken Treaties, was released by Presidential Advisors Leonard Garment and Frank Carlucci. They stated:

"Public Law 280 permits a state to acquire civil and criminal jurisdiction in Indian areas but only with the consent of the involved tribe. A state's assumption of jurisdiction under Public Law 280 is voluntary and whether a state repeals the law involved (or any other state law) is also within the discretion of the state. There is a provision in the Indian Civil Rights Act of 1968 which permits the states which have acquired jurisdiction under Public Law 280 to retrocede their jurisdiction back to the U.S. They are not required to do so at the request of the tribe.

"It is not true that Public Law 280 deprived any Indian Tribe of any of its civil or criminal jurisdiction over its members. The jurisdiction of the federal government over "major crimes" and under the Assimilated Crimes Act was divided and transferred to the states, but nothing in the Act strips the tribes of its powers.

"The Congress possesses the power to provide for the resuming of federal jurisdiction in Indian country where the states have acquired it under Public Law 280. The Congress, no doubt, would want to have the views of tribes which had consented to state jurisdiction before taking the action recommended under this proposal."

The above statement, issued on January 9, 1973, is the most current governmental policy statement on this issue. Much of this statement is erroneous, misleading and, at best, arguable. It is true that *today* a state may only acquire of extend its present jurisdiction with the consent of the tribes involved. But this was not the case from 1953 to 1968 when all jurisdiction was assumed.

[2] All conclusions in this section are based upon 1972 statistics provided by the Washington State Department of Social and Health Services, figures found in the Council of Governments *Book of States*, 1972 and 1973, and upon 1970 census figures.

It is a fact that several tribes vigorously opposed states' attempts to assume jurisdiction. The first sentence of the statement makes it appear that all of the tribes under Public Law 280 consented to it. The following sentence is also misleading. There is no question that a state's decision about whether to assume jurisdiction was, between 1953 and 1968, solely a matter to be decided by that state; however, the wording in the statement makes it appear that all tribes volunteered to be taken under the jurisdictional wing of the states.

In citing the 1968 Indian Civil Rights Act, the President's advisors stated that Congress permits the states to retrocede jurisdiction back to the United States. Technically, this is not true. Section 402(a) only allows the United States to accept retrocession by a state; the act is silent as to state initiative or procedure. The Indian Civil Rights Act does not prescribe how retrocession is to be accomplished; it does not call for legislative action, executive proclamation, etc. It merely allows the federal government to accept the retrocession of any state.

Prior to presenting and analyzing the available means of returning either part or all of the jurisdiction to Indian reservations, we shall trace generally the history of vacillation in federal policy toward Indians, emphasizing events since 1950. Also to be examined in considerable detail is the assumption of jurisdiction over Indian reservations in the State of Washington under Public Law 280.

Chapter 1

A Short History of Federal Policy Vacillation Toward Indians

A. EARLY HISTORY

The history of federal policy toward Indians through the 19th Century and the first half of the 20th Century is marked by wide variations running the gamut from Supreme Court recognition of Indian tribes as sovereign, domestic dependent nations in the early 1830's, to a policy of dispersion and relocation in the late 1830's, to an allotment and assimilation policy in the 1880's, to rejection of the allotment policy and adoption of a tribal enhancement policy in the 1930's, and finally to a policy of paying off Indian tribes for lands wrongfully taken from them during the preceding 100 years or so.

1. About sovereignty—conquest

Chief Justice John Marshall of the United States Supreme Court in *Cherokee Nation* v. *Georgia*,[1] decided in 1831, and *Worcester* v. *Georgia*,[2] decided in 1833, defined the basic relationship of Indian tribes to the federal and state governments in terms that are still reiterated today. The court through Marshall said that an Indian tribe is a sovereign entity—a "distinct, independent, political community," "capable of managing its own affairs and governing itself", but, he said, the sovereignty of tribes is limited. Although they still retain qualified internal sovereignty, *i.e.*, power to govern themselves as they see fit, they no longer have external sovereignty, *i.e.*, the power to engage in international relations, such as making treaties with foreign nations, or in more modern times, belonging to the United Nations or bringing cases before the World Court. The external sovereignty of Indian tribes, as well as of the states, is exercised exclusively by the United States federal government.

The internal self-governing powers of an Indian tribe continues to exist, except as they have been modified by express federal legislation. This congressional power to enact such modifying legislation was first recognized by the United States Supreme Court in *Cherokee Nation* v. *Georgia* in 1831, and is there said to be based on conquest. This principle has since been affirmed in other cases, and is now generally conceded.

As in the external sovereignty area, the federal government has—as against the states—exclusive power in the internal sovereignty area. Thus, a state cannot apply its laws on an Indian reservation, thereby affecting Indian internal affairs and government, unless the federal Congress expressly delegates such power. Public Law 280 is an example of such specific federal authorization to the states.

The federal plenary power to enact laws concerning Indian internal tribal affairs may be exercised regardless of Indian opposition. In recent years, however, Congress has been giving increasing importance to Indian views and consent.

The treaty-making power of Indian tribes, which had been recognized by Chief Justice Marshall in *Worcester* v. *Georgia* in 1883, was finally eliminated by Congress in 1871.[3] Thereafter, no further treaties were to be signed with Indian tribes, although the 1871 Act specifically provided that it did not "invalidate or impair" existing treaties.

2. President Jackson's statement, 1835—relocation

One of the earliest presidential statements of policy toward American Indians is contained in President Jackson's Seventh Annual Message to Congress of December 7, 1835,[4] and contains the attempted justification for the tragic "trail of tears" where the Cherokee Indians were driven from their ancestral homes in Georgia and vicinity to the area later to become Oklahoma. President Jackson deemed it certain that Indians "cannot live in contact with a civilized community and prosper". Thus, under the duty of treaty stipulation and moral command, President Jackson, in order to "protect and if possible preserve and perpetuate" the existing Indian tribes, raised a protective geographic barrier by purporting to create an extensive region in the West to be the "permanent residence" of the displaced Indians. This assigned area was to be occupied solely by Indians and "into which the white settlements are not to be pushed".

During the next fifty years western United States was settled. Gold was discovered in California, Alaska, Nevada, and elsewhere. Rich agricultural lands were found throughout the West. The notion of "manifest destiny" was born by which much of the non-Indian population came to believe that their God had created the West for their settlement and that they were destined to settle the land and fight off the savage Indians. Thousands of settlers moved into the western part of the continent. Inevitably, clashes occurred with the Indians who correctly saw this invasion as a threat to their way of life, if not to their very existence. Although the Indians won some important battles, the number and power of non-Indians was too great, and the Indians were unable to prevent the new arrivals from taking and occupying their land.

The policy of the federal government was to create reservations for Indians and to put Indians on these relatively small tracts of land so that the remaining western lands would be available for settlement. Time and time again, however, the pressures of increasing numbers of settlers forced relocation of reservation boundaries and diminution of their size. It was during this time, particularly during the 1850's, that the reservations in the State of Washington and some nearby states were created.

3. President Arthur's statement, 1881—assimilation

The tragedy of the Indian situation was recognized by President Arthur in 1881, when, on December 6, he delivered his First Annual Message to Congress,[5] describing both the problem and his proposed solution. Unfortunately, his "solution", when put into effect, resulted in further erosion of the Indians' land base, culture, religion, and independence. The plan was designed to draw the Indian into the "mainstream" of American life. President Arthur's speech foreshadowed the enactment of the Dawes Act of 1887.

The President concluded that the policy (epitomized by President Jackson) of relocating Indians to the seemingly illimitable vastness of the West, thereby encouraging their "savage life" and protecting them from the "influence of civilization", was unsatisfactory in result. The disagreeable results were constant Indian relocation and frontier collisions between ambitious settlers and Indans.

The solution was legislation to assimilate the Indian. In the President's words: "to introduce among the Indians the customs and pursuits of civilized life and gradually to absorb them into the mass of our citizens". The first legislative action sought by President Arthur was designed to introduce to the Indian "the protection of the law". This was to be advanced by an act making state and territory law applicable to Indian reservations within their borders. The second was to permit allotment to Indians of land secured by patent for 20 or 25 years to encourage "their present welfare and their permanent advancement". The allotment scheme's goal was to induce Indians to "sever their tribal relations", engage in "agricultural pursuits", and to "conform their manner of life to the new order of things". This assurance of title to soil would, hoped President Arthur, dissolve tribal bonds which perpetuated "savage life".

4. The Allotment Act—termination

The Allotment Act of 1887 was allegedly designed to encourage civilization of the Indians by giving them private, individual ownership of a particular parcel of land. The theory was that they would become family farmers like the non-Indian western settlers. In further implementation of this theory, the Act of May 8, 1906 gave the Secretary of the Interior power to issue a patent in fee simple whenever he was satisfied that any Indian allottee was competent and capable of managing his or her affairs. The Secretary's action did not require consent of the Indian allottee before the patent was issued, and, in fact, numerous patents were issued against the wishes of the Indians.

The allotment system failed miserably. The Indians were not instructed in agriculture, and were apparently not too interested in farming. As a result, much Indian land quickly fell into the hands of non-Indians. In fact, total Indian landholdings were reduced from 136,397,985 acres in 1887 to 48,000,000 acres by 1934.[6] It is interesting that it was only in 1938 that the court, in *U.S.* v. *Ferry County, Washington*,[7] held that the United States as trustee could no longer liquidate the trust and issue a fee simple patent without the consent of the Indian allottee.

5. The 1924 Citizenship Act

In 1924 Congress enacted legislation granting citizenship to all American Indians born within the territorial limits of the United States. Some Indians received citizenship under earlier, special statutes, but this one applied to all Indians who still remained non-citizens. An argument frequently heard after the enactment of this legislation was that Indians had thereby lost all their treaty rights. This argument failed, however, in the face of directly contrary language in the 1924 Act itself, and in light of court decisions which affirmed that treaty rights were not affected by the Act.

6. The 1934 Indian Reorganization Act—a pause

The Dawes Act policy of allotment continued without significant change until 1934 when Congress again changed the direction of federal policy by enacting the Indian Reorganization Act of 1934.[8] Among other things this Act recognized the failure of the Allotment Act policy and prohibited any further allotments of Indian lands. To help correct the Allotment Act error, the Secretary of the Interior was authorized to return to tribal ownership lands which had been withdrawn for homestead entry but had not yet actually been homesteaded. The Act authorized an annual appropriation of $2 million to purchase or reacquire land and add it to the diminished resources of the tribes, and a revolving credit fund of $10 million to enable the Indians to improve their land holdings and buy equipment. The tribes were authorized to form self-governments and to incorporate for business purposes.

As explained by one of its sponsors, the Act was designed to make the Federal Indian Service the "adviser" rather than the "ruler" of the Indians. "The Federal government will continue its guardianship of the Indians, but the guardianship envisaged by the new policy will constantly strengthen the Indians, rather than weaken them." [9]

7. The 1946 Indian Claims Commission Act

In 1946 Congress recognized the existence of numerous unsettled claims by tribes and bands of Indians for lands wrongfully taken, and enacted the Indian Claims Commission Act. The Act permitted suits against the United States for claims based on fraud, duress, unconscionable consideration, the taking of lands without payment of the agreed compensation, and claims based on fair and honorable dealings not recognized by existing rules of law or equity. The Commission had a specific lifetime, is now concluding its determination on the final claims filed with it.

B. MODERN HISTORY: TERMINATION

Introducton: In the late 1940's and early 1950's, federal policy toward Indians turned sharply and strongly toward "termination". Bureau of Indian Affairs actions between 1948 and 1953 reflected this policy. In 1953 Congress adopted House Concurrent Resolution 108 expressing the policy of termination, and followed this in the same year with enactment of Public Law 280, and then in 1954 with laws terminating the Klamath and Menominee Reservations. By the early 1960's, however, Indian opposition to this policy had increased considerably, and the policy was being recognized as a failure, if not a disaster.

1. Land policy of BIA 1948–57—termination

In the 1950's the assimilation or termination policy of the 1887 Allotment Act again became the dominant federal policy toward Indians and found its way into federal legislation. As a precursor to this policy, the Bureau of Indian Affairs, beginning in 1948, reversed its basic land policy of acquiring land to add to the Indians' depleted resources; and placed emphasis on the removal of restrictions against the sale, thus allowing Indian land to pass out of Indian ownership. From 1948 to 1957 a total of 2,595,414 acres of individually-owned trust land was removed from trust status. Public purposes alone used 2,174,518 acres. The amount of land removed from trust status and put up for sale was more than one-half of the area which had been painstakingly acquired since the enactment of the Indian Reorganization Act of 1934.[10]

2. House Concurrent Resolution 108—termination revisited

On August 1, 1953 Congress passed House Concurrent Resolution 108, which announced the new federal policy termination. This new policy sought to end the ward status of Indians by granting them all the rights, privileges, and responsibilities of citizenship, including subjection to the same laws which rule non-Indians. The Resolution declared termination by ending federal supervision and control over tribes, and individual members thereof, located in California, Florida, New York, and Texas, and also over other named tribes and members. This declaration ordered the abolishment of Bureau of Indian Affairs offices in the states named, and any other Bureau of Indian Affairs offices that served tribes or individuals "freed from federal supervision" in any other states.

3. Public Law 280

Congress in 1953 enacted the now infamous Public Law 280,[11] designed to further the termination process declared in House Concurrent Resolution 108, by giving certain states outright jurisdiction over Indian reservations within their borders, and authorizing others to enact legislation or amend their constitutions to assume jurisdiction over Indian reservations.

Under Public Law 280 the states were divided into three different categories, each being treated somewhat differently with regard to how they might assume jurisdiction over Indian reservations. The Act ceded criminal and civil jurisdiction directly to one group of states. A second group of states was empowered to take jurisdiction over reservations by enactment of appropriate state legislation. A third group of states was empowered to assume such jurisdiction by amending their state constitutions. The Act said nothing about requiring consent of the Indian tribes for such actions. Subsequent amendments changed the Act with reference to a few particular reservations, but the overall effect of Public Law 280 and amendments (prior to the 1968 Civil Rights Act) was as follows:

(a) Criminal jurisdiction was automatically granted to the following states:

State:	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community, may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State except the Warm Springs Reservation.
Wisconsin	All Indian Country within the State.

The Red Lake Reservation in Minnesota, the Warm Springs Reservation in Oregon, the Colville and Yakima Reservations in Washington, and the Menominee Reservation in Wisconsin, all objected strenuously to being subjected to state jurisdiction, and their objections were forwarded by the Secretary of the Interior to Congress, with the statement that "each of [these reservations] has a tribal law-and-order organization that functions in a reasonably satisfactory manner".[12] Although the Secretary said that other "Indian groups in [the affected states] were, for the most part, agreeable to the transfer of jurisdiction", it is clear from subsequent events that only a few of the other

groups of Indians were contacted, and that there was considerably more opposition to Public Law 280 among the affected Indians than was reflected in the Secretary's letter. In any event, Congress did recognize the objections of the Red Lake Reservation and the Warm Springs Reservation, and explicitly excluded them from the reach of the Act, so that the States of Minnesota and Oregon were not authorized to assume jurisdiction over these reservations. The Colville and Yakima Reservations had similarly objected, saying they feared "inequitable treatment in the state courts" and that "the extension of state law to their reservations would result in the loss of various rights".[13] Congress ignored their objections, however, and authorized the State of Washington to assume jurisdiction over these reservations if it desired to do so, even without the Indians' consent.

Upon becoming a state in 1958, Alaska was given jurisdiction over "all Indian country" within its borders. However, in 1970 Congress recognized that it had made a mistake as to the Metlakatla Reservation and expressly returned to that reservation concurrent jurisdiction over minor crimes. The House Report in support of this return of jurisdiction noted that this "community which had been operating a perfectly satisfactory law enforcement system for over a century was simply forgotten", at the time of the 1958 Act.[14] Nobody had asked the Indians, or taken the trouble to look and see what kind of law and order system they had developed for themselves on the Reservation.

(b) Under Public Law 280, civil jurisdiction was automatically granted to states as follows:

State:	*Indian country affected*
Alaska	All Indian country within the State.
California	Do.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except for the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

Two other groups of states were identified in Public Law 280 with different procedures created by which they were to assume jurisdiction over Indian reservations.

(c) Section 7 of Public Law 280 was directed at Nevada, but also covered some 36 other states. These states were authorized to enact state legislation to assume either criminal or civil jurisdiction, or both, over Indian reservations within their borders, again either with or without the consent of the Indian tribes involved.

Pursuant to the authority of the federal statute, Nevada enacted a statute providing for state assumption of criminal and civil jurisdiction over public offenses committed or civil causes of action arising in areas of Indian country in Nevada 90 days after July 1, 1955. Exception was made for counties where the boards of county commissioners petitioned the governor to exclude the area of Indian country within that county from the operation of the statute, and the governor, by proclamation, honors that petition.

(d) Section 6 of Public Law 280 provided the means by which Washington, Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota and Utah could assume either criminal or civil jurisdiction, or both, over Indian reservations with or without tribal consent. These states were treated separately because each had a constitutional disclaimer of jurisdiction over Indian land within their borders, either similar to, or identical with, the one in the Washington State Constitution, Article 25, Section 2, which provided:

"[T]he people inhabiting this State do agree and declare that they forever disclaim all right and title to all lands lying within said (State) owned or held by any Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States * * *"

The report of the United States Senate Committee on Interior and Insular Affairs anticipated that these states would have to amend their constitutions before they could exercise jurisdiction over reservations within their borders.[15] However, Public Law 280 was construed by the Washington Supreme Court in the 1959 case of *State* v. *Paul*[16] as authorizing the assumption of jurisdiction merely by enactment of state legislation. A federal court subsequently held, in

Quinault Tribe v. *Gallagher*,[17] that the State Supreme Court decision was controlling on this question of whether the constitutional provision need be amended prior to exercising jurisdiction because the State Supreme Court is the final interpreter of its State Constitution.

The result of these decisions was that the State of Washington (and the other states if their courts so held) could assume jurisdiction over Indian reservations within its borders merely by enacting appropriate legislation, there being no duty to amend the State Constitution. This result continues to perplex those who have read what seems to be a clear disclaimer of such power in Article 25, Section 2, of the Washington Constitution. It is questionable whether Congress would have enacted Public Law 280 in this form if only mere legislative action rather than a constitutional amendment would permit those states to assume jurisdiction without the tribal consent.

(e) Public Law 280 explicitly denied authority to the states for the alienation, encumbrance, or taxation of trust property, either real or personal (including water rights), or of any property subject to a restriction against alienation (such as allotted land).[18]

The Act also specifically denied the states the power for using such property in a manner inconsistent with any federal treaty, agreement, or statute, and said that it did not confer on the states jurisdiction to probate such property.[19] These limitations on state power over Indian legal and treaty rights were re-enacted in the 1968 Civil Rights Act.

4. Implementation of Public Law 280: A summary of State actions

A summary of the jurisdictional pattern throughout the United States follows. A more complete analysis of state action under Public Law 280 can be found in Appendix D.

(a) The six states that were given a specific grant of jurisdiction by Public Law 280 are:

State:	*Jurisdiction*
Alaska	Criminal and civil jurisdiction, except Metlakatla Reservation. The passage of the Alaska Native Claims Settlement Act substantially changed, if not abolished, reservations other than the Metlakatla.
California	Criminal and civil jurisdiction. No retrocession of jurisdiction by the State.
Oregon	Criminal and civil jurisdiction, except Warm Springs Reservation. No retrocession.
Minnesota	Criminal and civil jurisdiction, except for Red Lake Reservation. No retrocession.
Nebraska	Criminal and civil jurisdiction. Conflict over jurisdiction of the Omaha Tribe, caused by differing responses by the 2 governments as to the retrocession of the tribe. The State court held the State may withdraw its offer of retrocession despite Federal acceptance, with the Federal court holding the opposite. Presently, a petition for certiorari is before the U.S. Supreme Court.
Wisconsin	Criminal and civil jurisdiction. No retrocession.

(b) States under Section 6 of Public Law 280 are eight in number. The various states in this group, having state constitutional disclaimers of jurisdiction, have approached the assumption of jurisdiction in various ways. Some states have amended their constitutional disclaimer provisions; others have acted simply by legislation.

State:	*Jurisdiction*
Arizona	No constitutional amendment to remove disclaimer. Disclaimer provision narrowly construed by State courts to refer to title to land only. To date, jurisdiction has been extended only to air and water pollution laws. Such extension raises the controversy of whether Public Law 280 permits such partial assumption of jurisdiction.
Montana	The State supreme court has held that a constitutional amendment is not necessary. Criminal jurisdiction was assumed over the Flathead Reservation, concurrent with the tribe.

State—Continued	*Jurisdiction*
New Mexico	A 1969 disclaimer amendment to the New Mexico Constitution was rejected in a popular election. Though no assertion of jurisdiction under Public Law 280 is made, the State claims criminal jurisdiction for particular crimes. The validity of this assumption has not yet been tested in court, but the Pueblos of Sandia are seeking declaratory relief rebutting the State's claim.
North Dakota	The disclaimer provision was amended in 1965 to authorize legislative action under Public Law 280. Enactments permit civil jurisdiction over tribe or individual, if such tribe or individual consents. No tribes have given consent, but numerous individuals have consented.
Oklahoma	No attempt at constitutional amendment, nor any legislation enacted pursuant to Public Law 280. However, under various Federal statutes extending jurisdiction to the State, the State holds extensive jurisdiction over Indian reservations.
South Dakota	No constitutional amendment. A 1965 referendum providing for gubernatorial assumption of jurisdiction was rejected by the voters.
Utah	No constitutional amendment, but 1971 legislation assumes criminal and civil jurisdiction and provides for Indian consent to the extension of jurisdiction and for retrocession.
Washington	(Detailed discussion is contained in ch. 2.)

(c) Section 7 of Public Law 280 authorizes the various States in this group to assume jurisdiction by affirmative legislative action and has no State constitutional disclaimer provisions. Section 7 required no Indian consent, but the 1968 Civil Rights Act now requires such consent. Following are the 17 States in this group.

State:	*Jurisdiction*
Colorado	No assumption of jurisdiction under Public Law 280.
Connecticut	No exercise of jurisdiction under Public Law 280. The Pequot Reservation is subject to State supervision because it was established by the State.
Florida	The State has assumed exclusive criminal and civil jurisdiction.
Idaho	The State exercises civil and criminal jurisdiction in 7 subject areas, concurrent with the Federal Government and the tribes.
Iowa	The State exercises criminal and civil jurisdiction but asserts grounds independent from Public Law 280 for authority. (State once held Indian land in trust.) It appears these grounds are inadequate, resulting, at the most, in jurisdiction over the Sac and Fox Reservations.
Kansas	No jurisdiction under Public Law 280, although the State exercises jurisdiction over offenses by or against Indians on Indian reservations.
Louisiana	No jurisdiction under Public Law 280.
Maine	No jurisdiction under Public Law 280, but extensive exercise of jurisdiction pursuant to State law.
Michigan	No jurisdiction under Public Law 280, but some regulation under State law.
Mississippi	No jurisdiction under Public Law 280 or State law.
New York	The State exercises criminal and civil jurisdiction pursuant to special Federal statutes.
Nevada	The State exercises criminal and civil jurisdiction pursuant to Public Law 280, but several counties under State law have petitioned the Governor for exclusion, which means that in those counties State law does not apply on the Indian reservations.
North Carolina.	No jurisdiction under Public Law 280, but the Eastern Band of Cherokee Indians is subject to State laws, as they are deemed State citizens. Thus, unchallenged concurrent jurisdiction exists.

State—Continued	*Jurisdiction*
South Carolina.	No jurisdiction under Public Law 280. The Catawba Reservation was terminated from Federal supervision in 1962 and is under State control.
Texas	No jurisdiction under Public Law 280, but the State does exercise jurisdiction over Indians based on the State's special history with the Republic and as the State of Texas. The State exercise of jurisdiction is subject to doubt but no challenge has been mounted.
Virginia	No jurisdiction under Public Law 280. Existing reservations established by the State.
Wyoming	No jurisdiction under Public Law 280.

5. Termination of specific reservations

Congress, in 1954, continued to implement the termination policy enunciated in House Concurrent Resolution 108 and carried forward Public Law 280 by enacting the Menominee and the Klamath termination bills, thus ending the special treaty status and the federal relationship with these reservations. The termination of these reservations is now widely conceded to have been a grave mistake. The Menominees, especially, had established a viable and stable economic and social base, which disintegrated badly after termination.

Upon its enactment, Public Law 280 was subjected to prompt and persistent attacks by Indians. These attacks became increasingly effective as the results of the Menominee and Klamath terminations became more widely known. Finally, in 1958 the Federal Termination Policy was partially halted by Secretary of the Interior Fred Seaton, when he announced that no Indian tribe would thereafter be terminated without its consent. However, House Concurrent Resolution 108, the termination resolution, still remained on the books as the announced policy of Congress, and it was thus understandable that Indians continued to view with suspicion new bills in Congress or Bureau of Indian Affairs directives.

President Nixon, in his 1970 Message to Congress concerning American Indians, explicitly recognized the wrongness of the termination policy and its practical damaging effect on Indian people. The practical results of termination, according to the President, were disorientation among terminated Indians left to relate to myriads of governmental branches and levels, and the worsened economic and social condition of Indians. Because of this, the President concluded that termination was both "morally and legally unacceptable."

Clearly, this was not the prevailing view during the Menominee and Klamath terminations and, during the 1950's and 1960's, other bills were proposed for terminating additional tribes in furtherance of the intent of House Concurrent Resolution 108.

One of the most recent attempts to terminate an Indian reservation concerned the Colville Reservation in Washington. A law enacted in 1956, Public Law 722, set the framework for termination of the reservation and provided that the Colville Business Council should submit a plan for termination to the Secretary of the Interior not later than July 24, 1961. In compliance with the 1956 Act, the Colville Business Council did submit a draft of legislation providing for a two-stage termination program. A bill incorporating these ideas was introduced in the 89th Congress as Senate Bill 1442. In 1963 this bill passed the Senate but did not receive action in the House. On January 12, 1965 the Colville Business Council requested the reintroduction of Senate Bill 1442 with certain amendments, and Senator Jackson introduced this proposal as Senate Bill 1413. Testimony of representatives of the Business Council, purporting to represent the majority of Colvilles (both on- and off-reservation Indians) supported the bill. The amended bill passed the Senate on July 22, 1965 but again failed in the House. In February, 1970, still another bill was introduced for the termination of the Colville Reservation (this was the sixth such bill) as Senate Bill 3518. This bill eventually also died. Subsequently, after a vigorous internal struggle, the leaderstip of the tribe shifted and those opposing termination came into power. It now appears that the question of Colville termination is dead.[20]

It is worth noting here that one of the bitterest struggles during the Colville termination controversy was between Colville Indians who lived on the reservation and those who lived off. It was said that those living off the reserva-

tion tended to favor termination and distribution of the assets (allegedly up to 40,000 per person) because they were more interested in the money and less in the continuation of the reservation. On the other hand, those living on the reservation and deriving their way of life from that land base tended, by a larger margin, to favor its preservation.

During the 1960's the federal policy of termination came under increasing attack. Both Indians and non-Indians increasingly objected, pointing to the failure of termination on the Menominee and Klamath Reservations, and to the general tendency of termination to destroy not only the Indian's land base but their economic and cultural identity as well. The Indian attitude toward this law was summed up by Wendell Chino, President of the National Congress of American Indians, when he said:

"Public Law 280 gives to the various states the right to assume civil and criminal jurisdiction on Indian reservations without Indian consent, and as far as the American Indians are concerned, it is a despicable law.

"Public Law 280, if it is not amended, will destroy Indian self-government and result in further loss of Indian lands. Of those reservations where states have assumed jurisdiction under the provisions of Public Law 280, lawlessness and crimes have substantially increased and have become known as no man's land because the state and federal officials will not assume the responsibility of Public Law 280. We urge that the Public Law 280 be amended to allow for Indian consent.

"The National Congress of American Indians declared in 1969 that 'the current alleged policy of the federal government enunciated in House Concurrent Resolution 108 is a policy for the eventual termination of Indian tribes and reservations and serves as an obstacle to the development of our tribes and reservations." [21]

CONTEMPORARY HISTORY

1. 1968 Civil Rights Act

A change in federal policy toward Indian self-determination occurred when termination became recognized for its impairment of Indian progress and planning. President Johnson, in his April 1968 Message to Congress proposed ". . . a new goal for our Indian programs; a goal that ends the old debate about termination and stresses self-determination".

These and similar views resulted in the enactment of two important parts of the 1968 Civil Rights Act. First, the Act ended the authority in Public Law 280 by which Washington, Nevada, and most other states were permitted to assume jurisdiction over Indian reservations without Indian consent. Second, the Act requires Indian Reservation Courts to apply United States Constitutional principles such as due process and equal protection (to be discussed later).

As to the first significant part, the 1968 Act specifically provided that, in the future, no state could assume either civil or criminal jurisdiction over Indian country without "the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption". The Act goes even further and specifies the procedures by which Indian consent is to be obtained, (providing that state jurisdiction over either criminal or civil matters can be assumed).

"* * * only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the Tribal Council or governing body, or by 20 percentum of such enrolled adults." [22]

The 1968 Act also empowers the states and the Indians to agree on retrocession; that is, the return of civil or criminal jurisdiction from the states to the Indians. Public Law 280 was designed as a one-way street, authorizing the states to assume jurisdiction over Indian reservations but not providing any means for returning jurisdiction to the Indians. This power was provided in the 1968 Act, in which Congress authorized retrocession by any state of all or any measure of the criminal or civil jurisdiction, or both, acquired by such state pursuant to Public Law 280.[23] By Executive Order in November 1968, President Johnson authorized the Secretary of the Interior to accept retrocession from any state. Thus, if the Indian tribe, the Secretary of Interior, and the state government all agree, jurisdiction can be retroceded back to the reservation.

2. President Nixon's Policy

The change in federal policy toward Indians has become increasingly apparent in the years since enactment of the 1968 Civil Rights Act. In 1969, after the Nixon administration took over, Secretary of Interior Walter Hickel declared that:

"This administration is dedicated to improving—not destroying—that special relationship that exists between government, the Indians, and the land. We are not a pro-termination administration."

Probably the most significant evidence of this change, and one of the most eloquent indictments of the termination policy, came from President Richard M. Nixon in his Message to Congress of July 8, 1970. The President acknowledged the "centuries of injustice" to which the Indian had been subjected by the "white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure". During this period of oppression and brutality the Indians were "deprived of their ancestral lands and denied the opportunity to control their own destiny". The President also acknowledged that, in the face of such a history, the Indian has made "enormous contributions to this country" in art, culture, strength, spirit, and sense of history and purpose. The President stated that justice and enlightened social policy required the nation "to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions".

In his message, the President deemed the policies of termination and federal paternalism as "equally harsh and unacceptable extremes". Termination was proclaimed wrong for three reasons. First, it operates on the erroneous premise that the federal government may act unilaterally in discontinuing its legal and moral responsibilities to the Indian community, as if it were a benevolent entity without duties. Second, the practical results of termination have been "clearly harmful" in those cases in which it has been tried. Third, the policy itself creates among Indian groups who have not been terminated an apprehension and a suspicion that federal action, regardless of merit, is only a step to federal disavowance of responsibility. In this fashion, termination discourages Indian self-sufficiency.

Thus, the President rejects the policy of termination but also disapproves excessive Indian dependence on the federal government. A policy of Indian self-determination is seen as the means of insuring a federal-Indian relationship which serves the interest of the Indian peoples. The President's goal then is "to strengthen the Indian's sense of autonomy without threatening his sense of community * * * [to] * * * assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group * * * [and to] * * * make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support".

To achieve this goal, the President recommended that Congress pass a new concurrent resolution "which would expressly renounce, repudiate, and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress". In addition, the new resolution should affirm the integrity of all tribes, pledge government loyalty to treaty and trusteeship obligations so long as the Indians desired such, and guarantee continuation of adequate federal financial support when and if the Indian group decided to assume control for its governance. In short, this resolution would, in the President's words: "reaffirm * * * that the historic relationship between the Federal government and the Indian communities cannot be abridged without the consent of the Indians".

The President also announced proposed legislation to correct the dilemma facing the Indian of self-determination of federal funds and services. Recognizing that this choice is fostered by the assumption that the government alone must administer its Indian services and finding the assumption unnecessary, the President stated:

"I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the Tribal Council or comparable community governing group voted to do so."

This view of Indian administration of certain federally funded programs was also deemed appropriate by the President for education. Noting the poor level

of Indian education achievement in federally supervised schools, the President stated 'every Indian community wishing to so do should be able to control its own Indian schools".

Finally, the President acknowledged the conflict of interest existing within the federal government when it (1) exercises its trust duties as to Indian land and water interests, and (2) exercises its duty to the national resource use interest. To avoid the inevitable losing situation of the Indian in such circumstance, and to alleviate the credibility damage done to the federal government when its duties are at odds, the President asked Congress to establish an Indian Trust Counsel Authority. This Authority, composed of three members, two of which would be Indian, would assure independent legal representation for the Indians' natural resource rights". This Authority would be independent of the Departments of Interior and Justice, and would be empowered to sue. The United States would waive its immunity from suit in Authority litigation.

The President concluded his message proclaiming that this "new and balanced relationship" will make for better programs and more effective use of public monies because "the people who are most affected by these programs [will be] responsible for operating them".

3. Other evidence of the self-discrimination policy

In addition to the 1968 Civil Rights Act and the 1970 Presidential Message, further recent evidence of a change in federal policy away from termination has been forthcoming, and is illustrated by the following.

Large land areas taken away from various Indian tribes in the past, often by allegedly "mistaken surveys" are being returned to the tribes. In 1907 government surveyors surveyed the Yakima Reservation to set the boundaries established by the 1855 Treaty, and "mistakenly" excluded 21,000 acres of land, including Mt. Adams—a sacred mountain in the Yakima religion. Some of this 21,000 acre area was later opened to homesteading and passed into white ownership. The balance was included in the Gifford Pinchot National Forest. Although the Yakima tribe has tried over the past 30 years to obtain the return of their land, it was May 1972 before the President signed an executive order returning the land that had been included in the national forest. The land that had been homesteaded was not returned, although the Indians received some compensation for its loss.

A similar "mistaken survey" of the Warm Springs Reservation many years ago caused the exclusion from that reservation of some 66,000 acres of land. This land was returned in September 1972 to the Warm Springs Tribe by Presidential action.

On December 16, 1970 President Nixon signed into law a bill returning to the Taos Pueblo Indians 48,000 acres of land in the Blue Lake area of the Carson National Forest in northern New Mexico. This action came after a long effort by the Taos Pueblos to obtain recognition of their aboriginal claim to this land. From ancient times they had used the Blue Lake area as a religious shrine where they held private religious ceremonies and trained young members of the tribe.

Other lands have been returned to the Pala and Pauma Bands of Mission Indians in Southern California in the past few years.

It will be recalled that, in 1970, Congress reutrned criminal jurisdiction to the Metlakatla Indian Reservation in Alaska.

On May 14, 1971 Senator Henry M. Jackson, Chairman of the Senate Interior Committee, introduced Senate Concurrent Resolution 26, which would explicitly reverse the termination policy of House Concurrent Resolution 108. Senate Concurrent Resolution 26 passed the Senate on December 11, 1971, and is now being considered in the House. The Senate Interior Committee Report[24] which supported Senate Concurrent Resolution 26 said that its "primary purpose * * * is to replace the national Indian policy set forth in House Concurrent Resolution 108 * * *. In addition, Senate Concurrent Resolution 26 embraces the principles of maximum Indian control and self-determination * * *." The report recognizes that federal policy toward Indians has vacillated widely over the history of the country: "In the most sweeping terms, these [policies] have ranged from according tribes the full dignity and respect as separate and sovereign nations to treating the Indians in a demeaning and paternalistic guardian-ward relationship". The report argues that:

"A new national Indian policy [is needed] that is compatible with the Indians' unique relationship with the Federal government . . . to restore the confidence of the Indian people in the Government to permit them to work together to resolve the adverse social and economic conditions which beset Indian reservations and communities. House Concurrent Resolution 108 contributed significantly to the loss of such confidence and continues to be viewed with suspicion by the Indian community."

The Senate passed Senate Concurrent Resolution 26, declaring it to be the sense of Congress that:

(1) A government-wide commitment shall be made to enable Indians to determine their own future to the maximum extent possible;

(2) This statement of policy replaces that set forth in House Concurrent Resolution 108 approved by the 83rd Congress on August 1, 1953;

(3) Indian self-determination and development shall be a major goal of our national Indian policy * * *.

On August 2, 1972 the Senate also passed Senate 3157, entitled the Indian Self-Determination Act of 1972. Introduced by Senator Jackson in February 1972, this Act would allow tribes to contract with the Secretaries of Interior and Health, Education and Welfare to conduct and administer a number of projects under existing federal programs. A similar bill entitled the Assumption of Control Bill was introduced by the Administration. Both bills are now being considered by the House.

On April 20, 1972 Senator Proxmire and four other senators introduced a bill, Senate 3514, to repeal the Menominee Termination Act of 1954 and reinstitute the Menominee Indian Tribe as a federally recognized sovereign Indian tribe.

The rejection of the termination policy has also been apparent at the state level, especially in the State of Washington. Reflecting this change in attitude, the Indian Affairs Task Force was created in Washington in 1970, with Indians holding a majority of the memberships, including Chairman and two Vice Chairmen. The task force met with Indian people throughout the state and invited other Indians to submit oral or written statements. The product of their efforts, published in 1971 by the State of Washington under the title "Are You Listening, Neighbor?", is one of the most comprehensive, thoughtful, and creative reports ever produced on the subject of the relationship of a state to the Indians living in that state.

The report notes the rejection by the Johnson and Nixon Administration of the policy of termination, but pragmatically observes that:

"The Indians are aware, as the average white is not, that the President and Congress have authority only over Federal Indian Policy. The President may cry out against termination but he is powerless to stop the insidious forms of de facto termination being practiced daily by the State of Washington. Although more subtle, these practices are threatening the very survival of this state's citizens."

The report notes that the termination concept was based on the so-called "melting pot" notion that was so dominant in non-Indian thinking during the 19th century.

"The melting pot philosophy was a convincing idea. The only trouble with it was: it didn't work. The blacks never melted into the mainstream. The Mexican-Americans lumped themselves together in barrios and refused to bubble with the proper accent when the heat was applied. But the Indian has been the most resistant lump of all. The red man has persistently thwarted every effort to stir him into the broth. The Indian has refused to be assimilated.

"The right to maintain a separate way of life is a basic treaty obligation of the United States towards the Indians. But the right to preserve one's identity as a people should be viewed as a basic human right. For many groups in America this freedom can be exercised without a special land base and without special legal status. But Indians are historically place-oriented rather than job-oriented. Their identity is tied inextricably to the land and to the water that arises from or laps upon the shores of that land. They feel strongly that the preservation of their land base is a precondition of their existence as a people. For more than a hundred years the Indians in Washington have developed and maintained their separate way of life.

"The Bill of Rights spells out the basic nature of our democracy and the relationship between the citizen and his government. For the American Indian, survival as an Indian is as basic as individual freedom is to the rest of us. The ancestors of the Indians of Washington State forever surrendered their power to the United States in exchange for protection of their right to exist as a people. They did not bargain for, nor did the United States contract for, a training program in assimilation into the white society. The President said the goal of any new national policy toward the Indian people must be to strengthen the Indian's sense of autonomy without threatening his sense of community. To assure the Washington State Indian that he can assume control of his own life without being separated from tribal life involuntarily, must also be the Indian policy of the State."

Based on its studies, the Task Force made four specific recommendations, having to do with: (1) jurisdiction on the reservation; (2) zoning on the reservation; (3) tribal fishing rights; and (4) Indian water rights. The first recommendation urged the state legislature to announce a procedure for retrocession. Such a bill would permit, to the extent agreed to by individual tribes, a return of law and order authority from the state to the tribes. Thus, jurisdiction would be exclusive in either the state or tribe, or would be held concurrently, dependent upon the tribe's choice.

In addition, the Task Force recommended that all Indian reservation police officers should be deputized by the appropriate counties (so that unlawful non-Indians on Indian land may be legally arrested) and tribal judges should be made Justices of the Peace (so that they may hear cases of non-Indians arrested for crime on Indian land). Also county law enforcement officials should be required to provide equal services to the entire county, including the Indian reservation land within the county.

Pursuant to the recommendations of the Task Force, executive request bills were introduced in both houses of the Washington State Legislature in 1971. House Bill 1001 and Senate Bill 685 would, if enacted, have directed the Governor of Washington to retrocede civil or criminal jurisdiction, or both, to the federal government "whenever the governor * * * shall receive from the governing body or tribal council duly recognized by the Bureau of Indian Affairs of any tribe, community, or band, a resolution expressing its desire for such retrocession". Unfortunately, neither of these bills was enacted. These proposals, and alternative possibilities, will be discussed more fully in the next chapter of this report.

Similarly, other states are considering retrocession proposals. In Nevada, for example, a state law was enacted empowering counties to make the decision about retrocession, and eight counties have now returned jurisdiction over reservation lands within their borders to the federal government. It is noteworthy, too, that in New Mexico a proposed constitutional amendment was defeated which would have removed the state's constitutional disclaimer of jurisdiction over Indian lands and thus would have allowed the state to assume Public Law 280 jurisdiction.

D. CONCLUSION

In summary, we have seen great vacillation in the policies of the federal government toward Indians in the period since 1800. Those policies have ranged from enlightened action aimed at providing real opportunities for self-determination to patenalistic action aimed at terminating cultural identity and destroying the Indian's land base. The termination policies are illustrated by House Concurrent Resolution 108, Public Law 280, the termination acts for the Menominees and Klamaths, and the 1963 Washington statute—all of which provided for the loss of jurisdiction and authority of Indian tribes without their consent. The more recent self-determination policies are illustrated by the reversal within the Department of the Interior of its termination policy; by the authorization of retrocession in the Civil Rights Act of 1968 and the requirement in that Act of Indian consent prior to any further state assumption of jurisdiction under Public Law 280; by President Nixon's Message to Congress of July 19, 1970; and by the increasing support from the chairman of the U.S. Senate Interior Committee and from the Governor of the State of Washington. The policy that "self-determination" should be the guide in relations between the state and federal governments and the Indians follows the idea that the traditions, cultural values, legal systems, treaty rights, and reservation base of Indian peoples should be preserved and respected.

CHAPTER 2

State Jurisdiction Over Indian Reservations In The State of Washington

A. WASHINGTON LAW UNDER PUBLIC LAW 280

This chapter will examine the legislative action taken by the State of Washington under the authority of Public Law 280, the policies supporting such action, the judicial interpretations of assumption of jurisdiction enactments and the Indians' response to these events.

The initial question is: Why did the State of Washington implement the authority granted it by the Public Law 280? Implementation occurred by state legislation in 1957 [25] and 1963.[26]

The intent of the legislation must be discerned directly from its text because there is no statutory preamble, legislative history, or other helpful relevant public documents. One of the unfortunate aspects of state legislation in Washington, and most other states with similar budgetary constraints, is that little legislative history (such as committee reports, committee hearings, or floor debates) is kept which can help in determining the background or intent of legislation. In some instances, newspaper accounts will reflect what was said on the floor of the House or Senate about the proposed bill. This usually happens only when the legislation is of major importance, or has captured the public imagination. We have been unable to find such helpful background information for the 1957 or 1960 legislation.

1. The 1957 Washington Statute—self-determination

The terms of the 1957 Act reveal that it was intended to permit agreement between the state and Indians, if they so desire, on the assumption by the state of jurisdiction over Indian reservations. This was a laudable piece of legislation in that it could only go into effect upon the consent of the Indian reservation. Section 1 of the Act provided that the state:

"* * * obligates itself to assume * * * criminal and civil jurisdiction over Indians and Indian territory, reservation, country and lands within this state * * * whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe * * * a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the state * * * to the extent authorized by federal law * * *"

In Section 2 [27] the statute set forth the procedure by which such jurisdiction was to be proclaimed:

"* * * the governor * * * shall (within 60 days of receipt of the request from the Indians) issue * * * a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country and lands of the Indian body involved * * *"

In the case of the Colville, Spokane, or Yakima Tribes, Section 2 provided a special procedure for obtaining consent to state jurisdiction in which the tribal council's request must be ratified by a two-thirds majority of the adult enrolled members of the tribe voting in a referendum. The Yakima, Colville, and Spokane Reservations had raised special objections in Congress at the time of enactment of Public Law 280 to the possibility that the State of Washington might under any circumstances be empowered to assume jurisdiction over those reservations. The Washington State Law of 1957 recognized the weight of these objections and enacted the special conditions on the procedure by which consent of these three tribes was to be obtained.

This 1957 statute precluded any state assumption of jurisdiction over trust property or over treaty hunting and fishing rights [28] (which is consistent with the Public Law 280 limitations in this respect). It also provided tribal custom would prevail, if not inconsistent with state law,[29] in civil cases arising from Indian country.

Under the Washington Laws of 1957 state jurisdiction was requested by and extended to nine tribes, the Chehalis, Muckelshoot, Nisqually, Quileute, Quinault, Skokomish, Swuaxin Island, Suquamish, and Tulalip.[30]

Though the 1957 Act was based on a policy of self-determination, it had three flaws. First, it did not provide for a tribal period, during which both the Indians and the state could find out whether the situation on the reservations was actually improved by the assumption of jurisdiction, either for non-Indians or Indians, before making a more permanent arrangement. Second, it did not provide a method of returning jurisdiction to the Indians if state

jurisdiction was found to be unsatisfactory. Third, the belief of the Indians, in consenting to state jurisdiction, was that the system of justice on the reservation would be improved, and they would receive better law enforcement, better services for their juveniles, more social services, etc. This expectation proved incorrect. Most of the reservations that accepted state jurisdiction have now requested that it be returned.

2. The 1963 Washington Statute

The 1963 Act represented a policy shift in the State of Washington from self-determination toward termination and assimilation, and thereby toward an emphasis on the state legislature as a body in which the fate of the Indians, either with or without their consent, was to be determined.

The policy shift toward termination and assimilation at the federal level had hit a peak in the early 1950's, but seemed to find its strongest expression at the state level in the enactment of Chapter 36, Laws of 1963.

The most important change was imposition of total jurisdiction over some Indian land and partial jurisdiction over all of the Indian reservation land located in the State of Washington, without the consent of the tribes involved. The new scheme provides for state criminal and civil jurisdiction over all fee patent land on the reservation, *i.e.*, those lands owned by either Indians or non-Indians. (Fee patent lands are not owned by the United States in trust for the tribe, or by individual Indians subject to restraint or alienation, *i.e.*, allotted lands. In addition, the state assumed jurisdiction in eight subject areas over all reservation lands. The eight are: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon the public streets, alleys, roads and highways.

The 1963 Statute re-enacted, with only slight modification, the provision contained in the 1957 Act declaring that it was not intended to authorize the "alienation, encumbrance, or taxation of any real or personal property, including water rights and tideland" [31] belonging to Indians and held in trust by the United States or subject to a restriction against alienation imposed by the United States. The 1963 Act also disclaimed any control over hunting or fishing rights. It retained the provision that tribal custom would prevail in a civil case if not inconsistent with any state law.[32]

The 1963 Act re-enacted, with some modifications, the procedure for a tribal petition and the Governor's proclamation in the event a tribe desired full state jurisdiction.[33] One important change in this procedure was in allowing a tribe to request either civil or criminal jurisdiction instead of both or neither choice provided under the laws of 1957. Another new provision in the 1963 Act required the Bureau of Indian Affairs recognition of the tribal body issuing a petition requesting state jurisdiction. A related change in the 1963 Act deleted the previous special election procedures on the consent question for the Yakima, Colville, and Spokane Reservations. The new statute placed these tribes in the same class as other tribes in the state, requiring only a decision by the tribal governing body "recognized by the Bureau of Indian Affairs".

Jurisdiction over the nine tribes that had earlier consented to that jurisdiction under the 1957 Statute was expressly retained in the 1963 Act by a savings clause.[34] Two additional tribes, the Colvilles and the Swinomish, requested jurisdiction over the new 1963 Law. The Swimomish asked that only criminal jurisdiction be extended to their reservation. Needless to say, the 1963 Act suffers from some basic defects of the 1957 Act in that it: (1) ignores Indian views; (2) does not provide for any experimental period during which Indians and non-Indians can find out whether the situation is improved by the assumption of state jurisdiction; and (3) does not provide a means of returning jurisdiction to the reservation, even if Indians and non-Indians alike want to do this.

3. Court interpretation of the 1957 and 1963 acts

It will be recalled (*ante* p. 79) that eight states, including Washington, received separate treatment in Public Law 280 because of their respective constitutional disclaimers of right and title to all lands lying within the boundaries of the state held by any Indian or Indian tribe. The Washington Constitution "forever" disclaimed all such land rights and titles and provided

these Indian lands "shall remain under the absolute jurisdiction and control of the Congress of the United States".[35]

At first it was thought that these eight states would have to amend their constitutions before they could assume jurisdiction over Indian lands under Public Law 280. Carr and Johanson, writing in the *Washington Law Review* in 1958,[36] thought it "probable" that the 1957 Washington Statute would be held unconstitutional under the Washington Constitution. These authors believed Congress intended that states with constitutional disclaimers would have to amend their constitutions to come within the provisions of Public Law 280, and that the legislatures of these states could not, by state legislation, give the "consent of the people" for state constitutional law purposes.

Litigation arose following the enactment of the 1957 and 1963 statutes in Washington testing their validity. The important cases from the Washington Supreme Court and the U.S. Court of Appeals for the 9th Circuit have made it clear that the Washington legislative method of coming within Public Law 280 is constitutionally effective. Three cases that deserve consideration are *State* v. *Paul*,[37] *Quinault Tribe* v. *Gallagher*,[38] and *Makah Tribe* v. *State*.[39]

In 1959 the first challenge to the validity of the 1957 law occurred in *State* v. *Paul*. An Indian was charged with second degree assault on the Tulalip Reservation, a reservation which had requested state civil and criminal jurisdiction. The Washington Supreme Court upheld the validity of state jurisdiction over the Tulalips, saying "the consent of the people" in terms of Article 26 of the Washington Constitution could be accomplished through legislation, without a constitutional amendment, thus permitting Washington to take advanage of Public Law 280. The court relied on *Boeing* v. *Reconstruction Finance Corporation*,[40] which concerned a section of Article 26 of the Washington Constitution whereby the state disclaimed the right to levy taxes on federal property within the state without the consent of Congress and the consent of the people of Washington. A federal law granted consent for the state to tax certain classes of property and the state sought to take advantage of the provisions by legislative action.

The court in *Boeing* concluded that the legislature could validly grant "the consent of the people" for the purpose of Article 26. The court reasoned that the meaning of the Washington Constitution was fixed as of the date of its adoption in 1889 and at that time there was neither the initiative nor the referendum available for the submission of a question to the people of the State of Washington. Since the one method of granting consent, amending the Constitution, was so cumbersome, the court felt that, for the purposes of the compact with the United States, as embodied in Article 26:

"* * * it is clearly apparent that the makers of our constitution had in mind that the people would speak through the mouth of the legislature in agreeing that Federal property might be taxed" [41]

The court in *Paul* felt this reasoning from *Boeing* applied equally well to the disclaimer of jurisdiction over Indians and concluded that:

"Congress did not require that this compact clause be irrevocable, absent a Washington State constitutional amendment. Rather, Congress insisted on bilateral action by the people of the United States (speaking through Congress) and the people of the State of Washington (speaking through the legislature)." [42]

The *Paul* opinion is confusing in that it cites Section 6 and Section 7 of Public Law 280 as authority for assumption of jurisdiction under the Laws of 1957.[43] While no states are specifically mentioned in the statute, it can be seen from the legislative history that Congress drafted Section 6 with Washington and seven other similarly situated states in mind.[44] Section 7 was a catch-all for the other states.

The second important case is *Quinault Tribe* v. *Gallagher*, in which the Quinaults sought declaratory and injunctive relief in federal court to prevent the state from asserting jurisdiction over the tribe under the provisions of the Laws of 1957 as amended by the Laws of 1963.[45]

The Quinaults argued the Washington Constitution, the Enabling Act, and Public Law 280 require amendment of Article 26 of the Washington Constitution before the "consent of the people" required for the State of Washington to come within the provisions of Public Law 280 can occur. The 9th Circuit Court said the consent of the people of Washington for the purposes of Article 26 of the Washington Constitution is a question of state law and

federal courts are thus bound by the state court pronouncement in *Paul* and later cases on this issue.

To answer the arguments that the Enabling Act and Public Law 280 required an amendment of the Washington Constitution, the 9th Circuit Court looked to the legislative history for an indication of Congressional intent. The court said it was understandable Congress might assume an amendment was necessary to change the disclaimer provision since the provision was embedded in the state constitution. However, the real concern of Congress, the court continued, was not the particular method used, but rather that the disclaimer "be removed in some way which would be valid and binding under the state law".[46] The court held that Congress did not preclude the possibility of a legislative assumption of jurisdiction under Section 6 of Public Law 280.

The Quinaults urged another ground for the invalidity of Revised Code of Washington (R.C.W.) 37.12.010 (the codification of the 1963 Act): that the assumption of total state jurisdiction over non-trust lands and over the eight subject-matter areas was a partial assumption of jurisdiction and thus not authorized by the terms of Section 6 of Public Law 280. The 9th Circuit Court, however, avoided the question of whether a partial assumption would be justified under Section 6 of Public Law 280, by interpreting R.C.W. 37.12.010 as not being a "partial" assumption of jurisdiction by the State of Washington. The court characterized the law as being a full assumption of jurisdiction but subject to the condition precedent that the tribe request total jurisdiction. It should be remembered, R.C.W. 37.12.010 extends total jurisdiction to all non-trust lands and jurisdiction over the eight subject matter areas to the entire reservation, trust and non-trust lands alike.

It is difficult to see the logic of the 9th Circuit Court's holding that R.C.W. 37.12.010 is a total assumption. As the court recognized, the operation of R.C.W. 37.12.010 is to extend state jurisdiction over the state's Indian reservations in a less than total manner. Some 2 million of the approximately 3.5 million acres of the reservations in the state are subject to full state jurisdiction.[47] The remaining 1.5 million acres are subject to state jurisdiction only in the eight subject areas, except for the Swinomish Reservation which requested and received state jurisdiction only in criminal matters. Thus, on the Swinomish Reservation some 3,784 acres are subject to full state jurisdiction since they are not held in trust. The remaining 3,488 acres, being trust lands, are subject to state jurisdiction in the eight subject matter areas as imposed by R.C.W. 37.12.010 and to the state criminal jurisdiction as requested by the tribe. This situation seems clearly to place less than total jurisdiction in the state. It is both a partial territorial assumption of jurisdiction over non-trust areas and a partial subject matter assumption over the eight areas listed in R.C.W. 37.12.010.

Relevant here is the South Dakota Supreme Court holding *In re Hankins Petition*[48] that a South Dakota law assuming state jurisdiction only over those areas of highway that crossed Indian country to be an invalid partial assumption. The court reasoned that Congress clearly intended Section 6 of Public Law 280 to apply to South Dakota and when a federal power is being relinquished, the assumption of that power by the state must be in a manner clearly permissible under the federal statute. The court found Section 6 of Public Law 280 did not authorize a state to asume jurisdiction over only a portion of a reservation. The court also said that even though the question was not before them that they had doubts Section 7 would authorize a partial territorial assumption.

The third important case is *Makah Tribe* v. *State*,[49] in which the 1963 amendment to the Washington statutory scheme was first challenged in state court. The case arose from a declaratory judgment action brought by the Makahs to test whether the state had authority to enforce its motor vehicle laws within the reservation. Jurisdiction over motor vehicles was one of the eight subject matter areas which R.C.W. 37.121.00 extended to Indian reservations without the consent of the tribes. The Makahs had not requested any state jurisdiction under either the Washington Laws of 1957 or 1963 and thus there could be no argument that the tribe had consented as had the Quinaults in *Gallagher* and the Tulalips in *Paul*.

In *Makah*, the arguments made in *Paul* and *Gallagher* were reasserted. These were: (a) the legislative method assuming jurisdiction under Public Law

280 was contrary to the Washington Constitution, and (b) the Enabling Act, Public Law 280, and R.C.W. 37.12.010 constitute a partial assumption of jurisdiction contrary to the provisions of Public Law 280. The Washington court affirmed its holding in *Paul* that, for state law purposes, the legislature, independent of constitutional amendment, can grant the consent of the people to accept the jurisdiction offered by Public Law 280. It agreed with the *Gallagher* federal court in concluding that all Congress wanted under Public Law 280 was some form of binding consent of the state. The court also adopted the *Gallagher* court reasoning that the partial assumption of jurisdiction under R.C.W. 37.12.010 was not partial at all.[50] Lastly, in a statement remarkable for its lack of understanding of the Makah's objections, the court said if the Makahs are aggrieved because there is less than total state jurisdiction over the reservation, all they need to do is request from the Governor total state jurisdiction for the reservation.

The December 1972 Federal District Court decision in *Yakima Nation* v. *State of Washington*[51] affirms most of the above case law concerning the validity of R.C.W. 37.12. The Federal District Court held: (1) that Washington State Supreme Court decisions are controlling on the lack of need for a constitutional amendment in Washington to implement Public Law 280; and (2) that the question of whether R.C.W. 37.12 was a partial assumption of jurisdiction and thus invalid under Public Law 280 "has been determined adversely" to the Indians in the earlier Federal Court of Appeals decision of *Quinault Indian Tribe* v. *Gallagher*.

The effect of the case law is to hold valid the Washington legislature's response to the opportunities afforded by the provisions of Public Law 280. The questions involved have never been ventilated in the United States Supreme Court, and it is possible they never will be argued in that court. The Supreme Court has consistently refused to hear the cases that would settle the arguments. Certiorari was dismissed in *Paul* for a defect in the pleadings and certiorari was denied in *Seattle Disposal* and in *Gallagher*. Finally, the appeal in the most recent case, *Makah Tribe* v. *State*, was dismissed on March 23, 1970 for want of a substantial federal question. For the present, at least, R.C.W. 37.12.010 must be regarded as a valid exercise of legislative power.

4. Current litigation

The question of concurrent versus exclusive state jurisdiction is an issue presently before the courts. In the past, it seemed to have been assumed that state jurisdiction over the eight subject-matter areas was exclusive, and that the Indian tribes could no longer exercise any jurisdiction over these matters in Washington. The Attorney General of the State of Washington rendered an opinion to this effect in 1964. More recent investigation casts doubt on this view. Although it is not our purpose to exhaustively analyze this issue, we will nonetheless briefly summarize the arguments pro and con on this issue, which has recently been decided by the Federal District Court for the Eastern District of Washington in the case of *Confederated Bands and Tribes of the Yakima Nation* v. *State of Washington, et al.*, Civil No. 2732.

The principal question is whether Congress intended, in Public Law 280, to authorize the states to assume exclusive (rather than concurrent) jurisdiction over Indian reservations. Assuming that Congress authorized such an assumption of jurisdiction, a secondary question is, did the 1963 Washington Act in fact assume exclusive jurisdiction over Indian reservations—or only concurrent jurisdiction.

The courts have repeatedly said that a Congressional intent to empower the states to interfere with tribal self-government will not be lightly attributed, and to find such power in federal legislation ordinarily requires a clear statement by Congress to that effect.

To say the least, Public Law 280 is not as clear as it might be on this question. If Congress had intended that state jurisdiction, once assumed, was to be exclusive, it could have said so plainly and simply. It did not. This suggests that what Congress did intend was merely to permit the states to *also* exercise jurisdiction on reservations, leaving to the various Indian tribes the power to continue applying their own law, especially as to Indians, if they wished to do so.

On December 1, 1972 the Federal District Court determined that the Washington State assumption of jurisdiction over Indian reservations under Public Law 280 and Washington statutes was "exclusive", not "concurrent".

Yakima Nation v. *Washington* also raises the question whether the provisions of R.C.W. 37.12 which impose total state jurisdiction over all fee patent lands and partial state jurisdiction (eight subject areas) over all Indian lands is unconstitutionally vague, and fails to meet the constitutional standards of due process and equal protection. The Yakima Nation has argued the geographical and subject matter checkerboard pattern makes impossible a fair and equal law enforcement system. The geographical checkerboard pattern is created by the imposition of total state jurisdiction over fee patent lands, the eight subject areas. The subject matter checkerboard is created by the imposition of state jurisdiction over the eight subject areas. The legal system on the reservations has become so confusd as to deny Indians the opportunity to have the same quality of legal protection as non-Indians (equal protection) and denies the chance of a fair legal process (due process).

It will be recalled, the Yakima Reservation never requested state jurisdiction under either the 1957 or 1963 Statutes, and thus is subject to state jurisdiction only to the extent imposed without its consent under the 1963 Act.

In its December 1, 1972 decision the Federal District Court held that R.C.W. 37.12 was not unconstitutionally vague; it also held that this state law is not, as written, violative of the Federal Constitution due process and equal protection principles. The court held, however, that the question of whether R.C.W. 37.12 as applied on Indian reservations in Washington is violative of these federal constitutional principles is a question of fact to be determined at a full-scale trial. Upon later hearings, the court rejected the Yakima contentions.

Another argument raised by the Yakima Nation in this litigation is that, because tribal jurisdiction and federal jurisdiction arise from two different sources, the federal government may not delegate tribal governmental power to the states without the consent of the sovereign Indian nation. In other words, the United States does not have "plenary" power over Indian tribes in this respect. Its power stops short of the ability to delegate to the states authority to assume jurisdiction over Indian reservations. The Federal District Court rejected these arguments and held that Public Law 280 and R.C.W. 37.12 were valid even without the consent of the Indians.

If the Yakima Nation can obtain a reversal of the Federal District Court decision on appeal, presumably the effect will be to strike down R.C.W. 37.12.010 and the State of Washington will no longer have complete jurisdiction over free patent lands, or partial jurisdiction over all lands as to the eight subject matter areas. A victory in the case, however, would still leave the state with jurisdiction over those reservations which had previously consented to jurisdiction under either the 1957 or 1963 statutes. Furthermore, it would still leave the question of how to obtain retrocession for those tribes that had previously consented to state jurisdiction.

B. RETROCESSION

1. Indian requests for retrocession

The Indians in the State of Washington, as elsewhere, have become increasingly disenchanted with the "improvement" in reservation life that was supposed to result from state assumption of jurisdiction. Some of their views are illustrated by the report "Are You Listening Neighbor?", prepared by the Indian Affairs Task Force for the State of Washington.

The report tells of the repeated Indian charges of state failure in adequate law enforcement on reservations which creates "almost insurmountable problems within the reservation". The problems ranged from inability to mount comprehensive delinquency planning because of the state's total jurisdiction over juveniles but lack of jurisdiction over their parents to the law enforcement problems due to confusing physical boundary lines between trust or non-trust land within the reservation.

Indian complaints, serious and often bitter, charged racial discrimination in law enforcement, resulting in unsolved and uninvestigated homicides and highway accidents involving Indians. Police harassment was widely charged.

The Task Force report tells of the Colvilles' 1965 petition for state jurisdiction to that tribe's subsequent support of full retrocession of law and order jurisdiction from the state. The Colvilles had agreed in 1965 to pay the cost for the maintenance of law and order but concluded "law enforcement on the reservation, even with their tribal funding as a subsidy, was

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From Indians across the state complaints were brought to the Task Force of restrictions in the Indian arrest powers over non-Indians committing crimes on the reservation, as well as forfeiture of collected fines which were imposed on non-Indians. Cross-deputizing of tribal and Bureau of Indian Affairs police was seen as a solution to problems related to arrest.[53]

Additional concern was raised as to the lack of recognition and lawful authority of the tribal courts. In the past, at least, non-Indian violators on Indian land could not be tried before tribal courts, and tribal court decisions, when announced, were not binding on non-Indian state courts. The result is that the Indians often exercise physical force agaist those trespassing and infringing on federal treaty rights. The Quinault Indians have assumed jurisdiction over non-Indians on the treaty of implied consent. This is in part due to the County Sheriff's admission that his office has neither manpower nor funds to adequately protect invaded and damaged Indian areas and the referral of juvenile cases from the County Court to the Tribal Court.

It was in response to persistent objections by Indians throughout the nation and the reality that, in too many cases, Indian life simply worsened under state jurisdiction that Congress was forced to act. The Indian Civil Rights Act of 1968 contained a provision authorizing states to retrocede or return jurisdiction assumed over Indian reservations. The act enabling retrocession did not formulate any procedure to effectuate retrocession. It merely stated that the federal government could accept retrocession from a state. Hence, the action was first with the state and secondly with the government. Neither the tribe nor the federal government could force a state to relinquish jurisdiction acquired pursuant to Public Law 280.

The 1968 Civil Rights Act also provided that no state could, in the future, assume jurisdiction over any Indian reservation unless with the consent of the tribe, indicated by an affirmative vote at a special referendum election conducted under the supervision of the Secretary of the Interior. As indicated earlier, this legislation expressed a major policy shift for the federal government in removing federal consent for state assumption of jurisdiction over Indian reservations without the consent of those Indians. Unfortunately, the 1963 statute was already on the books in Washington and was not repealed by the 1968 federal law.

It was on the basis of the existence of this new federal authority for retrocession that the Indian Affairs Task Force recommended that . . .

"The State Legislature pass a bill outlining the procedure for retrocession. Retrocession would return to the State's Indian tribes whatever degree of law and order authority over their reservations that the individual tribes agree they can assume. This type of legislation would include provision for the tribe to asume full jurisdiction over law and order, or would provide for the tribe to assume with the State concurrent jurisdiction if the tribe preferred, or would permit the tribe to assume just those areas of jurisdiction which tribe chose to pay for and administer."

2. Who can act for the State in retroceding jurisdiction to the Indian tribes?

Washington's Governor Dan Evans has indicated that he favors returning jurisdiction to the Indian tribes. The Governor, by executive order, retroceded state jurisdiction over the Port Madison Reservation (upon the Indians' request), and the Secretary of the Interior has accepted the retrocession. However, a question has been raised whether the Governor of Washington has legal authority to retrocede jurisdiction to an Indian reservation without enactment of new state legislation specifically authorizing him to do so. State Senator Perry B. Woodall, from Toppenish, Washington, requested an opinion from the State Attorney General on this question:

"When state jurisdiction has been validly extended over an Indian people and reservation pursuant to and in conformity with R.C.W. 37.12.010 [1963 'consent' statute] or R.C.W. 37.12.010 [1957 'consent' statute, now repealed by the 1963 Act], can this jurisdiction be retroceded by action of the governor without any change in existing statute law?"

The Attorney General responded,[54] saying that the Governor could not retrocede jurisdiction to an Indian tribe unless new authorizing legislation was enacted by the state legislature. First, the Attorney General noted, the Gov-

ernor did not have power to retrocede the "partial jurisdiction which was assumed" over the eight subject-matter areas covered by R.C.W. 37.12.010, enacted in 1963. He stated he could find no source of authority for such gubernatorial action, either express or implied. Nor could the Attorney General find authority for the Governor to retrocede jurisdiction which had been proclaimed by the Governor under either the 1957 or the 1963 Act pursuant to a petition by a particular Indian tribe. The Attorney General did confirm the Governor's power to effectively rescind a "previous gubernatorial proclamation on the basis of some later discovery of error in its initial issuance", thus validating the recission of the Governor's proclamation of jurisdiction over the Quinault Reservation. The Attorney General, however, could not find authority either in the statutes or the Constitution for the Governor to retrocede jurisdiction to a reservation where the state's initial assumption of same was without defect.[55] The Attorney General noted in passing that two executive request bills were introduced in the 1971 legislative specifically designed to empower the Governor to retrocede jurisdiction to Indian reservations. He stated "their introduction at the Governor's request would seem to imply at least some degree of doubt on his part as to the extent of his authority with regard to retrocession and a need to clarify this matter".

Whether the Attorney General is or is not correct in his analysis of the law, the question that he has raised about the Governor's power to issue retrocession proclamations has caused the Governor to decline to issue further such proclamations. It appears doubtful that the Governor will want to issue any proclamations in the future if his action will leave an ambiguous question of jurisdiction to be resolved by the courts.

As for the Port Madison Reservation, it will be recalled that the Governor had already proclaimed retrocession, and that proclamation had been accepted by the Secretary of Interior, prior to the announcement of the above Attorney General's opinion. This poses a perplexing question about the status of jurisdiction on the Port Madison Reservation. If the Attorney General is correct, then the State of Washington may still have jurisdiction there. If the Attorney General is not correct, then jurisdiction has been returned to the United States, and, in fact, is in the hands of the Suquamish Indian tribe except for the eight subject-matter areas and, in certain respects, as to fee patent land.

It is important to the Indian community in Washington to know whether the Governor can, without further legislation, retrocede jurisdiction taken under the 1957 and 1963 Acts. Thus, a court-test of the correctness of the Attorney General's opinion should be seriously considered. Such a test may result from some future attempt by the Suquamish Indians to enforce tribal law on the Port Madison Reservation. Thus, someone charged with an offense under tribal law may take the case to the federal courts on the grounds that the tribal court has no jurisdiction. There are also other ways in which the issue might be raised in the courts and a definitive opinion obtained, some of which would produce a federal court decision, and others of which would produce a state court opinion.

C. PRESENT JURISDICTION IN OPERATION

1. Comment on eight subject areas covered by 1963 act

It is not the purpose of this study to either decide or recommend precisely where jurisdiction over these eight subject aras should reside. This is for the tribes, the state, and the federal government to decide. Rather, the purpose here is to explore some of the ramifications of the imposition of state jurisdiction over these areas, and describe alternative means of improving the system, specifically through the return of jurisdiction to the Indian reservations in a number of these areas.

The eight subject areas covered by the 1963 Washington Statute are: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles upon the public streets, alleys, roads and highways.

Operation of motor vehicles on the public streets, alleys, roads, and highways.—Undoubtedly, the strongest argument for state jurisdiction can be made here. At best, however, this argument supports only a claim for concurrent jurisdiction, leaving the Indian communities involved, if they wish, jurisdiction over Indians who violate tribal laws ir operating motor vehicles on the

public highways. The persistent Indian claims of racial discrimination and selective law enforcement by state and local police would be best met by having Indian police enforce the law as to Indians.

Certainly one of the most desirable solutions to this problem is recommended by the Indian Affairs Task Force, and illustrated by the arrangements now substantially in existence among the Warm Springs Indians, the adjacent counties, and the State of Oregon.

"All Indian police officers who serve reservations be deputized by the sheriffs of the counties within which the reservations lie so that Indian officers may legally arrest non-Indians who commit crimes on Indian land."

Also, as noted earlier, Arizona has recently enacted legislation to give tribal police officers power to arrest non-Indian offenders on the reservation.

Compulsory school attendance.—Attitudes in the non-Indian community toward compulsory school attendance have changed significantly over the past few years. Whether for good or ill, considerably less emphasis is placed on attendance now than a few years ago, and certainly less enforcement of attendance is visible now compared to years past, when truant officers regularly checked upon students failing to show at school.

Apparently, the 1963 statute was enacted on the assumption that the high dropout rate of Indian children from the public schools would be slowed or reversed if the state took over the policing of school attendance by Indian children. There is no evidence of such a change in school attendance of Indian children, certainly not from this cause. The problems that Indian children have with schools run much deeper than those that can be solved merely by having state or county officials enforce their school attendance.

In any event, this particular part of the 1963 Act is probably invalid because it conflicts with a more specific, and pre-existing, federal law. A federal statute adopted in 1929, and amended in 1946, says in part:

"The Secretary of the Interior may authorize the states * * * (2) to enforce the penalties of state compulsory school attendance laws against Indian children * * * except that this paragraph (2) shall not apply to any Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application."[56]

The policy expressed in this federal statute is consistent with the policy of self-determination in that it requires the approval of the governing body of the Indian tribe as a condition to state enforcement of school attendance. It is, in fact, difficult to see how the state could operate effectively in this highly personal and intra-family area unless it had the full cooperation and support of the Indian parents and community from whence the children came.

Public Assistance.—The State of Washington also took jurisdiction over public assistance in the 1963 Act. It is hard to believe the state intended to assume exclusive jurisdiction over these matters, and to oust the tribes from handling their own public assistance problems if they wished to do so. Public assistance is something people seek out themselves, and is regularly provided by the states to Indian people living in Indian communities within their borders, regardless of the existence of statutes such as R.C.W. 37.12. Thus, the state did not need the 1963 Act to justify providing assistance to Indians.

Mental Illness.—Again, it is difficult to understand why the state would feel it necessary to impose its jurisdiction over mental illness on the reservation without the consent of the tribe involved. If an Indian is mentally ill and goes off the reservation he is immediately subject to state law. On the reservation there would seem to be little reason to insist that state law applies. In addition, as we have especially seen in recent years, the question of when a person is mentally ill is exceedingly difficult to establish, and the result often depends significantly on the cultural attitudes of the community towards such matters. This is all the more reason why this particular area should be under the jurisdiction of the Indian community, unless they voluntarily consent otherwise.

There is sound argument why Indian reservations might wish to voluntarily consent to state jurisdiction over mental illness matters. State mental illness treatment facilities are only available to an individual who is committed by a state court. Thus, if an Indian tribe wished to have access to these facilities for its mentally ill, acceptance of state jurisdiction for this purpose would be essential. If commitment is through state court, confinement must be furnished to all citizens wherever they reside.

Domestic relations and juveniles.—The state took jurisdiction over domestic relations, juvenile delinquency, adoption proceedings, and dependent children. Included in this category are the most important and private inter-personal relationships. These are relationships which the federal government has historically left entirely up to the Indians. They are subjects over which, under a policy of self-determination, the Indian people should, themselves, have the greatest control—unles the Indian community voluntarily agrees otherwise.

The Indian Affairs Task Force thought this aspect of state jurisdiction was particularly invidious.

"It is obvious that with this sweeping jurisdiction over Indian juveniles and family affairs, it is possible for the state to violate the intention of the U.S. Constitution and our tribal customers. The state may reduce or destroy traditional family control which is vital to the Indian communal way of life, abolish undocumented marriages rendering the children of such unions illegitimate, change inheritance laws and confuse a people accustomed to simple tribal law with the sophisticated legal maze of the white man.

"It is also meant that counties which hired bigoted law officials and elected racially prejudiced commissioners and lawmakers could withhold law enforcement from Indian Country, thus encouraging lawlessness. In other cases, the law has been applied selectively. In almost every instance, the county government has lacked sufficient funds and personnel to enforc the law equally in the remote rural areas where the reservations are located. *Perhaps most frustrating of all to the Indians is their inability to control their own children under state imposed jurisdiction.*" (Emphasis added.)

One charge often made by Indians is that law enforcement officials fail to provide the same quality of service and enforcement to Indian juveniles as to non-Indians. Certainly, one of the widely recognized law enforcement princips for handling juveniles is that people of the same racial and cultural backgrounds can do the job best.

If state jurisdiction over juveniles is exclusive under the 1963 Act, then tribal police may not arrest Indian juveniles. Most of the Indian tribes in Washington operate as if state jurisdiction is exclusive and have declined to handle juvenile problems on the reservation for fear of violating state law. However, the Quinaults have taken a pragmatic approach to the problem and have reached an understanding with the Superior Court of Grays Harbor County. If an Indian youth is picked up by juvenile authorities in that County and brought before the Superior Court, the judge simply refers the case to the Quinault Tribal Court where the matter is heard and disposed of according to Indian ways. This de facto system has now been in operation for several years and is recognized as a distinct improvement over leaving Indian youths under the control of the non-Indian court.

2. The Indian tribal legal system and its recent enhancement

It is a little known fact in the non-Indian community that most Indian tribes in the State of Washington, and elsewhere, have legal systems of their own, with constitutions, criminal codes, judges, courts, jails, and the capacity to handle civil matters. One of the more significant developments in this area in recent years has been the creation of the National Amrican Indian Court Judges Association, composed of the majority of Indian Court Judges in the United States. This Association has moved forward positively to provide an unusually competent continuing education program for tribal judges.

The National American Indian Court Judges Association judicial seminars have been under way since 1970, and are conducted at seven locations throughout the West. They are taught by lawyers and law professors. Most, if not all, of the Tribal Court Judges attend the sessions and participate in the program. Funded by Law Enforcement Assistance Administration funds, the seminars have covered virtually every aspect of criminal law and court procedure normally used in the lower courts—whether tribal or non-tribal.

As background study material for the tribal judges, the National American Indian Court Judges Association prepared and distributed to each tribal judge:

(1) *Research Document in Support of the Criminal Court Procedures Manual*, published by Arrow, Inc., in 1971, (a comprehensive survey of federal court cases on civil rights).

(2) *Criminal Court Procedures Manual, A Guide for American Indian Court Judges.*

(3) About 1,500 pages of lesson plan text and teaching aids, covering virtually all aspects of criminal law and trial court procedure that might be useful in the tribal courts.

(4) A set of cassette tapes specially prepared as supplements to the lessons (distributed with a tape recorder to each judge).

(5) *McCormick on Evidence, Black's Law Dictionary, Webster's Dictionary*, and various other books and documents of value to tribal courts.

These continuing education seminars are held for two days each month. During this time the judges and the seminar leaders have covered the materials in the above lessons, conducted mock trials, and visited and observed various state and federal court proceedings.

It should be remembered that the Indian reservation courts normally have jurisdiction, under tribal constitutions and law and order codes, over all minor offenses, with a maximum limit on punishment of $500.000 and six (6) months in jail. Some courts had greater criminal jurisdiction prior to 1968, but the Civil Rights Act of that year limited their jurisdiction as above.

Indian reservation courts also have comprehensive civil jurisdiction. Ordinarily, they can adjudicate any civil case that comes before them, without limit as to amount, and without limit as to subject matter. Thus, they can handle tort, contract, probate, property, and other types of cases. The actual exercise of this power varies considerably from reservation to reservation, with some tribal judges handling a wide range of civil cases.[57]

The training program for the tribal judges is continuing for an additional year. At the same time, the tribes are generally revising and improving their law and order codes, and their ordinances on civil litigation. The Warm Springs and Yakima Reservations, for example, recently adopted comprehensive probate codes. Other reservations are in the process of evaluating the desirability of such additional ordinances and laws.

The reason for reporting this information here is to explicitly debunk any notion that the Indians living on reservations are either not interested or not trained to handle their own law and order and civil jurisdiction problems. The National American Indian Court Judges Association seminar program, and the general upgrading of the reservation court system throughout the nation, is an example of an emphasis and desire for continuing education. It demonstrates the fact that the Indian communities are both willing and able to handle their own legal systems. Every effort should now be made to encourage this movement and to remove state jurisdiction from those reservations that wish to operate their own judicial and law and order systems.

One of the arguments made in support of Public Law 280 and the various state statutes implementing same was that Indian reservation legal systems were less than adequate. It was generally believed that tribal courts were not required to, and often did not, provide defendants the same degree of due process and equal protection provided in the non-tribal courts under the federal Bill of Rights. The early case of *Talton* v. *Mayes*,[58] decided in 1896, was widely construed as holding that the federal Bill of Rights did not apply to Indian reservation courts (although recent decisions cast doubt on that proposition). This question has now become considerably less important, however, since the Civil Rights Act of 1968 was enacted. That Act imposes a statutory requirement on reservation courts to recognize and apply most of the rights (including due process and equal protection) that are guaranteed in the Federal Constitution. Thus, either an Indian or non-Indian who appears before a reservation court must now be accorded essentially the same rights he or she would receive in non-Indian courts. If denied those rights, the defendant can apply for review, through habeas corpus, to the federal courts.

The Indian Civil Rights Act of 1968 permits all parties appearing before Indian courts to be represented by an attorney—even a non-Indian attorney—if they wish. Expense for the attorney must still, under the 1968 Act, be paid by the defendant.

With these events, tribal courts have been developing rapidly and the argument citing their inadequacy in order to continue state jurisdiction must fail.

CHAPTER 3

The Remedy

A. INTRODUCTION

The goal of this chapter is to describe the various means by which Indian reservations in the State of Washington, and elsewhere, might obtain a return of either part or all of the civil and/or criminal jurisdiction previously assumed by the state.

Four problem areas need to be considered:

(1) Jurisdiction over persons. Should the Indian reservation exercise jurisdiction over Indians only, or over certain groups of non-Indians also?

(2) Jurisdiction over subject matter. Should the Indian reservation exercise jurisdiction over all civil and criminal matters arising on the reservation, or only over some of these areas?

(3) Jurisdiction over geographical area. Should the Indian reservation exercise jurisdiction over the entire land and water area covered by the reservation or only only the trust and restricted lands?

(4) What is the best means of achieving the desired jurisdiction?

Each of these questions must be answered for both criminal and civil jurisdiction.

B. CRIMINAL JURISDICTION

1. Jurisdiction over persons and subject matter—alternative possibilities

Because of the close inter-relationship of the issues involved in jurisdiction over persons and jurisdiction over subject matter, these two matters are here discussed together.

Presently, federal law does not empower reservation courts with jurisdiction over Indians or non-Indians charged with offenses covered in the Major Crimes Act, including murder, manslaughter, rape, carnal knowledge, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny. Thus, the commission of these offenses in Indian country is subject to the exclusive jurisdiction of the federal courts.

The Civil Rights Act of 1968 limits the maximum punishment that can be meted out by a tribal court to any defendant (Indian or non-Indian) to a $500.000 fine and/or six months imprisonment for each offense.

The following are some of the alternative goals to consider on jurisdiction over persons and subject matter.

(a) *The tribal courts could exercise jurisdiction over Indians only.* Thus, if an Indian committed an offense in Indian country, the tribal court would have jurisdiction over that Indian. The Indians covered by such jurisdiction would include enrolled members of that tribe or enrolled members of any other tribe in the United States. Non-Indians would not be covered under this alternative. Thus, an offense committed in Indian country by a non-Indian, whether against an Indian or another non-Indian, would not be under tribal jurisdiction, but would be under the jurisdiction of the state courts.

The tribal court would not have jurisdiction over major offenses covered by the Federal Major Crimes Act. These would continue to be under the exclusive jurisdiction of the federal courts.

Tribal courts have historically exercised jurisdiction over Indians, whether from that reservation or some other reservation. Such jurisdiction is authorized for Courts of Indian Offenses by Title 25 of the Code of Federal Regulations, Section ii.2. This type of jurisdiction would continue.

(b) *The tribal courts could exercise jurisdiction over all Indians and over non-Indians who violate certain types of tribal ordinances.* Tribal ordinance violations creating jurisdiction over non-Indians would be those designed to protect the resource base of the reservation, and those especially important to the customs and traditions of the tribe. Such ordinances would include ordinances on hunting and fishing, the use of dune buggies, blasting, logging, etc.

Most tribal courts have not exercised jurisdiction over non-Indians, although no federal statute prohibits them from doing so. Bureau of Indian Affairs policy has undoubtedly played a part in this decision, for, in the Bureau of Indian Affairs reviews of tribal ordinances, they have discouraged ordinances which covered non-Indians. Secondly, some tribes adopted constitutions which denied the tribal courts jurisdiction over non-Indians. Lastly, even if the tribal law was phrased broadly enough to cover non-Indians, if a non-Indian was involved, tribal and Bureau of Indian Affairs police seldom arrested such persons, preferring to call state or local police.

This practice is now changing. The Colville Tribe recently enacted an ordinance (for which it did not seek Bureau of Indian Affairs approval) which covers non-Indians as well as Indians who violate Colville hunting and fishing laws.

The Colorado River Indian Reservation took a different course of action to control dune buggies, which were threatening to destroy reservation lands. The reservation does not attempt to exercise jurisdiction over the driver of the vehicle, but simply takes possession of the dune buggy and holds a trial for it, imposing a period of confinement or temporary confiscation upon conviction. The recent federal decision in *Quechan Tribe* v. *Rose*[59] appears to lend support to this procedure. The Salt River and Gila Bands of Indians in Arizona and the Quinaults in Washington have used a slightly different technique for assuming jurisdiction over non-Indians. These tribes recently enacted ordinances providing for the installation of signs on highways entering the reservation, announcing that any person coming on the reservation thereby "consents" to the jurisdiction of the tribal court for the commission of offenses.

No definitive court test of the validity of these ordinances as applied to non-Indians has yet occurred. An Indian tribe can, of course, request the U.S. Attorney to prosecute non-Indians who fish or hunt in violation of tribal laws, or cut timber in violation of law. Such prosecutions can occur under federal statutes dealing with hunting, trapping, or fishing on Indian land (Section 1165),[60] and tree injuries or cutting on Indian land (Section 1853).[61]

Some tribes have been successful in controlling non-Indian activities on the reservation by this means, and have worked out cooperative arrangements with the local U.S. Attorney's office and the U.S. Commissioner. Other tribes complain that either the U.S. Attorney or the U.S. Commissioner, or both, are either (1) too far away, and too busy with other things to tend to reservation complaints, or (2) simply uncooperative, if not hostile to Indian concerns. In any event, many Indians feel their interests should be better protected and justice for all guaranteed through the tribal courts. The tribal legal system would be certainly more flexible in handling new and changing problems.

(c) *The tribal courts could exercise jurisdiction over all persons, whether Indian or non-Indian, who violate any part of the tribal law and order code, where either the violator, or the victim was Indian.* Thus, the tribal court would have jurisdiction if any Indian violated tribal law or if any non-Indian committed an offense against an Indian (either from that reservation or some other) or an Indian's property.

This option would provide maximum protection to the Indian community and would assure that the safety of Indian persons and Indian property was under the jurisdiction of the tribal law and order system.

(d) *The tribal courts could exercise jurisdiction over all persons, whether Indian or non-Indian, who violate any part of the tribal law and order code.* Under this proposition tribal jurisdiction over non-Indians would be the same as for Indians. Under this option a non-Indian who stole a bicycle from another non-Indian or who assaulted another non-Indian on the reservation would be subject to trial before the tribal court.

2. Jurisdiction over geographical area

This section is essentially concerned with one question: Should the Indian tribal court exercise jurisdiction over the entire area covered by the reservation, or only only trust and restricted lands?

Under the 1963 Washington statute, the state imposed its jurisdiction without Indian consent over all fee patent lands on the reservation, whether owned by Indian or non-Indian. Of course, it also imposed its jurisdiction without Indian consent—jurisdiction over all lands, trust, restricted, or fee patent—for the eight subject-matter areas. On those reservations which consented to state jurisdiction, this partial assumption poses no particular problem because it is swallowed up in the larger assumption of jurisdiction by consent. However, on the Yakma, Quinault, and other reservations not consenting to state jurisdiction, and on the Port Madison Reservation where the state has returned jurisdiction, the partial jurisdiction imposed by the state under the 1963 statute poses an almost impossible problem of law enforcement. A checkerboard pattern of jurisdiction is created which defies rational enforcement.

One means of resolving this problem is to return all criminal law jurisdiction to the Indian reservation so that all lands on reservations are governed by one set of laws. This would mean eliminating state jurisdiction on fee patent lands and eliminating state jurisdiction over the eight subject areas.

Congress was aware of the confusion that could be expected from a checkerboard system of state and tribal jurisdiction. Public Law 280 envisioned that the states would either take all criminal jurisdiction, or none. Unfortunately, the courts have misconstrued this provision and have allowed partial assumptions of jurisdiction to stand, with the expected and unfortunate results in confusion.

3. What is the best means of achieving the desired jurisdiction?

Several alternative procedures might be considered for achieving one or more of the results outlined above. Some of these procedures involve the enactment of laws by Congress, others involve enactment of laws by the state legislatures and still others involve litigation in the courts.

(a) *New federal laws on the question of jurisdiction over persons and subject matter.* One of the most troubling questions here is the extent to which Indian reservation courts can, or should, exercise jurisdiction over non-Indians on the reservations.

As explained earlier, the question of tribal court jurisdiction over non-Indians is presently unsettled. Different tribes are attempting to exercise such jurisdiction by a variety of means. They are presently basing this jurisdiction on the inherent sovereignty of Indian reservations, a sovereignty arising out of their status as independent governing entities, and from their treaty relationships with the United States. It seems likely that the validity of this basis of jurisdiction will be decided in the courts soon as Indian courts attempt to exercise jurisdiction over more non-Indians.

Rather than leaving the issue to the courts, Indians could request Congress to enact a law clearly providing Indian reservations with jurisdiction over non-Indians. Such a law could spell out in detail the extent and nature of tribal court jurisdiction over non-Indians. It could provide, for example, that an Indian reservation had jurisdiction over non-Indians under terms such as those discussed above.

Congress also has the power, even over the opposition of the state, to return either part or all of the subject matter or geographical area jurisdiction to Indian reservations. Indians could seek a federal law eliminating state jurisdiction in Washington over the eight subject areas, or over part of them. Going further, Congress could, for example, enact a law providing that when an Indian reservation meets certain standards it could insist upon the return of state jurisdiction to the reservation. The standards could be:

(1) Has the tribal court appropriate power?

(2) Has the reservation an up-to-date and effective law and order code?

(3) Has a majority vote of the adult Indians enrolled and living on the reservation been obtained?

(4) Has the concurrence of the Secretary of the Interior been obtained?

(5) Has appropriate notice to the Governor of the State been given?

Thus, in Washington, the Colville Reservation could, under such a law, obtain return of the jurisdiction formerly ceded by consent to the state. The Yakima Reservation could eliminate state jurisdiction over any or all of the eight subject matter areas imposed without their consent in 1963.

The five conditions stated above are merely illustrative. Some could be eliminated, or others added. Careful thought should be given to such conditions to assure that: (1) the tribe in fact wants a return of jurisdiction; (2) the tribal law and order system is prepared to handle such jurisdiction; (3) a system of justice, fair to Indian and non-Indian alike, will result from such a return of jurisdiction.

Another request that could be made to Congress involves the question of concurrent versus exclusive jurisdiction. It is still unsettled whether Public Law 280 authorized the states to take any more than concurrent jurisdiction over Indian reservations. Congress could enact legislation clarifying this issue, and firmly bestowing concurrent jurisdiction on the Indian reservations where they choose to exercise it.

One possible approach to this matter would be to obtain federal legislation authorizing the reservations to exercise concurrent jurisdiction. This legislation would require the state, as a matter of policy, to refrain from using its own law enforcement system on the reservations when a tribe has or creates

a tribal court and law and order system. The practical effect would be to return jurisdiction to those Indian reservations wanting to assume it and taking appropriate action to achieve that goal.

The major point made in this section is that the federal Congress has the constitutional power to return either part or all of the criminal or civil jurisdiction to Indian reservations, under terms and conditions deemed wise. Congress can act with the consent of the states involved, or in spite of them.

(b) *New state laws on the question of jurisdiction over persons and subject matter.* The Washington State Legislature could also enact legislation to return jurisdiction to Indian reservations. It could, for example, under the retrocession authority of the Civil Rights Act of 1968, enact a law authorizing the governor of the state to return jurisdiction to an Indian reservation upon the request of the tribe, or it could provide for the return of jurisdiction under other conditions, such as the five listed in the last section.

The Indian Affairs Task Force recommended enactment of such state legislation in 1970 and a bill to accomplish this was introduced in the Washington Legislature but did not get out of committee. It could be introduced and considered for passage again, either in the same form or modified.

An appendix is included at the end of this study describing what the various sections of such a bill might contain. The various Indian communities in Washington and elsewhere will want to decide whether this type of bill, or some other form, will best serve their purposes, and will have the best chance for passage by the state legislature(s) concerned.

(c) *Proceeding through the courts.* The Yakima Nation has sued the State of Washington to establish that the Washington law imposing state jurisdiction over the eight subject-matter areas under the 1963 Act is unconstitutional under the Federal Constitution.[62] If the Yakima Nation is successful in this litigation then no state or federal legislation would have to be enacted to return jurisdiction over these eight subject areas from the state to the reservation.

A second issue raised in the Yakima case is whether state jurisdiction is exclusively or only concurrent. Again, if the Yakima Nation wins the case, and the federal courts hold that Public Law 280 authorizes only concurrent jurisdiction, then no state or federal legislation will be necessary to assure that the Indian reservations have such concurrent jurisdiction.

Court action might also be taken to determine whether the Governor of Washington presently has the power to retrocede jurisdiction to those Indian reservations that earlier consented to state jurisdiction or whether he can only do so if the legislature enacts further laws explicitly giving him that authority.

Court action might be initiated to determine the extent to which non-Public Law 280 reservations have jurisdiction over non-Indians.

C. CIVIL JURISDICTION

Civil jurisdiction does not pose as many difficulties as criminal jurisdiction. The principal civil jurisdiction exercised by the State of Washington over Indian reservations is through the consent provisions of the 1957 and 1963 statutes. A number of reservations in the State of Washington consented to state assumption of civil jurisdiction. Those reservations may now wish a return of that jurisdiction. The same two legislative routes are available for such action.

Congress could enact a law returning civil jurisdiction to an Indian reservation, either outright, or upon certain conditions, such as the establishment of a tribal court and enactment of appropriate civil laws for handling civil cases.

Similarly, a state legislature could, under the authority of the Civil Rights Act of 1968, enact legislation retroceding jurisdiction to Indian reservations. Again, such a law might authorize the governor to simply return jurisdiction upon receipt of a duly authenticated request from the tribe and concurrence by the Secretary of the Interior, or it could require that certain additional conditions be met, such as the creation of a tribal court with appropriate authority to handle civil matters.

It will be recalled from the earlier discussion that where a tribal court has civil jurisdiction, that jurisdiction is ordinarily very broad. Criminal jurisdiction is limited by the Federal Major Crimes Act, and by the Civil Rights Act of 1968 punishment limitation of six months and $500,000. No such federal statutory limits exist for civil jurisdiction. Thus, at present, if a reservation has civil jurisdiction the tribal court has power to handle any civil case properly brought before it, regardless of the amount or of the field of law involved.

Appendix A

Suggested Form of Bill to Authorize Return of Jurisdiction to Indian Tribes in Washington

One possible form of a bill to return jurisdiction to the Indian Reservations in the State of Washington might contain the following:

1. A statement of purpose, that the law is designed to promote the policy of self-determination and to encourage the development of viable legal systems on the reservations in that state, and to promote greater cooperation between the State of Washington and the governing bodies of the Indian tribes within the state.

2. This section would contain definitions. The most important one would be the definition of "Indian Country" which would cover all lands within the boundaries of the reservation, including fee patent land.

3. The effect of this section would be to provide authority for retroceding jurisdiction over seven of the eight subject areas taken by the 1963 Act, when the Indians and the state agree to suchactions, i.e., (a) compulsory school attendance; (b) public assistance; (c) domestic relations; (d) mental illness; (e) juvenile delinquency; (f) adoption proceedings; (g) dependent children.

If implemented this would mean the Indian tribes would have exclusive (or concurrent) jurisdiction over Indians coming under these areas. The state would have jurisdiction over Non-Indians. The eighth subject area, the operation of motor vehicles on public rights-of-way, can also be included here if the Indian tribes desire. They might, however, decide that there is more reason to have concurrent jurisdiction in this case. Thus in practice the Indian tribe would exercise jurisdiction over Indians, and the State would exercise jurisdiction over Non-Indians, although legally the state could exercise jurisdiction over Indians, and the Indians could exercise jurisdiction over Non-Indians.

(This section does not affect those reservations which requested the state to take jurisdiction. That is covered later.)

The section might also provide that Indians are citizens of the state and are eligible for public services on an equal basis with Non-Indians, a situation that already exists but would thus be confirmed.

4. This section would provide that the Governor shall, by official proclamation, retrocede any state jurisdiction taken on the request of any Indian tribe within 60 days of receiving satisfactory evidence that the Indian tribe desires retrocession, provided that said retrocession will include criminal jurisdiction or civil jurisdiction or both and shall not be a retrocession of only part of the criminal or civil jurisdiction previously taken.

This section could be designed to remove any discretion from the Governor, i.e., to make the Governor's proclamation automatic upon receipt of the tribal request. Alternatively the section might describe other conditions that might be required to precede the Governor's proclamation, such as a showing that (1) the tribe had a tribal court with appropriate power, and that (2) the tribe had an effective law and order or civil law code. The tribes in the State of Washington will want to decide whether these or other conditions are desirable, or acceptable.

5. This section might describe the procedure by which the intention or consent of the tribe would be determined. It could use a procedure that requires a vote of a majority of the adult members of the tribe at a special referendum election conducted under the supervision of the Secretary of the Interior. (This is the procedure currently required under the 1968 Civil Rights Act for determining when a tribe wishes to consent to the assumption of state jurisdiction.)

This section would also preclude the possibility of a situation which recently arose in Nebraska, in *Goham* v. *Nebraska* (187 Nev. 35, 187 N.W.2d 305 (1971) where the state apparently retroceded jurisdiction against the will of the Indians involved.

6. This section could request prompt consideration of a retrocession request by the Secretary of the Interior. It might also include a savings clause to handle criminal or civil cases that had started prior to retrocession but were still pending after the effective date of that action.

7. This section could continue the option of an Indian tribe to request the state to assume jurisdiction. It should make clear, however, that only complete civil, or complete criminal jurisdiction, could be assumed. This would eliminate the possibility of the confusion that now exists under the 1963 Act where the state has imposed partial jurisdiction over the reservations. The section could also provide that no jurisdiction shall be created by implication.

The section could also include a description of the procedure by which tribal consent to the assumption of state jurisdiction might occur. This must, of course, comply with the Civil Rights Act of 1968, which says that tribal consent will be determined by a majority vote of the adult enrolled members of the affected tribe voting in a special election called for that purpose by the Secretary of the Interior. (See Section 406, Title IV, Public Law 90-284, 82 Stat. 80.)

8. This section is intended to clarify an obscure area of the law. If a tribal court has jurisdiction over a specific case, either civil or criminal, and a judgment is reached, that judgment is entitled to respect in the state courts. Since the state courts generally would lack jurisdiction to hear a case when the tribal courts had jurisdiction over it, there are likely not to be many cases of conflict. However, there are areas of concurrent jurisdiction and in those areas the state and tribal courts ought to show respect for each other's judgments. This section requires that the judgments of tribal courts shall be given full faith and credit in the courts of the State of Washington, and vice versa.

9. This section could attempt to provide a practical solution to the confusion that may exist even if retrocession is legislated. The state would have some jurisdiction over Indian country even if all the *Public Law 280* jurisdiction were retroceded. The tribes would have some jurisdiction over Indian country even if the fullest possible *Public Law 280* jurisdiction were extended to all Indian country. The most unfortunate aspect of these problems is that law enforcement officers are often unclear about their authority to arrest a particular suspect. As described earlier, the jurisdiction over a particular crime might depend upon the age of the criminal or whether he is an Indian. This section could be designed to create clear authority for the police to arrest and hold the suspect pending a determination of jurisdiction. The section might provide that the state could, on its own authority, extend to the tribal police the power to temporarily detain persons who might be outside the jurisdiction of the tribe. However, the U.S. Constitution forbids the state from authorizing the arrest of Indians in Indian country unless there is a federal statute delegating that authority. At the present time, the existing federal statute which provides for the extension of state jurisdiction requires tribal consent to that extension. Therefore this section could not be self-executing: it requires tribal consent.

The powers described here should be strictly defined to ensure the prompt handling of cases and to prevent the long-term detention of non-tribal members by tribal police and/or tribal members by state or local police.

10. This might spell out that the statute does not affect hunting or fishing rights of Indians. Such an exclusion is specifically provided for in *Public Law 280*, and would be restated in this statute to provide wider notice.

Appendix B

Possible Legislative Proposals

Outline of Suggested State (Washington) Legislation

Section 1 Short title
Section 2 Purpose and Construction
Section 3 Definitions
- (1) Indian Tribe
- (2) Indian Country
- (3) Tribal Court

Section 4 Repeal of state laws assuming jurisdiction and exclusion for jurisdiction obtained by petition.
State retention of jurisdiction over the operation of motor vehicles upon the public streets, alleys, roads and highways—Not recommended.
If state retains its highways and road jurisdiction, then is it to be concurrent with the tribes'?
State's Indian citizens are eligible for all public services.

Section 5 Retrocession by proclamation. Allows Governor to grant retrocession by executive order. Requires petition and tribal resolution. Sets time limit for Governor to act and automatic retrocession if he fails to act.

Section 6 Withdrawal of consent. Allows tribes who petitioned for state jurisdiction to withdraw their consent to state jurisdiction.

Section 7 Effective date of retrocession. Sets period of 60 days and automatic passage feature. Preserves any actions which are pending.
Section 8 Allows state to assume jurisdiction (new) when requested by a tribe.
Section 9 Sets forth procedure for Section 8.
Section 10 Sets effective date for new assumption of state jurisdiction—60 days. Preserves actions which are pending.
Section 11 Inherent right of Indian tribes. Reiterates the rights of Indian tribes to self-government and provides full faith and credit of decisions in tribal court to state courts, agencies and chartered bodies.
Section 12 Hunting, fishing and trapping is in the exclusive jurisdiction of the tribes if the violations occur within Indian Country. Allows seizures and forfeitures. Makes no distinction as to race or identity of offender.

ALTERNATIVES

If total retrocession cannot be obtained, the following alternatives can strengthen the law and order capabilities of the Indian tribes and are compromises.

(a) Declaration that state jurisdiction is concurrent with Indian tribes' and not exclusive with the state.

(b) Tribal court to handle all: (1) criminal and civil cases arising on the reservation; (2) civil matters where parties reside or work on reservation: (3) civil matters where disputed property is located on the reservation. States that appeals are through the tribal system and then into the county district courts.

(c) Recognition and deputization of tribal and Bureau of Indian Affairs police as state police deputies. Powers, certification, qualification, special board and credentials.

DRAFT OF SUGGESTED STATE (WASHINGTON) LEGISLATION

Chapter _____

AN ACT to restore the administration and execution of local control of criminal justice to Indian tribes within the State of Washington: and amending and repealing RCW 37.12.070.

Be it enacted by the Legislature of the State of Washington:

SECTION 1: *Short title:* Sections 1 through 12 of this act may be cited the "Indian Retrocession Act".

SECTION 2: *Purpose and Construction*

This chapter is designed to effectuate more efficient administration and execution of law and order services in the State of Washington and to insure optimum participation by local governments in the resolution of their local problems. This chapter further intends to promote greater cooperation between the State of Washington and the governing bodies of the Indian tribes within the State.

This chapter shall be liberally construed to effectuate its purposes.

SECTION 3: *Definitions*

(1). "Indian Tribe" means any tribe, band, community or organized group of Indians recognized as possessing the right of self-government by the United States.

(2). "Indian Country" means any and all land lying within the exterior boundaries of any Indian Reservation recognized by the United States, irrespective of the issuance of any and all patent or patents, allotments, unextinguished titles or grants, including all rights-of-way running through such lands.

"Indian Country" shall further mean any and all lands not lying within the exterior boundaries of an Indian Reservation which are owned by the United States and whose use is reserved exclusively or primarily for American Indians.

(3). "Tribal Court" means any court of any Federally recognized Indian Tribe, band, community or group which has duly established said court by virtue of Treaty with the United States, by executive order of the United States or by Tribal enactment of constitutions, by-laws, codes of law and order or ordinances.

SECTION 4: *Laws Repealed and Jurisdiction Retroceded*

Chapter 240 of the Laws of 1957 and Chapter 36 of the Laws of 1963 are hereby expressly repealed, and all jurisdiction obtained by virtue of said laws is hereby retroceded except as follows:

(1). Jurisdiction taken upon the request and petition of any Indian tribe is not retroceded by the provisions of this section.

(2). *NOTE*—this section is not recommended; however, it is included herein for the purposes of bargaining since this section emobdies serious concerns of the State of Washington.

Jurisdiction over the operation of motor vehicles upon the public streets, alleys, roads and highways is not retroceded by this section, but it specifically retained as it applies to all Indian country within the State and may not be retroceded by any action under Section 5 of this Chapter.

(3). The State of Washington explicitly states and recognizes that the state jurisdiction retained by Section 4, sub-section (2) is not exclusive and that Indian tribes have concurrent jurisdiction over Indians while they are operating motor vehicles on public streets, alleys, roads and highways within Indian country.

(4). Indians, residing within the State of Washington, are eligible for all public services provided by public agencies on an equal basis with all other citizens of the State.

SECTION 5: *Retrocession by proclamation*

The Governor shall be and is hereby empowered to grant, by Official Proclamation, retrocession of part or all of any state jurisdiction which was obtained by the state by Chapter 240 of the Laws of 1957 and/or by Chapter 36 of the Laws of 1963; provided that the Indian tribe requesting such retrocession shall petition the Governor for said proclamation. The petition submitted shall set forth the precise area or areas of state jurisdiction to be retroceded and shall contain a certified copy of a resolution passed by the governing body of said Indian tribe authorizing said petition. The petition shall further contain satisfactory evidence that the majority of the Indian tribe desires retrocession.

The Governor shall act upon the request of each Indian tribe within sixty (60) days of receipt of the petition requesting retrocession. If no action is taken by the Governor by the sixty first (61) day after the receipt of said petition, the requested retrocession shall automatically be granted.

SECTION 6: *Withdrawal of Consent*

A petition signed by the majority of the adult members of any Indian tribe who are enrolled tribal members according to the census roles of the Bureau of Indian Affairs shall be sufficient evidence that said Indian tribe desires retrocession. Adult members shall include those eighteen (18) years of age or older as of a date set by the growing body of said Indian Tribe. The petition for withdrawal of consent shall state that the named Tribal member, with full knowledge of the facts, hereby withdraws his or her consent to the jurisdiction of the State in the specific areas where retrocession is being requested.

SECTION 7: *Effective Date of Retrocession*

Retrocession under Section 4 of this Chapter shall become effective sixty (60) days after this bill becomes law. Retrocession under Section 5 of this Chapter (Retrocession by proclamation) shall become effective sixty (60) days after the retrocession is proclaimed or sixty (60) days after failure of the Governor to act. All actions pending before state, county or local courts or before administrative agencies which were instituted prior to the effective date of retrocession shall continue as if retrocession had not taken place.

SECTION 8: *Assumption of State Jurisdiction*

The Governor shall be and is hereby authorized to accept or to refuse, at his own discretion, state jurisdiction over any Indian reservation and tribe upon the presentation of a petition requesting State assumption of jurisdiction which complies with Section 9 of this Chapter. Any jurisdiction so obtained shall be strictly limited to the authorizations embodied in the federal act of April 11, 1968 (Public Law 90-284, 82 Stat 78).

SECTION 9: *Request for State Jurisdiction*

All petitions for state jurisdiction must comply with the provisions set forth in Section 6 of this Chapter. A majority vote of the adult members,

eighteen (18) years of age or older, who are enrolled tribal members according to the census rolls of the Bureau of Indian Affairs, voting in a special election called for that purpose by the Secretary of the Interior of the United States, duly certified, will be deemed sufficient evidence.

SECTION 10: *Effective Date of State Jurisdiction Taken by Request*

State jurisdiction obtained by virtue of the provisions of Section 8 of this Chapter shall become effective sixty (60) days after it is proclaimed by the Governor. All actions pending in any Tribal Court, which were instituted prior to the effective date of the assumption of jurisdcition by the State, shall continue as if the new State jurisdiction had not been obtained.

SECTION 11: *Inherent Right of Indian Tribes*

Nothing in this Chapter or in any other law enacted in the State of Washington shall be construed to diminish the inherent right of Indian tribes to self-government. All judgments of Tribal Courts shall be given full faith and credit in the Courts of the State of Washington, in all administrative proceedings and before all bodies chartered by the State of Washington.

SECTION 12: *Hunting, Fishing and Trapping*

NOTE—This is an optional section which is recommended on the strength of the case of *QUECHAN TRIBE* v. *ROWE*. Its implications in the State of Washington are great as this subject is the core of numerous problem areas.

Any and all hunting, fishing and trapping in Indian Country is subject to the sole and exclusive jurisdiction of the Indian Tribe where these occurences take place, regardless of the identity of the hunter, trapper or fisherman. Any and all property utilized or involved in the violation of tribal laws regarding hunting, fishing and trapping may be seized by tribal law enforcement officers and may be subject to forfeiture in Tribal Court proceedings.

This section shall not be construed to change or alter the jurisdiction in any other subject matter.

ALTERNATIVES

(A) The State of Washington explicitly states and recognizes that the state jurisdiction over criminal and civil matters adopted pursuant to Chapter 240 of the Laws of 1957 and Chapter 36 of the Laws of 1963 are not exclusive with the State and are to be exercised and enforced concurrently with Indian Tribes within the State.

(B) In the exercise of any measure of criminal or civil jurisdiction, or both, over any Indian Tribe within the State, pursuant to Chapter 240 of the Laws of 1957 and Chapter 36 of the Laws of 1963, any and all actions where a crime occurs in Indian Country; or where in civil matters the parties all reside or are employed in Indian Country; or disputed property is located in Indian Country, said actions shall be tried by the Tribal Courts and all peace officers shall cite such matters for trial and disposition to Tribal Court. Any appellant from the decision of a Tribal Court must first exhaust all Tribal remedies, such as appealing to the Tribal Appellate Court where established. If no Tribal Appellate system is in existence, appeals shall be taken to the Federal District Court.

(C) The State of Washington explicitly states and recognizes that any member of a police department of an Indian Tribe or any member of the Bureau of Indian Affairs Police, who is certified by the Director of the State Police Department, shall be deputized as a State Policeman by said Director upon receiving said certification. Deputization as a State Policeman shall entitle any qualifying Indian Peace Officer to enforce the Laws of the State of Washington and the Indian Tribe where he is employed in Indian Country and in pursuit of any offender fleeing from Indian Country irrespective of the race or identity of the offender. Said deputies shall be further empowered to enforce the laws of the State of Washington at any place within the State that they evidence a violation of said laws occuring in their presence.

In order to be certified by the Director of the State Police Department a formal application must be submitted to the Department. Said application shall be identical in every respect to the application for employment by the State Police. Said applicant must prove that he has received ___ hours of police training from a competent Federal or State law enforcement training agency. The Director must conduct a personal interview of the applicant and administer such testing of the applicant as will be provided herein.

The Director of the State Police Department shall appoint four persons with at least five (5) years of law enforcement experience to a board to be known as the "Indian Police Qualification Board". This Board must consist of at least two American Indians who are enrolled members of a Tribe located in the State of Washington. The Director shall preside over this Board. The Board will set the qualifications for the deputization of Indian police applicants and shall take into consideration the work experience of the applicant in the area of law enforcement. The Board shall formulate a test or tests to judge the qualifications of all applicants and all successful applicants must be certified by the Director. The Board may recommend additional training for unsuccessful applicants and may determine the place, length and nature of additional required training.

Upon deputization, the Indian Police Officer shall be issued proper State Police credentials and identification, without restriction or limitation.

DRAFT OF SUGGESTED TRIBAL IMPLIED CONSENT ORDINANCE

Whereas, numerous acts against the peace and safety of the community have arisen as a result of the continued presence of non-community (Reservation, etc.) members, and,

Whereas, the _____ (name of Tribe) have not received satisfactory assistance from State, County and local Authorities to prevent and punish these continued acts, and,

Whereas, the _____ (name of Tribe) has reviewed the best means to counteract these problems, and,

Whereas, it is the recommendation of the _____ (name of Tribe) that the Law and Order Code (constitution where applicable) be amended to include a presumption of implied consent to all persons within the exterior boundaries of the Reservation.

Now therefore be it resolved that the Law and Order Code (constitution) be and is hereby amended to include the foregoing ordinance.

Be if further resolved that the following Ordinance shall become effective thirty (30) days from the date hereof. (or if required, within thirty (30) days from the date approved by the Agency Superintendent or Secretary of Interior, as required).

Ordinance No. _____

The Tribal Court of _____ (name of Tribe) shall have jurisdiction over all offenses enumerated in the Law and Order Code when committed by any person within the exterior boundaries of the _____ Reservation.

Any person who shall enter within the exterior boundaries of the _____ Reservation shall be deemed to have impliedly consented to the jurisdiction of the Tribal Court and therefore shall be subject to prosecution for violations of the Law and Order Code in said Court. Said persons also shall have been deemed to have impliedly consented to the jurisdiction of the Tribal police, sheriffs, game wardens, etc. and therefore shall be subject to arrest, apprehension, confinement by said Tribal authorities as well as having their personal possessions confiscated and held subject to forfeiture in Tribal Court.

The _____ Reservation shall be defined as all territory within the exterior boundaries including fee patented lands, rights-of-ways, roads, waters, bridges and lands used for schools, churches, agencies or any other purposes.

Any person entering within the boundaries of this reservation shall become subject to the Laws and Regulations of this Reservation.

Signs shall be posted at each roadway entering the Reservation and on each waterway entering the Reservation, stating "You are now entering the _____ (name of Reservation) Reservation. By so entering you have been deemed to have given your consent to be subject to the Laws and Regulations of this Reservation pursuant to Ordinance No. _____ (set forth number of this ordinance). If you do not consent to said jurisdiction, DO NOT ENTER".

Therefore be it further resolved that the Tribal Secretary prepare and post said warning signs upon final approval of this ordinance as set forth herein.

OUTLINE SUGGESTED AMENDMENTS OF P.L. 90-284—INDIAN CIVIL RIGHTS ACT

(a) Same as 1968 Act—Allows U.S. to accept retrocession by a state.

(b) Same as 1968 Act—Repeal of Section 7 of P.L. 280 enabling states to assume jurisdiction.

(c) *New*-Sets forth procedures for states to request retrocession absent in 1968 Act.

i. State may request retrocession by using the same method it used to assume original jurisdiction, i.e., if jurisdiction was obtained legislatively it must retrocede legislatively; if by executive proclamation it must retrocede by proclamation.

ii. Spells out (i) more with direct reference to legislative retrocession.

iii. Spells out (i) more with direct reference to executive action (proclamation).

(d) *New*-Sets up another method of retrocession by election (state election—either referendum or special state election).

i. Sets standards and procedures of election method and makes them consistent with other elections.

ii. Makes elections federal elections not state elections (optional).

iii. Makes Secretary of the State submit formal retrocession request to U.S. 10 days after certification of election. Waiver if Secretary of State does not act—tribes can act directly.

(e) *New*-Enables state legislatures to allow their executive branches to request retrocession on their own and to call for tribal elections for retrocession.

i. Sets up procedure for tribal election for retrocession and makes the executive submit a formal request to the U.S. Waiver and failure provision.

(f) *New*-Safeguards against reneging by state—as in Nebraska—or overruling by the legislature of the executive or vice-versa. Requires U.S. authorization to repeal validly executed retrocession request.

(g) *New*-Allows tribes who have retroceded to return under state jurisdiction. Sets up election procedure, majority of enrolled adults requirement and waiver and failure clauses.

(h) *New*-Enables state which has granted retrocession to reacquire jurisdiction over retroceded tribe or tribes.

(i) *New*-Requires states to pass provisions for retrocession. Key is that their failure to do so will subject them to a cut-off of federal funds which inure either directly or indirectly to the benefit of the state's Indian population. Sets forth time for action, hearing, time extensions, holding of funds, or forfeiture and allocation to the tribes.

(j) *New*-Provides for concurrent jurisdiction in states which have previously assumed jurisdiction or obtain it in the future.

(k) *New*-Provides for cases to be brought into tribal courts, to go through the tribal appellate system and then to be appealed to U.S. District Court.

Repeal of Section 404-Consent to Amend State Laws—The consent of the United States allowing states to amend the enabling acts of their constitutions which were required for admission to the United States is withdrawn. It is specifically stated that no state may pass any law not in conformity with its enabling act.

All other provisions of P.L. 90-284 are retained and remain in full force and effect.

SUGGESTED AMENDMENT OF P.L. 90-284 (H.R. 2516—THE INDIAN CIVIL RIGHTS ACT)

Title IV.—Jurisdiction Over Criminal and Civil Actions

Retrocession of jurisdiction by state

Sec. 403. (a) the United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of sec. 1162 of title 18 of the United States Code, or section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to section prior to its repeal.

(c) The consent of the United States is hereby given to any State to request retrocession of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of Section 1162 of Title 18 of the United States Code, section 1360 of Title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588) as it was in effect prior to its repeal by subsection (b) of this section in the following manner.

i. Any State which has assumed jurisdiction over any Indian Tribe, be it civil jurisdiction, criminal jurisdiction, or both, may request the United States to grant retrocession to said jurisdiction by acting in the same manner said State acted to originally obtain jurisdiction.

ii. The United States will accept a request for retrocession from any State which has assumed jurisdiction over any Indian Tribe, be it either civil jurisdiction, criminal jurisdiction, or both, by legislative action of the State legislature when original jurisdiction over said Indian Tribe or Tribes was obtained by legislative action.

iii. The United States will accept a request for retrocession from any State which has assumed jurisdiction over any Indian Tribe, be it either civil jurisdiction, criminal jurisdiction, or both, by executive action only when the State legislature has authorized such executive action or when jurisdiction over said Indian Tribe or Tribes was originally obtained by executive proclamation.

(d) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State which is requested by the electorate of such State voting by majority vote during a referendum held on regular State election days or by a special State election held for that purpose.

i. Any referendum or special State election held on the subject of retrocession shall proceed in the same manner as any other State referendum or special election and no procedures or standards shall be set which are stricter or not consistent with procedures or standards for other general State elections.

ii. Any referendum or special election held by the State on the subject of retrocession shall be considered a Federal election and State Officials shall be bound by the same procedures and provisions which govern all Federal elections.

iii. In the event the majority of the electorate of said State approves in a referendum or Special State election granting request for a retrocession or retrocessions, the State Secretary of State shall, within ten (10) days after the certification of said election, submit a formal request to the United States, through the Secretary of the Interior, requesting such retrocession. Failure of the State Secretary of State to act as prescribed shall be deemed as a waiver by such State and formal request for retrocession may then be submitted to the United States, through the Secretary of the Interior by any and all Indian Tribes located in the State, whether or not they were a party to said referendum or special State election.

(e) The United States hereby authorizes any State which has obtained criminal jurisdiction, civil jurisdiction, or both, over any Indian Tribe or Tribes, to act by and through its State legislature to authorize its executive to submit requests for retrocession to the United States and to empower its executive to call special elections for any Indian Tribe or Tribes who submit petitions to said executive or to the State legislature requesting retrocession.

i. Said special election by each Tribe shall require that a majority of the enrolled Indians within the affected area of such Indian country, eighteen (18) years of age or older vote to request rfetrocession. Upon certification of said election whereby a majority of the enrolled Indians within the affected area of such Indian Country, eighteen (18) years of age or older vote to request retrocession, the executive must submit a formal request to the United States, through the Secretary of the Interior, within ten (10) days, requesting retrocession on behalf of said Tribe or Tribes. Failure of the executive to so act shall be deemed a waiver by such State and formal request may then be submitted to the United States, through the Secretary of the Interior by the Indian Tribe or Tribes whose request was not properly submitted to the United States by the executive.

(f) Any State which enacts legislation or authorizes executive action to request retrocession on behalf of any Indian Tribe or Tribes, or any State where the executive is authorized to request retrocession without legislative authority (where jurisdiction was originally obtained by executive action) may not thereupon revoke the action taken by either subsequent legislation in the

event of executive action or by executive action in the event of legislative granting of retrocession, until specifically authorized to do so by the United States.

(g) Any Indian Tribe which obtains retrocession or has obtained retrocession may petition the United States, through the Secretary of the Interior, to return to State jurisdiction. Upon receiving a petition from such Indian Tribe, the United States through the Secretary of the Interior shall call a special election where the majority of the enrolled Indians within the affected area of such Indian country, eighteen (18) years of age or older vote to return to State jurisdiction. The United States, through the Secretary of Interior, shall within ten (10) days after the certification of said election, submit a formal request to the State Governor or State legislature, whichever originally granted retrocession for that specific Indian Tribe, for a resumption of State jurisdiction. Failure of the United States to so act shall be deemed a waiver, and the affected Indian Tribe may then submit a formal request for resumption of State jurisdiction to the State.

(h) Any State which has previously requested retrocession of any or all of the jurisdiction it obtained over any Indian Tribe or Tribes within the State, and which said request has been accepted by the United States, is hereby authorized by the United States to re-obtain jurisdiction over any or all areas of jurisdiction requested by any Indian Tribe which request is in accordance with the provisions of section 403, paragraph (g) above and the majority vote of the enrolled Indians within the affected area of such Indian Country, eighteen (18) years of age or older.

(i) Any State receiving or participating in funds of the United States, which said funds inure to and for the benefit of Indians residing within such State, either directly or indirectly, shall enact provisions for the requesting of retrocession and for the requesting of re-obtaining of jurisdiction once retrocession is granted, at its next regular session of the State legislature, but in no event at any date later than one hundred and eighty (180) days after the enactment of the act. Said State provisions shall be consistent with the provisions and procedures set forth herein and shall not create a burden greater than set forth in this act. Failure of any State to so act shall be deemed a waiver of any and all funds allocated to the State by the United States in such portion or portions as the United States, through the Secretary of the Interior, determines to inure to either the direct or indirect benefit of said States' Indian citizens, and will be subject to forfeiture. In the event any State fails to act as prescribed herein, within the time specified, the United States through the Secretary of Interior shall call for and hold a hearing on said State's failure, within forty-five (45) days of the specified time for the State to act has elapsed. At said hearing the Secretary of the Interior, or his appointee, shall preside and all concerned parties shall be present. Upon hearing and evaluating all evidence the Secretary or his appointeee may extend the time for the State to act, but only in the event that good cause is shown and for a period not to exceed ninety (90) days from the final day of said hearing.

Appendix C

Summary of State Jurisdiction Over Indian Reservations in Washington

Under the 1957 Washington State Legislation, Reservations in Washington could petition the Governor to assume either state criminal or civil jurisdiction, or both, over reservations in that State. This power to request state jurisdiction was reiterated in the 1963 Washington legislation, although the 1963 Act also imposed, without Indian consent, state jurisdiction over all Indian reservation lands for eight subject-matter areas, and total state jurisdiction for all fee patent land. The summary below describes those reservations that *requested* state jurisdiction, and the state's response to those requests.

RESERVATION-BASED TRIBES IN WASHINGTON STATE

1. *Chehalis*—Confederated Tribes of the Chehalis Reservation. Membership: approximately 116. Tribal Resolution: September 20, 1957 requesting state jurisdiction. Governor's Proclamation: October 14, 1957, effective December 13, 1957. Jurisdiction: Criminal and Civil.

Acreages	
Total acreage on reservation	4,225
Land in tribal trust	21
Individual trust land	1,637
Total in fee	2,566

2. *Colville*—Confederated Tribes of the Colville Reservation. Membership: approximately 5,350. Tribal Resolution: January 14, 1965, requesting state jurisdiction, Washington State Senate Resolution: Nr. 1965-28. Governor's Proclamation: January 29, 1965, effective January 29, 1965 proclaiming state jurisdiction. Jurisdiction: Criminal and Civil. Petition for Retrocession: August 12, 1971.

Acreages	
Total acreage on reservation	1,800,000
Land in tribal trust	937,247
Individual trust land	71,851
Total in fee	790,902

3. *Hoh*—Hoh Indian Tribe. Membership: 60. The Hoh Indian Tribe has not petitioned for state jurisdiction, nor has the governor issued any proclamation.

4. *Kalispel*—Kalispel Indian Community. Membership: 167. Kalispel Indian Community has not petitioned for state jurisdiction, nor has the governor issued proclamation.

5. *Lower Elwha*—Lower Elwha Tribal Community. Port Angeles, Washington 98362. Membership: 250. Lower Elwha Tribal Community Council has not petitioned for state jurisdiction, nor has the governor issued proclamation.

6. *Lummi*—Lummi Tribe of Indians. Membership: 1,225. Lummi Business Council has not petitioned for state jurisdiction, nor has the governor issued ex parte proclamation.

Acreages	
Total acreage on reservation	12,442
Land in tribal trust	12
Individual trust land	7,073.07
Total in fee	5,356.03

7. *Makah*—Makah Indian Tribe. Membership: 805. Makah Tribal Council has not petitioned for state jurisdiction, nor has the governor issued proclamation.

Acreages	
Total acreage in reservation	27,012.66
Land in tribal trust	24,525.87
Individual trust land	2,486.79
Total in fee	0

8. *Muckelshoot*—Muckelshoot Indian Tribe. Membership: 408. Tribal Resolution: July 24, 1957 requesting state jurisdiction. Governor's Proclamation: Effective October 25, 1967 assuming civil and criminal jurisdiction. Retrocession: In June 1971, a tribal vote was held on retrocession—vote was against retrocession.

Acreages	
Total acreage in reservation	3,440
Land in tribal trust	0.29
Individual trust land	1,188.28
Total in fee	2,251.43

9. *Nisqually*—Nisqually Indian Community. Membership: 85. Tribal Resolution: October 19, 1957 requesting state jurisdiction. Governor's Proclamation: December 2, 1957 effective January 31, 1958. Jurisdiction: Criminal and Civil.

Acreages	
Total acreage in reservation	4,717
Land in tribal trust	2.50
Individual trust land	813.05
Total in fee	3,901.45

10. *Nooksack*—Nooksack River Indian Community of Washington. Membership: Approximately 370. No petition for state jurisdiction.

11. *Port Gamble* (Clallum). Membership: 165. The Clallum Tribe has not petitioned for state jurisdiction, nor has governor issued proclamation.

Acreages

Total acreage in reservation	719
Land in tribal trust	719

12. *Port Madison* (Suquamish)—Suquamish Tribe of the Port Madison. Membership: 275. Tribal Resolution: Requesting state jurisdiction. Governor's Proclamation: May 15, 1958. Tribal Resolution for Retrocession: January 11, 1971. Governor's Proclamation for Retrocession: August 26, 1971. Federal Register copy of acceptance, Secretary of the Interior, dated April 5, 1972.

13. *Puyallup*—Puyallup Tribe. Membership: Approximately 450. The Puyallup Tribal Council has not petitioned for state jurisdiction, nor has the governor issued proclamation.

Acreages

Total acreage in reservation	18,050
Land in tribal trust	33
Individual trust land	0
Total in fee	18,017

14. *Quileute*—Quileute Tribe. Membership: 450. Tribal Resolution: September 9, 1957 requesting state jurisdiction. Governor's Proclamation: October 3, 1957. Jurisdiction: Criminal and Civil.

Acreages

Total acreage in reservation	594.09
Land in tribal trust	584.34
Individual trust land	9.75
Total in fee	0

15. *Quinault*—Quinault Tribe of Indians. Membership: Approximately 1,200. Tribal Resolution: Requesting state jurisdiction. Governor's Proclamation: January 12, 1965 (voids state jurisdiction). (There is no state jurisdiction by consent at this time.)

Acreages

Total acreage in reservation	189,621
Land in tribal trust	5,414
Individual trust land	123,523.95
Total in fee	61,665.49

16. *Shoalwater* (Chinook)—Shoalwater Bay Indian Reservation. Membership: 15. The Chinook Tribe has not petitioned for state jurisdiction, nor has governor issued proclamation.

Acreages

Total acreage in reservation	335
Land in tribal trust	335

17. *Skokomish*—Skokomish Indian Tribe. Membership: 386. Tribal Resolution: May 22, 1957 requesting state jurisdiction. Governor's Proclamation: July 13, 1957 effective September 28, 1957. Jurisdiction: Criminal and Civil.

Acreages

Total acreage in reservation	4,987
Land in tribal trust	16
Individual trust land	2,905
Total in fee	2,066

18. *Spokane*—See Kalispel.

19. *Squaxin*—Squaxin Island Indian Tribe. Membership: 165. Tribal Resolution: Requesting state jurisdiction. Governor's proclamation: Effective September 25, 1959. Jurisdiction: Criminal and civil.

Acreages

Total acreage in reservation	1,496
Land in tribal trust	1.84
Individual trust land	826.05
Total in fee	688.11

20. *Swinomish*—Swinomish Indian Tribal Council. Membership: 495. Tribal Resolution: August 21, 1962 requesting state jurisdiction. Governor's proclamation: June 7, 1963 effective June 7, 1963. Jurisdiction: Criminal only.

Acreages

Total acreage in reservation	7,155
Land in tribal trust	272.74
Individual trust land	3,097.66
Total in fee	3,784.60

21. *Tulalip*—Tulalip Tribe. Membership: 950. Tribal Resolution: April 4, 1958 requesting state jurisdiction. Governor's Proclamation: May 8, 1958 effective July 7, 1958. Jurisdiction: Criminal and Civil.

Acreages

Total acreage in reservation	22,490
Land in tribal trust	5,171.09
Individual trust land	3,706.94
Total in fee	13,611.97

22. *Yakima*—Confederated Tribes of the Yakima Indian. Membership: 5,975. The Yakima Tribe has not petitioned for state jurisdiction, nor has the governor issued proclamation.

Acreages

Total acreage in reservation	1,366,505
Land in tribal trust	798,754
Individual trust land	296,459
Total in fee	133,000

APPENDIX D

STATE BY STATE ANALYSIS OF STATE JURISDICTION OVER INDIAN RESERVATIONS THROUGHOUT THE UNITED STATES (EXCEPT WASHINGTON)

This appendix will outline those states who have asserted jurisdiction over Indian tribes and the rationale behind said assertion. As will be illustrated, the states justify their claims by the passage of state statutes, Public Law 280 and other special federal legislation conferring states authority over Indians and Indian reservations. This appendix will first show specific jurisdictional statutes; second, other federal regulations; and third a jurisdictional survey of states which have exercised jurisdiction over Indian tribes. The materials prior to the survey section are included because it is often erroneously presumed that Public Law 280 was the first federal authorization for states to assume jurisdiction over Indians and Indian reservations. This introductory material is not intended to point out every federal delegation to states, but merely to illustrate that Public Law 280 does not stand alone as the sole conveyor of jurisdiction to states.

SPECIFIC JURISDICTIONAL STATUTES

Most of Title 25 of the United States Code deals with the operation of the Bureau of Indian Affairs, or involves activities relating to specific tribes. The same holds true for most of Title 25 of the Code of Federal Regulations; however, there are a few significant exceptions that relate to jurisdictional matters, either involving a specific tribe, specific state, or specific problem.[1]

Both New York and Kansas were given jurisdiction by specific congressional legislation.[2] The New York Acts have interesting similarities and differences compared to Public Law 280.

The Act authorizing criminal jurisdiction may allow the concurrent exercise of jurisdiction by the state and tribes. According to the legislative history, this Act was passed because in some instances the tribes were not enforcing tribal, or any, law.[3] New York was without any jurisdiction to protect the Indians so the net result was a breakdown of law and order. Interestingly though, as passed, the Act is permissive, so that New York is not bound to enforce the laws. Rather, the state will act only if it is determined to be necessary, or if the tribe is not doing the job. This approach is unlike Public Law 280, which specifies that the states "shall" have jurisdiction. This latter language is mandatory and seems to preclude the tribes from exercising jurisdiction concurrently (except as the state might allow).

With respect to civil jurisdiction, New York exercises exclusive jurisdiction.[4] The tribes were given one year in which to certify tribal laws and customs to

to be preserved. Those so certified are enforced in civil actions. This Act appears to be a direct outgrowth of the assimilation philosophy that became manifest in Congress as acts of termination.

The Act giving jurisdiction to Kansas is limited to criminal matters.[5] The exercise of jurisdiction is exclusive, and as it is self executing it requires no act by Kansas. This is unlike Sections 6 and 7 of Public Law 280 which require the states to take affirmative action before they can assert jurisdiction over the tribes.

OTHER FEDERAL REGULATIONS

Under the authority of 25 U.S.C. Section 231[6] the Secretary of the Interior can allow state authorities to enforce state laws respecting health and education. According to 25 C.F.R. Section 31.4 the statute requires compulsory attendance. This requirement of compulsory school attendance is effectuated by 25 C.F.R. Section 33.3. This regulation provides that all Indians shall be amenable to state school laws and the employees of the state can come on the reservation and inspect school facilities and enforce such laws. An exception is made for tribes that have a duly constituted governing body: no inspection until the governing body adopts a resolution consenting to the application of this regulation.[7]

A far-reaching regulation is found in 25 C.F.R. Section 1.4.[8] Part (a) specifies that state and local laws relating to land-use regulation shall not apply to lands belonging to an Indian tribe that have been leased. Part (b) authorizes the Secretary to make such laws applicable in specific cases or geographic areas.[9] The purpose of this regulation is to enunciate and particularize the law which makes such state land controls inapplicable to trust lands, and provide a method by which such laws can be made applicable.[10]

The Secretary has made extensive use of this regulation. The first action was to make the laws of California and the city of Palm Springs applicable to the Agua Caliente Indian Reservation. The next was to make applicable throughout the State of California all laws existing or as they may exist.[11] This did not include the laws of the cities or counties, as they were to be adopted by separate action as needed. Nor was it intended to change the exemption provisions of Public Law 280. This meant the extension of state land-use regulations would not be allowed to operate in a fashion that would constitute an encumbrance. This caveat is interesting as many courts consider zoning controls to be a legitimate exercise of state power and therefore not an encumbrance. Which theory is being adopted by this enactment is not known. Arguably, the exceptions in Public Law 280 were meant to forestall the application of land-use laws such that specific action is necessary to make them applicable. Presumably, as long as California promulgates regulations of a general nature there will be no conflict.

Later, the Secretary delegated his authority under 25 C.F.R. Section 1.4 to the Bureau of Indian Affairs.[12] This delegation gave the Commissioner the option to make applicable state and local laws in those states with jurisdiction pursuant to Public Law 280. As to other states, the state and local laws can be made applicable only by appropriate provision in the lease or other agreement. This authority has been further delegated to the area directors so that they will make the final determination.[13]

JURISDICTIONAL MAP OF THE UNITED STATES

This section presents a state by state analysis of jurisdiction over Indian reservations. Essentially, it is limited to the application of Public Law 280, as the application of the other statutes and regulations has been outlined above.

Alaska

This is one of the six states specified in Public Law 280 as being given jurisdiction without further action.[14] There have been recent important changes in Alaska following the passage of the Alaska Native Claims Settlement Act.[15]

Prior to this Act, the state had criminal and civil jurisdiction as indicated in Public Law 280.[16] The exception for the Metlakatla Reservation was provided for in 1970; and in its operation there is concurrent state and tribal jurisdiction over offenses committed on the reservation. The change followed a Resolution of Alaska directed to Congress asking for such a modification.[17]

Now that the Settlement Act has been passed, reservations other than the Metlakatla are substantially changed, if not, in fact, abolished.[18] Except for the Metlakatla Reservation, there is no way to evaluate the ultimate impact of this new legislation.[19] The Metlakatla Reservation remains unaltered and continues to exercise jurisdiction concurrently with the State.

California

One of the six named states. As specified, California has jurisdiction with respect to all reservations for both criminal and civil matters.

There has as yet been no retrocession of jurisdiction by the state. According to a letter from the Office of the Attorney General:

"The Department of Justice has received only one inquiry regarding the provision in Public Law 280 to allow for retrocession of jurisdiction. That inquiry came from a tribe of Yuma Indians who were unsatisfied in State administration. The Department informed the attorney for the Tribe that there is no statutory procedure to implement the provision."[20]

Oregon

One of the six named states.[21] Except for the Warm Springs Reservation, the state has jurisdiction with respect to criminal and civil matters. The exception for the Warm Springs Reservation was included when Public Law 280 was proposed; probably because the tribes objected to the prospect of Oregon jurisdiction and had sufficient law and order procedures to back up their views.

There has been no legislation dealing with retrocession as of this date.[22] Whether the various Indian tribes are planning any attempts in this area is as yet unknown.

Since the Warm Springs Reservation is beyond state jurisdiction there has been an accommodation worked out between the respective parties.[23] The agreement provides that the state police will act only in emergency situations which are beyond the capacity of the tribal police and where specifically requested. Such accommodations are a legitimate means of securing law enforcement, while at the same time respecting the sovereign integrity of both parties.

Minnesota

One of the six named states. The state has jurisdiction, except for the Red Lake Reservation, with respect to criminal and civil matters.[24]

With respect to retrocession, there is no evidence to indicate what the tribes are considering.

Nebraska

One of the six named states. The state has complete criminal and civil jurisdiction.

There is an exception to this statement, but it will take a decision by the United States Supreme Court to resolve its existence. The controversy arises out of the claim by both the state and federal government to exclusive jurisdiction over the Omaha Tribe. This has led to a breakdown of law enforcement, as neither party is confident of their position.

The difficulty stems from the attempt by Nebraska to retrocede jurisdiction pursuant to the 1968 Act as to two tribes. The federal government accepted the retrocession only as to the Omaha Tribe.[25] The state then decided to withdraw its offer. In the case of *State* v. *Goham*,[26] and *State* v. *Tyndall*,[27] the state courts held that Nebraska could withdraw its offer as it was an all-or-nothing proposition. A contrary result was reached in Federal District Court in the case of *Omaha Tribe* v. *Village of Walt Hill*.[28] At present a petition seeking certiorari is pending.

It seems likely the Supreme Court will follow the federal court decision. Such a result would be consistent with the language of the retrocession provision.[29] The statute clearly allows the federal government to accept any measure of jurisdiction, and this is precisely what the Secretary has done.

Wisconsin

One of the six named states. The state has complete criminal and civil jurisdiction.

So far no attempt has been made to obtain retrocession, though several tribes are studying the feasibility of such action.[30]

THE SECTION 6 STATES

Under Section 6, the federal government has given its consent to those states with constitutional disclaimers of jurisdiction to amend their constitutions.[31]

These disclaimers were made part of the state constitutions when the states joined the Union, so such a procedure was deemed necessary. So far the states involved have been rather independent in their approach to this requirement: some have amended their constitutions, others have acted simply by legislation. The state courts that have considered the issue have held that what this federal legislation requires is only a binding commitment by the state. Such a view seems at odds with the intention of Congress, but so far the Supreme Court has not chosen to review the decisions.

Prior to the enactment of Section 6 the states argued they had jurisdiction because the various Acts of Admission were phrased in terms of being "on an equal footing with the original states in all respects whatever".[32] This argument was rejected in *Donnelly* v. *United States*.[33] A California case, *Lux* v. *Hagen*,[34] had held this language to mean the state was seized of all the rights of sovereignty, jurisdiction, and eminent domain which the other states had. As the *Donelly* case indicated, there had been no express reservation by the federal government of jurisdiction over the lands. Despite this, the offense was held to be cognizable only in federal court. The court cited *United States* v. *McBratney*,[35] for the proposition that the states have jurisdiction over offenses committed by whites against whites on the reservations. That case involved a murder committed on the Ute Reservation. The case of *United States* v. *Kagama*,[36] indicated that as between Indians this decision does not apply. Nor does it apply where an Indian on the reservation is a victim. In *McBratney*, the act of admission had the usual language about equal footing.[37]

The existence of the disclaimer has not been made academic by the recent cases. In *Williams* v. *Lee*,[38] a non-Indian trader on the Navajo Reservation brought suit in state court to collect a debt. The Supreme Court upheld a motion to dismiss because the tribal court, and not the state court, had jurisdiction. According to the court, the test of jurisdiction has been modified over time to allow state courts to take jurisdiction where essential tribal relations were not involved and the rights of Indians would not be jeopardized.[39] Absent governing Acts of Congress, the court indicated, the question of allowing state jurisdiction has always been one of whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them.[40] In this case, to allow the state court to exercise jurisdiction would undermine the authority of tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves.

The *Williams* case was thought to authorize a unilateral assumption of jurisdiction despite the disclaimers as long as there was no infringement of the right of Indians on the reservations to make their own laws and be governed by them.[41] A per curiam opinion of the Supreme Court in 1971 changed this view.

In the case of *Kennerly* v. *District Court*,[42] the court held that Public Law 280 is the kind of act referred to in *Williams*, such that it alone specifies the means to obtain jurisdiction. The case involved a suit in state court to collect a debt incurred by members of the Blackfoot Reservation at a store established within the exterior boundaries of the reservation. Montana had done nothing pursuant to Public Law 280 to obtain jurisdiction over the Blackfeet. According to the Court, Section 7 specifies how Montana is to obtain jurisdiction.[43] With respect to the Blackfoot Reservation, Montana never took affirmative legislative action concerning either criminal or civil jurisdiction.[44] There was a tribal council enactment of the Law and Order Code in 1967 that the state relied on, arguing that this was an exercise of tribal powers of self-government under the *Williams* test. However, the court said, *Williams* was limited to the case where there was no Act of Congress. In this case, Section 7 of Public Law 280 applies, and there is no provision for tribal initiative, either as a necessary or sufficient condition. Even the 1968 change requiring consent did not lend support to the state argument because it requires a vote of the whole tribe, and not just thec council.

As the law now stands, a state must act in a manner consistent with Public Law 280 in order for it to obtain jurisdiction over Indians on the reservations.

Arizona

The constitutional disclaimer is contained in Section 20 of the Enabling Act. The state courts favor the finding of jurisdiction, theorizing that the disclaimer deals with title to land.[45] There has been no constitutional amendment despite an arguable need for it.[46]

To date, Arizona has extended its jurisdiction only so far as to make applicable the air and water pollution laws.[47] These acts specify that they are

adopted pursuant to Public Law 280 and apply to both civil and criminal actions. It is not entirely clear whether Section 6 (and necessarily Section 7) authorize partial assumption of jurisdiction. The State Attorney General thought it did not.[48] The relevant language found in Section 7 is "at such time and in such manner". The argument is that this allows a partial assumption, or only authorizes any type of binding commitment to assume complete jurisdiction. It is probably safe to say that no court is going to strike down a partial assumption. Rather, that language indicates a desire by Congress to give the states as much discretion as possible.[49] This view is reasonable, given the burden the state is undertaking when it extends its authority into the reservations.

Montana

The disclaimer is contained in its Constitutional Ordinance No. 1, Section 2. Under the law of the state the people must change the constitution; however, this has not prevented the state from acting. Following the Washington view, the Montana courts, in *McDonald* v. *District Court*,[50] held that a constitutional amendment is not necessary. According to the Montana and Washington courts, all that Congress meant by Section 6 is that the people commit themselves in some binding fashion; and it is a question of state law as to whether this means proceeding by means of a constitutional amendment.

To date, the state has extended jurisdiction only over the Flathead Indian Reservation.[51] This jurisdiction is restricted to criminal matters.[52] The rest of the Montana statute allows other tribes to consent to criminal and/or civil jurisdiction, with a requirement that the relevant county commissioners consent also.[53] A further provision allows a tribe that has consented to obtain retrocession after two years.[54]

With respect to the Flathead Reservation the jurisdiction is believed to be concurrent with the tribe.[55]

New Mexico

The disclaimer is contained in Article 21, Section 2. To change the constitution the legislature must submit the proposal to the people.[56] In 1969 an amendment to the disclaimer was proposed by a constitutional convention, but it was rejected in a popular election the same year.[57] Since this election there has been no attempt to assert jurisdiction pursuant to Public Law 280.

The state claims criminal jurisdiction over the Indians for the offenses of murder, manslaughter, assault with intent to kill, arson, burglary, and larceny.[58] This legislation is invalid since there was no congressional authorization for it.[59] So far there have been no court tests of the validity of this provision.

The state is seeking a declaratory judgment in federal court against the Sangre De Christo Development Company, Inc., and the United States, declaring that it has jurisdiction to regulate various aspects of a subdivision project located on lands leased from the Pueblo of Tesuque.[60] The state is seeking to apply state laws relating to sale and consumption of alcohol, property and gross receipt taxes, land subdivision controls, water supply and sewage disposal, building construction and promotional advertising. This suit, if successful, will frustrate to a large degree federal policy designed to make Indians economically sufficient. The Supreme Court has been careful to preserve this policy. *Warren Trading Post Co.* v. *Arizona Tax Commission*.[61]

The state can exercse jurisdiction only as Congress provides. The state has jurisdiction with respect to alcoholic beverages pursuant to federal law,[62] and the state can tax a non-Indian lessee of Indian lands, assuming such is the case here.[63] The remaining regulations cannot be applied unless the Secretary of the Interior has made provision. Public Law 280 clearly specifies that it does not authorize the "encumbrance or taxation of any property belonging to any Indian tribe".[64] As discussed above, the Secretary can make applicable land-use regulations,[65] and 25 U.S.C. Section 231 authorizes the Secretary to allow states to enforce health and sanitation laws.

Unless this authority has been so utilized the state has no jurisdiction over the Indians on their lessees. A contrary result would arguably constitute an encumbrance on the land. A Washington case, *Snohomish County* v. *Seattle Disposal Co.*,[66] illustrates the problem. In this case the defendant leased land from the Tulalip Indian Tribe for a sanitary land fill. The court ruled that the county had no jurisdiction to require a conditional use permit as it was an encumbrance. Admittedly, the Washington court used a broad definition of encumbrance,[67] but the court did follow Supreme Court pronouncements that

such words should be interpreted broadly and in favor of the Indians for whom such legislation is passed.[68] Application of land use controls can be deemed an encumbrance because it limits the use to which the land can be put. The state cannot regulate the lessee either, because this would only be an indirect attempt to do what cannot be done directly.

To allow New Mexico to apply its land-use controls would restrict the uses to which the Indians can put their land.[69] Congress has provided a mechanism for the application of such laws. The only way the state can apply these land-use controls is if the area director has elected to make them applicable by provision in the lease, because New Mexico has not obtained jurisdiction pursuant to Public Law 280.[70] No other method is permissible or effective.

Not to be intimidated by the state, the Pueblo of Sandia have filed in federal district court seeking declaratory relief.[71] They are seeking a declaration that the state has no jurisdiction to tax or regulate its operation. The outcome will reflect the problems and analysis presented above with respect to the state's claim.[72]

North Dakota

The disclaimer is contained in Article XVI, Section 203 of the State Constitution. It was amended in 1965 to authorize the legislature to take such jurisdiction as Congress grants. The legislaton passed pursuant to Public Law 280 authorizes the state to assume civil jurisdiction over a tribe or an individual, if such tribe or individual consents.[73] It is unclear if this legislation authorizes concurrent state and tribal jurisdiction. Possibly an individual or tribe can condition their consent so that concurrency is the end result.

So far no tribe has given its consent.[74] An unknown number of individuals have signed statements accepting state civil jurisdiction.[75] I have no information on how these statements are obtained, or where they are stored. The Attorney General's office could not specify the number of individuals involved, which indicates an absence of any central filing procedure. If this, indeed, is the case, obvious questions of proof come to mind.[76]

Oklahoma

The disclaimer is contained in Article I, Section 3 of the Constitution. There has been no attempt to amend it, nor any legislation passed pursuant to Public Law 280.

The state has been given extensive jurisdiction pursuant to a variety of other federal statutes. The degree of jurisdiction is so great that cases have held the state to be acting in the capacity of a federal agency.[77]

South Dakota

The disclaimer is contained in Article 22 of the Constitution. The state attempted to take jurisdiction over all civil and criminal matters within Indian country pursuant to Public Law 280.[78] The Governor was given the power to assume the jurisdiction by proclamation.[79] In 1965 this legislation was submitted to a referendum and defeated.[80]

Since that time no further action has been taken, nor is any contemplated.

Utah

The disclaimer is contained in Article III, Section 2 of the Constitution. It has not been amended.

The state passed legislation in 1971 to obtain criminal and civil jurisdiction pursuant to the 1968 amendment of Public Law 280. [81] The changes incorporated in the 1968 Act [82] seem to eliminate the necessity for an amendment of the disclaimer. This requirement has so far been successfully avoided in Washington and Montana, so this change may be of little consequence. What it does do, though, is eliminate potential conflict. The Act specifies that consent is given to amend where "necessary" the State Constitution. Presumably it is left for the state to decide if such an amendment is necessary.

Consistent with the 1968 Act, the Utah statute requires the Indians to consent to the extension of jurisdiction.[83] Provision is also made for retrocession.[84] The latter is arguably unnecessary, but its inclusion forestalls the argument that state machinery is needed before there can be a retrocession of jurisdiction to the federal government. Under the state statute, retrocession is automatic on receipt by the Governor of a tribal council resolution, or if a majority of the tribal members so request.[85] The final arbiter of whether the state takes jurisdiction is the Governor.[86]

Washington

See Appendix C herein.

THE SECTION 7 STATES

This section of Public Law 280 gives the consent of the United States to those states without jurisdiction to assume it by affirmative legislative action.[87] This section applies to those states without any disclaimer provision.

As first enacted, Section 7 gave the states the option of action, or not, without regard to the Indians themselves. This procedure provoked complaints by the Indians which led to the 1968 change making consent a prior condition.[88]

Colorado

The state has taken no action to assume jurisdiction under Public Law 280. The question first came up in *Whyte* v. *District Court of Montezuma County.*[89] This case involved an action for divorce brought in state court by the wife. Both spouses were enrolled members of the Ute Reservation and were married there. The court indicated that the state has no jurisdiction in the absence of congressional authority. There was no constitution disclaimer, but this was not controlling as the test is whether Congress has authorized the exercise of jurisdiction. In this case Colorado had not complied with Public Law 280; and as was confirmed in *Kennerly* v. *District Court,*[90] such compliance is a condition precedent.

Connecticut

The state exercises no jurisdiction pursuant to Public Law 280. The single reservation, Pequot, was established by the state,[91] and is subject to state supervision. The supervision is exercised through the welfare department.[92]

The state statute is comprehensive, and has been modified to fit changing needs. The reservation is declared to be for the exclusive benefit of the Indians,[93] and the statute defines Indian.[94] It is the duty of the welfare commissioner to enforce these provisions.[95]

The original source of this jurisdiction is not ascertainable from the statutes. The likely source is the original power of Connecticut to deal with Indians before it became part of the United States.

Florida

The state has assumed criminal and civil jurisdiction.[96] The exercise of jurisdiction is exclusive.[97]

Idaho

The state exercises civil and criminal jurisdiction with respect to seven subject areas.[98] These subject areas are: (a) compulsory school attendance; (b) juvenile delinquency and youth rehabilitation; (c) dependent, neglected and abused children; (d) insanities and mental illness; (e) domestic relations; (f) public assistance; and (g) operation of motor vehicles.

Any further assumption of jurisdiction, criminal or civil, is made subject to tribal consent.[99] After 1968 this requirement was imposed by the federal statute, of course.

The Idaho statute has been declared to confer jurisdiction that is concurrent with that exercised by the federal government and tribes.

Whether there has been any extension of jurisdiction or requests for retrocession in specific cases is unknown.[1]

Iowa

The state exercises both criminal and civil jurisdiction.[2] The legislative enactments involved were passed in 1959 and 1967, after the enactment of Public Law 280, so the state claim is presumptively valid. Interestingly, the state does not feel it necessary to rely on this fact for support.[3] The Iowa Code provides:

"Every person, whether an inhabitant of this state or any other state . . . or of a territory or district of the United States, is liable to punishment by the laws of this state . . . except where it is by law cognizable exclusively in the courts of the United States."[4]

By its own terms this power of the state does not extend into Indian country because offenses committed there are by law exclusively a federal matter, but in Iowa the reservation was established by the state.[5]

In 1896 jurisdiction was given to the United States, which accepted it.[6] This transfer of jurisdiction contained a reservation by the state of certain rights and powers; such as jurisdiction to service process and enforce the criminal

law on the reservation.[7] In 1904 the land was patented to the United States subject to these same restrictions.

This legislation raises serious questions as to the validity of the states' claim to have jurisdiction with or without Public Law 280 as a basis. The Act tendering jurisdiction in 1896 specifies that the rights retained apply to land "now held or hereafter acquired". Even assuming the state has jurisdiction with respect to the lands granted by them, this does not mean it has jurisdiction over trust lands given by the United States. Public Law 280 is not supportive as it clearly denies to the states the right to tax the Indians or encumber their land. The underlying assumption by the state seems to be that the federal government is estopped to deny Iowa the right to act in this fashion.[8] Without an extended discussion, it is safe to say estoppel arguments are not persuasive to courts when applied against the federal government.[9]

The state has at most civil and criminal jurisdiction over the Sac and Fox Reservations.[10] Claims to be able to exercise powers of eminent domain and taxation are unfounded. The state had no original authority to treat with the Indian tribes under the United States Constitution and they cannot bootstrap themselves just because the state once held the land in trust.

Kansas

The state has jurisdiction only over offenses committed by or against Indians on Indian reservations.[11] This is not jurisdiction pursuant to Public Law 280.

The grant of jurisdiction is exclusive.[12] The legislation is self-executing.

Louisiana

The state exercises no jurisdiction over Indians pursuant to Public Law 280, or any other federal statute. The exceptions to those are those discussed above, namely, enforcement of compulsory attendance,[13] and land-use controls.[14]

Maine

The state exercises no jurisdiction pursuant to Public Law 280. It does exercise extensive jurisdiction pursuant to state law.[15] The reservations are under state control because of the historical development of the state. In 1820 the state agreed to assume treaty obligations executed by the Commonwealth of Massachusetts before establishment of the Federal Union. Prior to 1966 the Indians were under the supervision of the State Department of Health and Welfare. Since that time a Department of Indian Affairs was established.[16]

Michigan

The state exercises no jurisdiction pursuant to Public Law 280.[17] Like Maine, this state regulates Indians under state law. Indians can sue or be sued in any court.[18] There is no indication of state power over offenses committed on reservations, and Indians are deemed exempt from the game laws.[19]

Mississippi

The state exercises no jurisdiction pursuant to Public Law 280. All reservations are under federal control.[20]

New York

As indicated above, the state exercises criminal and civil jurisdiction pursuant to a federal statute.[21]

Nevada

The state exercises criminal and civil jurisdiction pursuant to Public Law 280.[22] The validity of the state law was tested in court and upheld.[23] In the same case (*Davis*) an earlier statute was struck down as it was enacted before the effective date of Public Law 280.[24]

Under the Nevada law, the effective date of the assumption of jurisdiction is ninety (90) days after July 1, 1955. Prior to the end of the ninety days, the Board of County Commissioners can petition the Governor to exclude the area of Indian country within their county from the operation of the statute; and the Governor by proclamation honors that petition.[46] At a later time this exclusion can be withdrawn.[26]

In the *Davis* case there had been an attempted murder of a non-Indian by two enrolled members of the Pyramid Lake Paiute Tribe of Indians within the exterior boundaries of the Pyramid Lake Reservation. The court held that

exclusive jurisdiction of the offense remained vested in the federal district court because the County Board of Commissioners for the relevant county had petitioned the Governor for exclusion of the Pyramid Lake Indian Reservation. The court rejected the argument that the power of the Governor to accept the petition was an unconstitutional delegation of legislative power.[27]

Pursuant to the authority of Nevada Revised Statutes 41.430(2), several counties have petitioned the Governor for exclusion so that the federal government retains jurisdiction. The counties are Clark (entire county), Churchill (entire county), Mineral (entire county), Lyon (entire county), Pershing (entire county), Humboldt (McDermitt and Summit Lake Reservations only), Elko (Duck Valley Reservation at Owyhee only), and Washoe (Pyramid Lake Reservation only).[28]

North Carolina

The state exercises no jurisdiction pursuant to Public Law 280.

Rather, as a result of the history of the Eastern Band of Cherokee Indians, these Indians are deemed citizens of the state. The Eastern Band of Cherokee Indians was formed from a remnant of the Cherokees who remained in the state after the rest of the tribe was forced into the West. By treaty in 1835 it was provided that those Indians who remained behind could become citizens of the states wherein they resided.[29] The state courts indicate that this separation from the tribe did not destroy the duty imposed on the federal government to act in a guardianship capacity; but the courts treat this duty as applying to property rights and economic welfare, not to jurisdiction of courts.[30] Whenever the United States Supreme Court has considered the matter, it has concluded that this tribe is subject to the laws of North Carolina[31] The relevant state statutes are found in sections 71–1 and 71–7.[32]

The state officials agree that with respect to all matters concerning Indian lands the federal courts have exclusive jurisdiction.[33] This grows out of the guardianship duty owed by the federal government.

At present the federal government takes the position that the exercise by the state of criminal jurisdiction is only concurrent as between the state and federal governments.[34] So far no dispute has arisen as to this issue, and the state seems willing to accept it.[35] In the absence of a showing of discretionary treatment afforded the Indians in state courts, it is unlikely the federal government will press its claim.

South Carolina

The state exercises no jurisdiction pursuant to Public Law 280. The sole reservation, the Catawba, was terminated from federal supervision in 1962.[36] The reservation is now under state control.[37]

Texas

The state exercises no jurisdiction pursuant to Public Law 280. The state does exercise jurisdiction over the Indians, though. The basis is unclear, but seems to be involved with the special history of the Republic, and the State of Texas.[38]

The legislative history behind Public Law 280 indicates that Texas was one of several states seeking to legislate with respect to Indians.[39] This casts doubt on the state's ability to act without congressional consent; at the very least, Congress had doubts.

In 1967 a state law was enacted authorizing the acceptance of trust responsibilities over the Tiqua Indian Tribe.[40] The assumption was made contingent on congressional and tribal consent. Clearly, this would be more than is contemplated by Public 280. The reaction of the Indians is unknown.

Virginia

The state exercises no jurisdiction pursuant to Public Law 280. The reservations were established by the state.[41] The state exempts from Game Department license requirements any Indian who habitually resides on a reservation.[42]

Wyoming

The state exercises no jurisdiction pursuant to Public 280. The question has arisen at least twice, and the fact that the state had not accepted jurisdiction was acknowledged by the court.[43]

FOOTNOTES

[1] 25 U.S.C. Sec. 232, 233 (criminal and civil jurisdiction conferred on New York); 18 U.S.C. Sec. 3243 (jurisdiction conferred on Kansas over offenses); 25 U.S.C. Sec. 231 (Secretary of the Interior given authority to allow state officials to enforce education, health and sanitation laws); 25 C.F.R. Sec. 1.4 (Secretary given authority to adopt state and local land-use controls).

[2] New York: 25 U.S.C. Sec. 232 (offenses), July 2, 1948, Ch. 809, 62 Stat. 1224; 25 U.S.C. Sec. 233 (civil), September 13, 1950, Ch. 845, Sec. 1, 64 Stat. 845. Kansas: 18 U.S.C. Sec. 3243 (offenses).

[3] 1948 U.S.C.A. 2284.

[4] 1950 U.S.C.A. 3731.

[5] 18 U.S.C. Sec. 3243, June 25, 1945, Ch. 645, 62 Stat. 827.

[6] 45 Stat. 1185, 25 U.S.C. Sec. 231.

[7] 25 C.F.R. Sec. 33.3.

[8] January 1, 1972 Revised, published in 30 Fed. Reg. 7520 (1965).

[9] See Appendix E (25 C.F.R. Sec. 1.4).

[10] 30 Fed. Reg. 7520 (1965), Fed. Reg. Doc. 65-6028.

[11] 30 Fed. Reg. 8722 (1965).

[12] *Ibid.* at 9699.

[13] *Ibid.* at 11285 (notice to area directors).

[14] 18 U.S.C. Sec. 1162; 28 U.S.C. Sec. 1360.

[15] Public Law 90-203; 85 Stat. 688.

[16] See Appendix E (Public Law 280).

[17] See Appendix E (Resolution of Alaska).

[18] Letter from the Office of the Attorney General of Alaska, October 11, 1972.

[19] Whether the reservations are indeed abolished as a sovereign body makes a difference, and depends ultimately on congressional intent. The Settlement Act raises more questions of purpose and meaning than any legislation in this area, and it will be some time before all the complications are resolved.

[20] December 8, 1972, signed Jerry Littman, Chief, Information Services.

[21] See Appendix E (18 U.S.C. Sec. 1162; 28 U.S.C. Sec. 1360).

[22] Letter, October 31, 1972, Edward Branchfield, Legal Counsel for Oregon.

[23] See Appendix E (letter from the Oregon police).

[24] See Appendix E (Public Law 280).

[25] See Appendix E (Secretary's acceptance of retrocession).

[26] 187 Nebraska 35; 187 N.W.2d 305.

[27] 187 Nebraska 48, 187 N.W.2d 298.

[28] 460 F.2d 1327 (8th Cir. 1972).

[29] 25 U.S.C. Sec. 1323(a).

[30] Letter, November 27, 1972, David Mebane, Attorney General's Office.

[31] The relevant states are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington.

[32] Act Admitting California, September 9, 1850, 9 Stat. 452, Ch. 50.

[33] 228 U.S. 243 (1913).

[34] 69 Cal. 255.

[35] 104 U.S. 621 (1881).

[36] 118 U.S. 375 (1886).

[37] Act of Congress, May 3, 1875.

[38] 358 U.S. 217 (1959).

[39] *Ibid.* at 219.

[40] *Ibid.* at 220.

[41] Sullivan, John, "State Civil Power Over Reservation Indians", 33 *Montana Law Review*, 291.

[42] 400 U.S. 423 (1971).

[43] The court's reference to Sec. 7 is correct. Agreed, Montana is a Sec. 6 state but that section only gives consent to the states to assume jurisdiction as provided by the rest of the statute.

[44] 400 U.S. at 425.

[45] Most disclaimer clauses are in the following form: Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

[46] A.G.O. No. 60-63.

[47] Arizona Revised Statutes 36-1801, effective February 9, 1967 (air); Arizona Revised Statutes 36-1865, effective March 16, 1967 (water).

[48] A.G.O. No. 60-30.

[49] Statement by George Dysart, Solicitor's Office, Portland, Oregon.

[50] 496 P.2d 78 (Montana 1972).

[51] This information from Cranston Hawley, Tribal Judge, Fort Belknap Reservation, Montana.

[52] Revised Code of Montana, 1963, 83-801 *et seq.*

[53] *Ibid.* 83-802.

[54] *Ibid.* 83-803.

[55] Parker, Alan, "State and Tribal Courts in Montana: The Jurisdictional Relationship", 33 *Montana Law Review* 277.

[56] New Mexico Constitution, Article 19, Sec. 14.

[57] Letter, October 4, 1972, Office of Attorney General, Thomas Dunigan, Assistant Attorney General.

[58] New Mexico Statutes Annotated 41-21-7.

[59] *Davis* v. *Warden*, Nevada State Prison, 88 Nevada Advisory Opinion 118 (1972).

[60] Letter, October 4, 1972, Office of the Attorney General.

[61] 380 U.S. 685 (1965).

[62] 18 U.S.C. Sec. 1161, August 15, 1953, Ch. 502, Sec. 2, 67 Stat. 586.

[63] Oklahoma Tax Comm. v. Texas Co., 336 U.S. 342.

[64] 28 U.S.C. Sec. 1360(d).

[65] 25 C.F.R. Sec. 1.4. As previously indicated, this authorization has been delegated to the area directors.

[66] 70 W.2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967).

[67] The court defined an encumbrance as any burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee.

[68] Squire v. Capoeman, 351 U.S. 1 (1956).

[69] Not all courts accept the view that land use regulations are an encumbrance, feeling rather that it is a legitimate exercise of the policy power of the state. See 8 *McQuillin Municipal Corporations*, Sec. 25.10 (1965).

[70] See notes 11 and 12.

[71] Letter, October 4, 1972, Attorney General's Office.

[72] The result should be the same, i.e., the state has no jurisdiction. Unfortunately, gambling and its incident operations could be regulated under some theory of the state's paramount interest in its citizens' welfare. Such a result would be due more to a line of cases treating gambling as bad per se, than a correct application of the principles of law involved in the dispute.

[73] North Dakota Century Code Annotated 27.19.

[74] Letter, October 11, 1972, Attorney General's Office, Paul Sand, First Assistant.

[75] *Ibid.*

[76] It is not clear how these statements are kept. It is unlikely each Indian carries a card, or has a tattoo on his forehead.

[77] Cohen, Felix S., *Handbook of Federal Indian Law*, p. 119, See also Ch. 23, Sec. 3-10.

[78] South Dakota Revised Statutes 1-1-18, Ch. 467, Laws of 1963.

[79] South Dakota Revised Statutes 1-1-21.

[80] 201,389 against, 58,289 for; letter, September 20, 1972, Office of Attorney General, Walter Andre, Assistant.

[81] Utah Code 63-36-9 *et seq.* (1971).

[82] Public Law 90-284, Title IV, Sec. 404, 82 Stat. 79, codified in 25 U.S.C. Sec. 1324 (see Appendix).

[83] Utah Code Annotated 63-36-10.

[84] *Ibid.* 63-36-15.

[85] *Ibid.*

[86] *Ibid.* 63-36-11.

[87] Ch. 505, Sec. 4, 67 Stat. 589, historical note (see Appendix).

[88] Public Law 90-284, Title IV, Sec. 403, 82 Stat. 79.

[89] 140 Colorado 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829.

[90] 400 U.S. 423 (1971).

[91] Letter, October 16, 1972, Office of Legislative Research, Richard E. Neier, Senior Research Specialist.

[92] Connecticut General Statutes Annotated 47-60 *et seq.*; 47-60 (conveyances of land by Indians void) (1949); 47-61 (limits application of adverse possession) (1949); 47-63 (definitions (1961); 47-64 (use of reservations) (1961); 47-65 (duties of welfare commissioner) (1961); 47-66 (tribal funds) (1961).

[93] *Ibid.* 47-64.

[94] *Ibid.* 47-63.

[95] *Ibid.* 47-65.

[96] Florida Statutes Annotated 258.16, derivation laws of 1961, Ch. 61-252, Sec. 1 & 2.

[97] *Ibid.* Ch. 61-252, Sec. 2.

[98] Idaho Code 67-5101.

[99] *Ibid.* 67-5102.

[1] Failed to receive an answer to correspondence directed to the Governor and the Attorney General.

[2] In 1959 the state legislature provided for law enforcement on the Sac and Fox Reservations by authorizing salary and expenses of a deputy sheriff for the relevant county (Sec. 337.12, Code 1971). In 1967 the legislature enacted Sec. 1.12 Iowa Code Annotated which provides for the enforcement of the civil laws of the state on the reservation.

[3] Letter, October 26, 1972, Department of Justice, Elizabeth Nolan.

[4] Iowa Code Annotated Sec. 753.1.

[5] It is not so clear if the state set this reservation up, or whether the Indians purchased the land themselves. Cohen, *Federal and State Indian Reservations.*

[6] Ch. 110, Acts of the 26th General Assembly.

[7] Sec. 3, Ch. 110. Nothing contained in this Act shall be so construed as to prevent on any of the lands referred to in this Act the service of any process issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state, or to prevent the establishment and maintenance of highways and the exercise of the rights of eminent domain under the laws of this state over lands now held or hereafter owned by or held in trust for said Indians, or to prevent the taxation of said lands for state, county, bridge, county road, and district road purposes * * *

[8] See *Vermillion* v. *Spotted Elk*, 85 N.W.2d 432 (N.D. 1957). An analysis of later cases shows this case to be discounted whenever the question comes up. See especially 164 N.W.2d 891.

[9] This is borne out in the area of Indian law by the cases beginning with *Williams* v. *Lee* and ending with *Kennerly*.

[10] There is room for dispute as to the existence of criminal jurisdiction. Sec. 7 requires affirmative legislative commitment (*Kennerly*), though the language preceding this allows the state to use "such manner" as is appropriate. In Iowa, the only legislative action has been the provision for paying an additional deputy sheriff. Whether this is enough of a commitment makes an interesting question.

[11] 18 U.S.C. Sec. 3243, June 25, 1948, Ch. 645, 62 Stat. 827.

[12] *Ibid.* "To the same extent as its courts have jurisdiction over offenses committed elsewhere within the state."

[13] 25 C.F.R. Sec. 33.3.

[14] 25 C.F.R. Sec. 1.4.

[15] Maine Revised Statutes Annotated 22, Sec. 4701 *et seq.*

[16] Cohen, *Federal and State Indian Reservations.*

[17] Letter, October 10, 1972 Attorney General's Office, Curtis Beck, Assistant.

[18] Michigan Statutes Annotated 27A.2011. In general see *Callaghan's Michigan Civil Jurisdiction*, Indians, Sec. 2.

[19] *Ibid.* 13.1355(2); 13.1340 (preserve hunting privileges); 13.1623 (exempt from fishing laws).

[20] What plans, if any, Mississippi has in this regard are unknown as the state has not responded to inquiries.

[21] The state law is found in Art. 25, Sec. 2 of *McKinney's Consolidated Laws of New York.*
[22] Nevada Revised Statutes 41.430.
[23] *Davis* v. *Warden, Nevada State Prison,* 88 Nevada Advisory Opinion 118 (July 21, 1972).
[24] Nevada Revised Statutes 194.030, *Davis,* page 3, note 4.
[25] *Ibid.* 41.430(2).
[26] *Ibid.* 41.430(3).
[27] *Davis,* page 4.
[28] Letter, September 27, 1972, Office of Attorney General, Julian Smith, Jr., Deputy Attorney General.
[29] Treaty of New Echota, Art. XII.
[30] State v. McAlhaney, 220 N.C. 387, 17 S.E.2d 352.
[31] Utah Power and Light Co. v. United States, 243 U.S. 389 (1916); *Eastern Band of Cherokee Indians* v. *United States and Cherokee Nation,* 117 U.S. 288 (1886).
[32] Statutes of North Carolina, Sec. 71–1 (subject to the rights and duties of all citizens).
[33] Letter, October 5, 1972, Department of Justice Ralph Moody, Special Counsel to Attorney General.
[34] *Ibid.*
[35] Letter, October 5, 1972, Attorney General's Office, Kenneth Fish, Legal Assistant.
[36] 25 U.S.C. Sec. 931 *et seq.,* Public Law 86–732, Sec. 1, 73 Stat. 592.
[37] Cohen, *Federal and State Indian Reservations.* See also 25 U.S.C. Sec. 935.
[38] The State Attorney General was not exactly helpful, claiming a state statute restricted his giving of legal assistance.
[39] 1953 U.S.C.A. 2409.
[40] Texas Statutes Annotated, Art. 5421Z–1.
[41] Cohen, *Federal and State Indian Reservations.*
[42] Code of Virginia (1952), Sec. 29–52.
[43] Letter, October 12, 1972, Attorney General's Office, Fred Reed, Assistant Attorney General.

Appendix E

Public Law 280 and Related Documents

[H.R. 8347, 93d Cong., 1st Sess.]

BILL To amend section 1326 of the Civil Rights Act of April 11, 1968 (82 Stat. 80; Public Law 90–284), relating to State civil jurisdiction in actions to which Indians are parties, and State jurisdiction over offenses committed by or against Indians in Indian country

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1326 of the Civil Rights Act of April 11, 1968 (82 Stat. 80; Public Law 90-284), is hereby amended to add the following thereto:

"State jurisdiction heretofore acquired over Indian tribes, bands, or groups which were and still are duly recognized as Federal Indian tribes by the United States Government who were unilaterally brought under Public Law 280 (Act of August 15, 1953; 67 Stat. 589, as amended August 24, 1954, 68 Stat. 795) without having previously consented thereto are hereby granted the right to remove themselves from all or such measure of the State jurisdiction conferred by said Public Law 280 as they are agreeable to: *Provided,* That such tribe, band, or group initiates positive action to evidence their unwillingness to consent to the continuation of such jurisdiction, in whole or in part, in the form of a special election by a majority vote of all eligible adult Indians voting at such election held for that purpose. The Secretary of the Interoir shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults. Following said special election the tribe, band, or group of Indians involved shall notify the appropriate secretary of state and the Secretary of the Interior of the results of any such election within ninety days thereafter.

"The right of removal from State jurisdiction hereby conferred upon any tribe, band, or group shall not require the consent of the appropriate State if they desire total removal therefrom, but if they desire to be selective by giving their consent to a limited State jurisdiction over certain areas of criminal and civil matters in Indian country, then the consent of the appropriate State must first be obtained for anything less than total transfer from the State to the United States Government.

"In the event that any such tribe, band, or group of said federally recognized Indians sees fit to exercise the rights conferred by this amendment, the United States Government is hereby authorized to resume jurisdiction following their removal from the jurisdiction of the State.

"Any removal action by a tribe under this amendment will not become effective for a period of one year following notification thereof to the appropriate secretary of state, and the Secretary of Interior."

25 C.F.R. 1.4 (Rev. Jan. 1, 1972) 30 F.R. 7520 1965 June 9.

(a) Except as provided in paragraph (b) of this section * * * none of the laws, ordinances, codes, resolutions, rules or other regulations of any state or political subdivision thereof limiting zoning or otherwise governing, regulating or controlling the use or development of any real or personal property * * * shall be applicable to any such property leased from or held or used under agreement and belonging to any Indian or Indian Tribe * * * that is held in trust by the U.S. or is subject to a restriction against alienation imposed by United States.

(b) The Secretary of Interior * * * may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances * * * referred to in paragraph (a) * * * as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. When deciding whether to adopt these laws etc. secretary can consult with Indians and may consider use of property in locale 7 (30 F.R. 7520, June 9, 1965).

Executive Order 11435 Nov. 21, 1968.

Designating the Secretary of the Interior to accept retrocession can be done by the Secretary without approval, ratification, or other action of the President or any other officer of the United States. (Publication in the Federal Register necessary. Retrocession of criminal jurisdiction only after consultation with the Attorney General).

Nebraska Omaha Reservation Retrocession

Pursuant to authority vested in the Secretary of the Interior by Executive Order No. 11435, I hereby accept, as of 12:01 A.M., E.S.T., October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation of Thurston County, Nebraska, as follows: ----------
(description of boundaries)
except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by legislative resolution No. 37.

House Joint Resolution No. 72, in the Legislature of the State of Alaska

Relating to a requested amendment of Public Law 85–615 which would give the Metlakatla Indian Community criminal jurisdiction over minor offenses concurrent with the state's jurisdiction.

Be it resolved by the Legislature of the State of Alaska:

Whereas since 1944 the community of Metlakatla has had its own magistrate and police force with certain limited criminal jurisdiction pursuant to its constitution adopted under federal law; and

Whereas in 1958, the United States Congress passed Public Law 85-615 extending state criminal jurisdiction over all the Indian territory of Alaska which had previously been under territorial law; and

Whereas the community of Metlakatla was unaware of the change in the law until years later and continued acting under its local police powers; and

Whereas Public Law 85–615, by delegating total criminal jurisdiction to the state, works a great hardship on this community because the state police have limited manpower making it impossible for them to deal effectively with minor criminal offenses in the somewhat isolated community of Metlakatla; and

Whereas Public Law 85–615 destroyed the effectiveness of the local police and judiciary and created a gap in law enforcement in the area; and

Whereas an amendment giving this community concurrent criminal jurisdiction is not without precedent in laws dealing with the Indians in that a similar arrangement exists between the state and Indian communities in Idaho and there are specific exceptions to 18 U.S.C. 1162;

Be it resolved that the Congress of the United States is respectfully urged to amend Public Law 85–615 to give the community of Metlakatla concurrent criminal jurisdiction over minor offenses.

Copies of this Resolution shall be sent to the Honorable Lyndon B. Johnson, President of the United States; the Honorable Stewart L. Udall, Secretary of the Interior; the Honorable John W. McCormack, Speaker of the House; the Honorable Carl Hayden, President Pro Tempore of the Senate; the Honorable Wayne N. Aspinall, Chairman of the House Interior and Insular Affairs Committee; the Honorable Henry M. Jackson, Chairman of the Senate Interior

and Insular Affairs Committee; and to the Honorable E. L. Bartlett, and the Honorable Ernest Gruening, U.S. Senators; and the Honorable Howard W. Pollock, U.S. Representative, members of the Alaska delegation in Congress.

MAY 16, 1972.

Mr. OWEN PANNER,
Attorney at Law,
1026 Bond St.,
Bond, Oreg.

DEAR MR. PANNER: This letter shall constitute an agreement of understanding with the Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon concerning the deployment of State Police at or near the Kah-Nee-Ta recreational facilities for the purpose of law enforcement and maintenance of peace. The State Police will assist the Tribal Council along the lines mentioned in your letter to the Attorney General dated March 16, 1972. The State Police will be called upon to assist only in emergency situations which are beyond the capacity of the Tribal Police and where specifically requested by the Tribal Police. State Police officers will in their discretion arrest any persons who are not members of the Confederated Tribe and who have violated the state law. It is understood that the State Police have authority under state law to arrest Indians and non-Indians alike who are not members of the Confederated Tribes of the Warm Spring Reservation.

It is further understood that the Tribal Council will arrange to have the following officers who are stationed near the Reservation area deputized with Deputy Special Officer commissions from the U.S. Department of Interior, Bureau of Indian Affairs, which would authorize them to enforce tribal regulations. However, as a matter of policy the State Police will not exercise this authority, but would rather leave this responsibility to the Tribal Police. The purpose of deputizing State Police is that in cases where doubt exists as to an offender's identity, the State Police will be empowered to take the offender into custody and deliver him to the Tribal Police headquarters for identification and turn him over to the appropriate jurisdiction. The State Police officers are: 2nd Lt. Laidum W. Brockway, Sgt. Jackie L. Crisp, Cpl. LeRoy Carstensen, Troopers Elmer L. Wulf, Russell D. Wymors and Wayne A. Lee.

In addition, the Tribal Council will make arrangements for prompt deputization of other State Police officers called on a scene where heavy commitment is requested of the State Police by the Tribal Council.

If these conditions are agreeable to the Tribal Council, I would appreciate your advising me with a copy to the Attorney General.

Yours very truly,

HOLLY V. HOLCOMB, *Superintendent,*
Department of State Police,
Salem, Oreg.

FOOTNOTES

CHAPTER 1.—A SHORT HISTORY OF FEDERAL POLICY VACILLATION TOWARDS INDIANS

[1] U.S. (5 Pet.) 1 (1831).
[2] U.S. (6 Pet.) 515 (1832).
[3] 25 U.S.C. Sec. 71 (1964).
[4] Commager, Henry, *Documents of American History, 7th ed.,* (New York: Appleton-Century-Crofts, 1963), at 260–61.
[5] *Ibid.* at 556.
[6] *Hearings Before the Committee on Indian Affairs,* U.S. Senate Committee on Indian Affairs, Feb. 27, 1934, Senate 2755, at 16.
[7] F. Supp. 399 (1938).
[8] 48 Stat. 984, 25 U.S.C. Sec. 461 (1934).
[9] Comments of Rep. Howard of Nebraska, as reported in *Congressional Record,* 73rd Cong., June 14–18, Vol. 78, part II, 1934, at 11732.
[10] "Preliminary Statement" of American Indian Chicago Conference, held at the University of Chicago, June 13–20, 1961, at 15.
[11] Now codified as: 18 U.S.C. Sec. 1162, 28 U.S.C. Sec. 1360.
[12] See letter from Orme Lewis, Assistant Secretary of the Interior, *U.S. Code Cong. & Ad. News,* Vol. II, 83rd Cong., 1st Sess. (1953), at 2413–14.
[13] See Orme Lewis letter cited in footnote 12.
[14] *U.S. Code Cong. & Ad. News,* Vol. III, 91st Cong., 2nd Sess. (1970), at 4785.
[15] *See Report of Senate Committee on Interior & Insular Affairs, U.S. Code Cong. & Ad. News,* Vol. II (1953) at 2412.
[16] 53 W.2d 789, 337 P.2d 33 (1959). A law review article written earlier in 1959 by two third-year law students, Carr and Johanson, incorrectly predicted an opposite result in State v. Paul. *See* 33 *Wash. L. Rev.* 289 (1959).
[17] 368 F.2d 648 (9th Cir. 1966), *cert. denied* 387 U.S. 907.

[18] 25 U.S.C. Section 1321(b). The entire section reads thus: (b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing. Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. (Public Law 90–284, title IV, Section 401, April 11, 1968, 82 Stat. 78.)
[19] 18 U.S.C. Sec. 1162(c).
[20] For an analysis of the proposed Colville Termination bills, *see Holland,* "The Last Days—An Inquiry into the Proposed Colville Termination", in Volume II of *Studies in American Indian Law,* R. Johnson, ed., (1971).
[21] "President Johnson Presents Indian Message to Congress", *Indian Records* (March 1968) at 28.
[22] 25 U.S.C. Sec. 1326.
[23] 25 U.S.C. Sec. 1323.
[24] Senate Report 92–501, *National American Indian Policy,* December 7, 1971 (To accompany S. Con. Res. 26).

CHAPTER 2.—STATE JURISDICTION OVER INDIAN RESERVATIONS IN THE STATE OF WASHINGTON

[25] *See* R.C.W. 37.12.020–070.
[26] *See* R.C.W. 37.12.010–070.
[27] The full Section 2 (now repealed) provided: Whenever the governor of this state shall receive from the tribal council or other governing body of any Indian tribe, community, band, or group in this state a resolution expressing its desire that its people and lands be subject to the criminal and civil jurisdiction of the State of Washington to the extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservation, country, and lands of the Indian body involved in accordance with the provisions of this chapter: *Provided:* That with respect to the Colville, Spokane, or Yakima tribes or reservations, he shall not issue such proclamation unless the resolution of the tribal council has been ratified by a two-thirds majority of the adult enrolled members of the tribe voting in a referendum called for that purpose.
[28] Ch. 240, Laws of 1957, Sec. 6. Now codified as R.C.W. 37.12.060.
[29] Ch. 240, Laws of 1957, Sec. 7. Now codified as R.C.W. 37.12.070. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.
[30] See Appendix C for a complete list of governors' proclamations asserting jurisdiction over Indian reservations in Washington.
[31] R.C.W. 37.12.060.
[32] R.C.W. 37.12.070.
[33] R.C.W. 37.12.021. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the State of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in R.C.W. 37.12.060.
[34] R.C.W. 37.12.010.
[35] Art. 26, Sec. 2, *Wash. State Const.*
[36] *See* "Extent of Washington Criminal Jurisdiction Over Indians", by Carr and Johanson, 33 *Wash. L. Rev.* 289 (1958).
[37] 53 W.2d 789, 337 P.2d 33 (1959).
[38] 368 F.2d 648 (9th Cir. 1966), *cert. denied* 387 U.S. 907.
[39] 76 W.2d 645, 457 P.2d 590 (1969).
[40] 25 W.2d 652, 171 P.2d 838 (1946).
[41] 25 W.2d 652 at 659.
[42] 53 W.2d 789 at 794.
[43] The confusion as to the relevant section was not helped by the later cases. Arquette v. Schneckloth, P.2d 921 (1960) 560 W.2d 178, 351 cites Section 6 as the relevant provision, while Adams v. Superior Court, 57 W.2d 181, 356 P.2d 985 (1960) cites Section 7. Both sections were cited in Somday v. Rhay, 67 W.2d 180, 406 (1965) but only Section 6 in State v. Bertrand, 61 W.2d 333, 378 P.2d 427 (1962). The most recent case, Makah Tribe v. State, 76 to 645, 457 P.2d 590 (1969) cites both sections.
[44] *U.S. Code Cong. & Ad. News,* Vol. II (1953) at 2409, 2412.
[45] It should be pointed out that the Quinault situation poses special problems. Jurisdiction was extended to the Quinaults under a resolution to the Governor purporting to come from the Tribal Council. Governor Rosellini later determined that the tribal resolution was defective and proclaimed a return of jurisdiction over the Quinaults to the United States. Each side regarded the other as having jurisdiction over the Quinaults and neither enforced any law on the reservation. The *Gallagher* suit was brought in an attempt to resolve this situation. For an analysis of this problem, see Newman "Jurisdiction Over Indians and Indian Lands in Washington", in Vol. I of *Studies in American Indian Law,* R. Johnson, ed. (1970).
[46] 368 F.2d 648 (9th Cir. 1966) at 656.
[47] This figure is the sum of acreage of the ten reservations that have elected state jurisdiction plus the non-trust areas of the non-electing reservations. Acreage on the different reservations in Washington is shown in Appendix D.
[48] 125 N.W.2d 839 (1964).
[49] 76 W.2d 485 (1969).

[50] The word-magic that is required to arrive at the conclusion that this partial assumption of jurisdiction is *not* a partial assumption of jurisdiction is made obvious when one reads the April 1972 opinion of the Washington Attorney General (A.G.O. 1972, No. 9), when he says that "partial jurisdiction . . . was assumed by the 1963 Act."

[51] Cause No. 2732, U.S. District Court, Eastern District of Washington, Southern Division Opinion filed Dec. 1, 1972.

[52] A recent study by M. H. Von Broembsen and Hadden of Washington State University concerned the nature of law and justice systems in Ferry and Okanagon Counties as it relates to the Colville Indian Reservation. The investigators sought to answer two questions: (1) whether the arrest rate for Indians increases considerably during "per capita" time, and that fines for offenses increases at this time (thus providing a source of revenue for the county treasury), and (2) whether law and order is not enforced on the reservation by county and state officials. The Report of the study concludes: The data gathered from the court records do not support the hypotheses that fines increase during or just after dividend/per capita payments, but that there is weak evidence that the number (or proportion) of Indian arrests do increase. It is evident, however, that the 'quality' of law enforcement has declined over the years (at least with regard to Ferry County) and it seems apparent that very *few* arrests take place on the reservation. It is also quite clear from the opinion survey that the Indians do not think they are getting adequate protection, and that law enforcement officers do not pay attention to complaints. Generally speaking, it appears as though the Indian population is dissatisfied with law enforcement on the reservation. This is in marked contrast with the non-Indian population, who on the whole feel satisfied with law enforcement in their respective areas. There is also strong support for the establishment of an Indian police force and Indian Courts. One critic of this study concludes that the data in the study plus other published data not there considered demonstrate an even stronger case of discrimination against Indians than is shown in the conclusion to the study. Arrests of Indians, it is said, are "wholly out of proportion to their percentage of the population. This runs as high as a factor of 4½ in Okanagon County to a factor of 3.8 in Ferry County." Letter from William T. Scanlon to Gerald P. Boland, Feb. 10, 1973.

[53] The Arizona legislature recently moved to solve this problem by enactment of the following statute: Sec. 1., Title 13, Ch. 4, Art. 7, Arizona Revised Statutes is amended by adding section 13-1364 to read: 13-1364. *Indian police; powers; qualifications.* A. While engaged in the conduct of his employment any Indian police officer appointed by the Bureau of Indian Affairs or the governing body of an Indian Tribe as a law enforcement officer and holding a certificate of qualification and training from the director of the Department of Public Safety shall possess and exercise all law enforcement powers of peace officers in this state. B. Each agency appointing any Indian Police officers pursuant to this section shall be liable for any and all acts of such officer acting within the scope of his employment or authority. Neither the state nor any political subdivision shall be liable for any acts or failure to act by any such Indian police officer.

[54] Wash. A.G.O. 1972, No. 9.

[55] The Attorney General argued that if the Governor could do this, within his discretion, an incongruity would be presented. Under the 1963 Act the governor must declare state jurisdiction over an Indian reservation upon receipt of a proper petition from the governing body of the tribe, however, if the governor has discretionary power to return jurisdiction then he could "immediately or at any time thereafter" change his mind and issue a "proclamation of retrocession". Wash. A.G.O. 1972, No. 9.

[56] 45 Stat. 1185 (1929 Amended 60 Stat. 962 (1946) codified as 25 U.S.C. Sec. 231.

[57] In fiscal year 1970, 4,411 new civil type cases were reported as filed in Indian courts. Some 5,304 were filed in 1969. Nearly ¾ of the 3,089 pending civil cases at the end of fiscal year 1970 were in the courts of the Navajo area. "The Combined Tribal and Bureau of Criminal Justice Services Statistical Report F.Y. 1970", (Division of Judicial, Prevention, and Enforcement Services, Bureau of Indian Affairs) at 56.

[58] 163 U.S. 376 (1896).

CHAPTER 3.—THE REMEDY

[59] —— F. Supp. ——, Civil No. 72-56-67 (D.C.S.D. Cal. 1972). The federal court permanently enjoined the County Sheriff from interfering with tribal game wardens who had confiscated a non-Indian's firearms for violating tribal and federal ordinances about hunting on the Fort Yuma Reservation in California.

[60] Sec. 1165. *Hunting, trapping, or fishing on Indian land.* Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, pelties, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited. (Added Public Law 86-634, Sec. 2 (July 12, 1960) 74 Stat. 469.)

[61] Sec. 1853. *Trees cut or injured.* Whoever unlawfully cuts, or wantonly injures or destroys any tree growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both. (Act of June 25, 1948, Ch. 645, 62 Stat. 787.)

[62] See discussion of this case in text with footnote 51, *infra.*

LIST OF ABBREVIATIONS

Following is a list of abbreviations used throughout this document:

Ad.	Administrative
A.G.O.	Attorney General's Opinion
ante.	Above
Art.	Article
C.F.R.	Code of Federal Regulations
Cal.	California
cert. denied	Certiorari denied
Ch.	Chapter
Cir.	Circuit
Cong.	Congress/Congressional
D.C.S.D.	District Court, Southern District (Federal)
Doc.	Document
ed.	Editor/Edition
et al.	And others
F.2d	Federal Reporter, Second Series
F. Supp.	Federal Supplement
Fed Reg.	Federal Register
Ibid.	In the same place
i.e.	That is
infra	Within
In re	In the matter of
N.W.2d	North Western Reporter, Second Series
P.2d	Pacific Reporter, Second Series
Pet.	Peters
R.C.W.	Revised Code of Washington
S.Con.Res.	Senate Concurrent Resolution
Sec.	Section
Sess.	Session
Stat.	Statute
U.S.	United States Supreme Court Reports
U.S.C./U.S.C.A.	United States Code/United States Code Annotated
v.	Versus
Vol.	Volume
W.2d	Western Reporter, Second Series
Wash.	Washington
Wash. L. Rev.	Washington Law Review

STATEMENT OF JAMES B. HOVIS, ATTORNEY, YAKIMA TRIBAL COUNCIL, YAKIMA, WASH.

Mr. Hovis. I know we have some very short time in regard to this record, and I will try to be very brief in an overview of my statement.

First I would like to thank the committee for the time here today. And, secondly, I want to report to you that your staff, both minority and majority counsel, have been most generous with their time in trying to understand some of the problems that I have with S. 1, and I think that this has been very helpful to me and I hope I have been helpful to the staff.

This Indian situation is somewhat complicated because it is a little different situation than this committee deals with every day. I do not join in the remarks of Mr. Pirtle, of wanting this committee to delay action in regard to this matter.

The reason why is because the enactment of Public Law 280 of the '83d Congress has provided in the State of Washington a system of justice upon the Indian reservation that creates on a reservation a total lack of law and order.

Since the State has moved in in its assumption in 1963, we have gradually gone downhill. To now the arrests on our reservation are now some 20,000 percent less than they were in 1963.

We have plenty of law, but no order. So we cannot wait. We have already lost a decade of our young people with the State having juvenile authority and not doing anything about it. These juvenile offenders during this 10-year period are adult offenders today. It is my experience in working over 20 years in criminal work, that where you have a family that starts to go the wrong road, and you have mothers and fathers that are engaged in criminal activities, you are also going to have kids that will tend to follow criminal activities.

So, we have lost a decade of children and we are creating for ourselves a serious situation that is emerging on the Indian reservations in regard to law and order. Therefore, we would say to this committee that we do not care how bad a job on S. 1 you do, there is no possible way that this Congress can destroy law and order as the 83d Congress did by the enactment of Public Law 280.

There is no possible way that you can make a worse system of justice and law and order than we have today. The talents of man could not devise a worse system.

We have, on our reservation, a checkerboard system. We have some Indian lands and non-Indian lands. While 90 percent of the land on the Yakima Reservation remain in the Indian ownership, in the more populated areas, some 30 to 40 percent are in non-Indian ownership.

In the State of Washington we have full State jurisdiction on non-Indian land. Exclusive full State jurisdiction on these non-Indian lands. Then we have tribal jurisdiction and Federal jurisdiction on Indian lands, except for eight enumerated categories that are undefined—these categories are compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, juvenile dependency, adoption, and, operation of motor vehicles on the public streets and highways.

They are not defined, so they are left to the discretion of State officials, and it is a complete breakdown—a complete breakdown of law and order on our reservation.

We need the attention of this committee for some action to restore order, and to devise relief to protect the person and property of the people on the Yakima Reservation.

I would suggest that to settle this question between the Indian people who are taking the position that Mr. Pirtle is, and the people who are taking the position that my tribal council does, that we provide that where the tribes consent to the provisions of S. 1, that this title shall apply on that reservation.

And, that when they vote to accept this title in its entirety, that this title shall then apply on the reservation, and supersede all other Federal laws like the Thirteen Major Crimes Act, the Assimulative Crimes Act and Public Law 82–280.

Then we can get back to primary Federal jurisdiction on the Yakima Reservation, still retaining the tribe's right to maintain concurrent jurisdiction for the tribes to maintain their own law and order system over their own members, and the State's jurisdiction to maintain its own law and order on the non-Indian lands and reservation over non-Indians.

Now with these three current jurisdcitions it may create a triple jeopardy situation. We therefore need an amendment that when a non-Indian is punished under State law, he shall not come underneath this title, and if an Indian is punished underneath a tribal law, he shall not come underneath this section, so they can all work together, but without double or triple jeopardy.

Also this bill should provide for these tribes within the State of Washington that want to retrocede part of the State jurisdiction, that they be allowed to do this, piecemeal. Those who wish to get completely out from under Public Law 83–280, may do so and those who wish to maintain a portion, may do so. This will allow different choices on different reservations.

The amendments I have in our statement will allow tribes, who are sovereign governments on the reservation, to have some control over what would be best. If this is done S. 1 will give protection to person and property on the Yakima Indian Reservation.

Senator, I cannot tell you how terrible the situation is. We are spending $300,000 of our own money to remedy the situation, but we lack authority. We are trying to do something. We are spending over $60 of the tribes money for each tribal member. But, where we do not have the jurisdiction, there is nothing we can do to be effective. Where we do not have jurisdiction over juveniles they will not heed our law enforcement officer's direction. The time to take care of juveniles is when they are committing minor offenses, not when they have committed a felony.

And, when we have tried to tell them, you know, tried to get them off the streets and to cease drinking and so forth, they know what jurisdiction is. All these young people apparently have had good law training. They say to our police officers, you do not have any jurisdiction. And we get a pretty negative answer from them. It is creating for us a situation in regard to our children that is most serious.

Law and order is the most important thing that the Yakima Indian Nation and its tribal council are concerned about. If you do not have security, if you do not have law and order in an area, then you do not have very much of anything else, Senator.

My tribal council has authorized me to tell you that we are available any time, any place, and in any way, to be of assistance to this committee.

Now, Senator Abourezk is talking about going forward with this matter in the Interior Committee. That may be all well and good. At least it has not been handled so far. And, that proposed 2-year delay gives me a lot of fear and a lot of concern.

And, I might secondly say, and I am sure that he is sincere in saying that the subcommittee will be moving forward, but how about the House subcommittee? Are they going to handle the situation as soon as this subcommittee?

Please, I beg of you with all the sincerity I can on behalf of the people I represent, do not ignore this most serious question on the Yakima Reservation and on other reservations. We have to get away from the State "law without order". They have the law, but they will not make any arrests. They will not provide adequate personnel in our reservation.

They will not take care of the situation, whatsoever. So we need some help to protect the persons and property of people on our reservation.

I thank you. I am sorry I have exceeded my time.

Senator HRUSKA. Your words are not falling on deaf ears. There are Indian reservations in my State. I would not want to get into similarities and differences between your State and mine, but we know that we do have problems also. And some of them, when you described them, fall into well known pitfalls from my own knowledge and observation and it is difficult—a difficult problem.

Senator Ervin labored long to complete what he was able to produce. And, through the help of some of the rest of us in the Congress, but that does not even solve all the problems.

Mr. HOVIS. It has not, but the Judiciary Committee, particularly considering the dedicated interest we had from Senator Ervin, has been very helpful in this Public Law 83-280 question.

This is the only Committee where we have gotten any relief, Senator. The other Senate committees have been unable to get their counterparts in the House to coordinate any Public Law 83-280 activity.

Senator HRUSKA. Thank you, for two things. Thank you for your statement, and your explanation of it. Secondly, for your offer of help. We will bear that in mind.

The committee will be recessed until this afternoon at 2:30.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 2:30 p.m., the same day.]

AFTERNOON SESSION

Senator HRUSKA. The subcommittee will come to order. We will continue our hearings on S. 1 which we commenced this morning.

Our witness this afternoon is the Honorable Alfonso J. Zirpoli, chairman of the Committee on Administration of the Criminal Law for the Judicial Conference of the United States.

Judge Zirpoli, we welcome you and will include and incorporate into the record your statement in full.

You may now proceed to highlight it in your own way and own style.

STATEMENT OF HON. ALFONSO J. ZIRPOLI, U.S. DISTRICT JUDGE, NORTHERN DISTRICT, CALIFORNIA

Judge ZIRPOLI. Thank you, Mr. Chairman.

As the representative of the Judicial Conference of the United States, I wish to thank the chairman for the privilege of expressing the views and recommendations of the conference on Senate Bill No. 1.

Senate Bill 1, 94th Congress, first session, is the culmination of an effort that had its inception more than 20 years ago when the

American Law Institute embarked on the drafting of a "Model Penal Code." It is a monumental bill representing intensive effort and the best thinking of legal scholars and practicing attorneys. The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States is proud to have been a part of the process of consideration, analysis, and comment. This is not to say that we do not still have strong reservations as to certain points of S. 1 which will appear later in this testimony, but we do approve of the objectives sought and the methods utilized by the bill.

Before adverting to these reservations and our specific recommendations relating thereto, with your kind indulgence, we would like this committee to know that the Judicial Conference of the United States and its Committee on the Administration of the Criminal Law undertook the formidable task of reviewing the several proposed new Federal criminal codes some 4 years ago and has been carefully reviewing them ever since. We began our study in January of 1971 with a section by section—in fact, line by line, analysis of the Brown Commission Code.

Later, with the introduction of Senate Bill No. 1 and the Department of Justice bill, Senate No. 1400, in January and February of 1973, we changed our modus operandi to a comparative study of all three proposals.

That study resulted in three reports to the conference, which were approved and forwarded to this committee. The first and most important report was that of April, 1973, covering the "General provisions," which now form parts I and II of the bill presently before this committee. We respectfully resubmit this report and particularly urge this committee to again review at least the first eight pages thereof.

We, of course, do not expect this report to be incorporated in the record of these proceedings. The second report covering the sentencing provisions was approved and forwarded to this committee in September of 1973. A copy thereof is again respectfully submitted to this committee.

I might add in that connection that I had occasion this morning to read the testimony of Judge Neaher, and he made certain comments of the need to incorporate in Senate Bill No. 1 the provisions of the Youth Corrections Act and also provisions to cover young adult offenders and particularly to provide provisions for the expungement of the record—for instance, provided in section 5021 of title 18, United States Code.

I might add that while he expressed these as his personal views, they are also the views of the Committee of the Conference on Probation and also the views of the Judicial Conference of the United States.

The third report, which covered the substantive offense provisions of the proposed codes and made a comparative study thereof, was forwarded to this committee in March 1974. It is respectfully resubmitted with the offer to make available to your staff the working papers of our committee and the individual members thereof.

With the introduction of the present bill in January of this year, and indeed prior thereto, the Committee on the Administration of the Criminal Law again commenced its study of the general provisions thereof, namely parts I and II. The report of the committee,

which was approved by the Judicial conference and forwarded to this committee in March of this year, forms the basis of the views and recommendations of the conference upon which I shall now comment. It represents the unanimous recommendations of the 11 experienced district and appellate judges chosen from each of the 11 circuits comprising the Federal system and is the product of their joint efforts covering a period of many days over the past 3 years in a line-by-line analysis of parts I and II.

While we express general approval of the format of S. 1 and its five parts, my present testimony will be directed to part I, and offenses of general applicability of part II, with some comment on the other parts of the proposed code where appropriate. Our specific comment on these portions of the bill are based on our views as to the effect thereof on litigation, its impact on the courts, and the fairness of the procedures.

On matters relating to construction, section 112(a) of the bill would abrogate the rule of strict construction. It thus follows the recommendation of the Brown commission. However, we believe that abrogation of the rule will introduce a litigable issue at the trial and appellate levels without corresponding benefits to the litigants. The few cases where it might be said that an unduly restrictive view of a statute resulted in acquittal of persons who were clearly within the letter and spirit of the law are not sufficient to override the experience we have had with the present rule.

Furthermore, we are of the opinion that introducing the words "fair import of their terms to effectuate the general purpose of this title" as a rule of construction might result in substantial interpretive litigation, in an undesirable imprecision in drafting criminal legislation, and in unnecessary constitutional confrontations.

We endorse the present bill as to jurisdiction. Although Federal jurisdiction would be expanded, S. 1 has the least expansion. It would also amend 28 United States Code, section 522, by requiring that the Attorney General submit annual reports to the Congress setting forth the number of prosecutions commenced in the preceding fiscal year under each section of title 18, identifying the number of such prosecutions commenced under each jurisdictional base applicable to each such section.

Under the bill, efficient administration of court calendars would be, to a large extent, dependent upon a wise and sensitive exercise of prosecutorial discretion. The procedure of S. 1 is designed to act as a restraint on the exercise of concurrent Federal jurisdiction and as a means for Congress to review such exercise.

We also prefer the drafting technique of the present bill. Its approach lists in the jurisdictional subsection of each offense all of the jurisdictional bases permitting federal prosecution for that offense. It is also provided in section 201(c) that the "existence of Federal jurisdiction is not an element of the offense." Thus the gravemen of the crime becomes more intelligible and will ease the burden of trial judges in charging juries.

On the matter of culpable states of mind, chapter 3 of the bill is designed to make coherent the bewildering variants used to describe the mental element of an offense. It wisely abolishes the

troublesome degree of culpability known as willfully and would limit the states of mind to intentional, knowing, reckless, and negligent.

We endorse this approach. However, S. 1 goes on to classify the offense elements into: (1) conduct, (2) circumstances surrounding the conduct, and (3) the result of the conduct, and then defines the state of mind with relation to each. This procedure becomes complex and thus causes us much concern.

We believe that it will be productive of unnecessary litigation, that it will confuse judges and juries, and that it may cause injustice. Acceptance of a guilty plea under rule 11, F.R.Cr.P. will be more complex and may well be confusing to even bright defendants in understanding the differences among the degrees of culpability when related to the offense elements.

This observation is difficult to fully understand unless one has gone through the day-to-day experience of insuring that the accused fully appreciates the consequences of his guilty or nolo contendere plea before such plea is accepted, and particularly when we have full compliance with the provisions of rule 11(f) of the present bill which provides: "That notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon a plea without making such inquiry as will satisfy it that there is factual basis for the plea."

Our committee has devoted a substantial amount of time to definitions which, we believe, would achieve the same objectives as S. 1 and would not alter the substantive sections of the code if adopted. The definitions we prefer are: A person engages in conduct:

(1) 'knowingly' if, when he engages in the conduct, he does so voluntarily and not by mistake, accident, or other innocent reason; (2) 'intentionally' if, when he engages in the conduct, he does so knowingly and with the purpose of doing that which the law prohibits or failing to do that which the law requires; (3) 'recklessly' if, when he engages in conduct with respect to a material element of an offense, he disregards a risk of which he is aware that the material element exists or will result from his conduct. His disregard of that risk must involve a gross deviation from the standard of care that a reasonable person would observe in the situation; except that awareness of the risk is not required where its absence is due to voluntary intoxication; (4) 'negligently' if, when he engages in conduct with respect to a material element of an offense, he fails to be aware of a risk that the material element exists or will result from his conduct. His failure to perceive that risk must involve a gross deviation from the standard of care that a reasonable person would observe in the situation.

Senator HRUSKA. Would the witness suspend for just 2 or three minutes?

Judge ZIRPOLI. Certainly.

[A brief recess was taken.]

Senator HRUSKA. Thank you for your patience. You may proceed.

Judge ZIRPOLI. Turning to bars to prosecution—chapter 5 is S. 1 concerned with bars and defenses. The bars to prosecution are: (1) time limitations and (2) immaturity.

Section 511 on time limitations, generally retains existing law as to statutes of limitations. It simplifies the many statutes prescribing different periods for commencement of prosecution for specific cases to three: (1) capital offenses, no time limitation; (2) felonies and misdemeanors, 5 years; and (3) infractions, within 1 year.

Several changes in existing law are contained in section 511: (1) the limitation period would be stayed in all cases by the filing of a complaint as well as by the filing of an indictment or information; (2) the circumstances under which a prosecution for a lesser included offense would not be time barred even if the applicable time has expired for the lesser offense, if the period has not expired for the parent offense; and (3) existing law is revised regarding the suspen sion of the running of the statute of limitations because of the concealment or absence from the jurisdiction of the alleged perpetrator of the offense.

Our comments are directed to the problem posed by the second change; that is, the lesser included offense which is time barred, but time has not run out on the parent charge. S.1 would not treat the lesser included offense as time barred if there is, at the close of the evidence at trail, sufficient evidence to sustain a conviction of the offense charged.

As the working papers of the National Commission on Reform of Federal Criminal Laws points out on page 297:

> It is clearly established in most states and in the District of Columbia that one cannot be convicted of an offense necessarily included in the one charged if the included offense is barred by the statute of limitations even though the charged offense is not.

We agree with existing law. The rationale for a lesser point of limitation for a lesser offense applies whether it is the offense charged or a lesser included offense. Furthermore, to hold otherwise would give overzealous prosecutors the opportunity to revise time-barred offenses by overcharging.

Section 512 which treats with immaturity prevents prosecution other than for murder of any person under 16 years of age. However, it does not bar a juvenile delinquency proceeding under chapter 26, subchapter A, which incorporates the provisions of Public Law 93-415 (1974).

Now, I have made a hasty reading of both of those provisions, and it appears to me that there may be some differences that will require reconciliation. I would suggest that they be reviewed with that in mind. We express our concern that the formulation of section 512 does not treat the problem of persons less than 16 years old committing minor offenses in areas under the exclusive contral of the United States. We believe that specific authority should be granted the United States magistrates to deal with such cases. A clear illustration would be a juvenile exceeding the speed limit on a military reservation.

On the subject of defenses, the following defenses appear in chapter 5, section 521, Mistakes of Fact or Law; section 522, Insanity; section 523, Intoxication; section 531, Duress; section 541, Exercise of Public Authority; section 542, Protection of Persons; section 543, Protection of Property; section 551, Unlawful Entrapment; and section 552, Official Misstatement of Law.

We believe with regard to all these defenses that codification of them is not desirable or necessary. As to several of the defenses, this is an ambitious attempt to codify extensive and sophisticated decisional law which has emanated essentially from State courts—See sections 551, 541, 542, 543. We deem it particularly important

to note that freezing of defenses in statutory form would prevent the continued examination and analysis on a case-by-case basis so important in finding the best solution. It would do no harm to the structure of the code to omit them and the benefit to be derived by continued testing of ideas in court greatly outweigh enacting them.

In addition to these general comments on defenses, we offer particular comment on several of the sections.

As to section 522, Insanity—as I have just stated, we do not believe that defenses should be codified. However, if a section on mental disease or defect should be included, we favor the adoption of the National Commission's version which substantially restates the American Law Institute formulation. Section 522 provides that it is a defense that the defendant as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged."

This has been characterized as doing away with the separate insanity defense. We are persuaded to recommend against this section by the reasoning of the National Commission which rejected it. The Commission stated that:

> Any effort to refer the mental illness issue to the general formulations on culpability could lead only to a confusing and contradictory judicial interpretation of the culpability requirements, as judges were forced, without legislative guidance, to develop a jurisprudence relating to mental illness under the rubics of 'intent,' 'knowledge,' and 'recklessness.'

The problem would be exacerbated by the proposed complicated culpability definitions. We are further persuaded by the fact that the Federal Courts of Appeal's opinions in this area have become more uniform by adopting the ALI formulation with some variations. See *United States* v. *Brawner*, 471 F. 2d 969 in which the opinions of the various circuits are surveyed at pages 979–981. Accordingly, we recommend that the problem of the mentally ill charged with crime be left in repose.

In sum, section 522 would freeze the insanity defense and would not permit changing concepts and knowledge to work their way into the law; it would increase litigation and confuse juries. We agree with the need of an alternative verdict of not guilty by reason of insanity, but we believe that such a verdict should be incorporated in the Federal Rules of Criminal Procedure.

We also wish to point out that we have in the past offered proposed legislation which would revise chapter 313 of title 18, United States Code. These revisions would, among other things, require hearings, fully comporting with due process standards as to mental competency. Of particular interest in the context of this discussion, the proposal provides for civil commitment of a person acquitted after raising the defense of insanity if that person is dangerous to himself or to the person or property of others. We firmly believe that legislation to revise chapter 313 of title 18 is the better route for the Federal effort.

I might add here and submit a copy of our proposed draft of the amendment to chapter 313. I do so because it provides for a form of civil commitment and avoids in the giving of the third plea, the plea of not guilty by reason of insanity.

Senator HRUSKA. May the Chair suggest that when it is procured that that will be inserted in the hearing record at this point? Would that be agreeable?

Judge ZIRPOLI. Yes, it would.

[The material referred to follows:]

A BILL To amend Chapter 313 of Title 18 of the United States Code.

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 Federal Act for the Commitment of Incompetent Persons.

Chapter 313 of Title 18 of the United States Code is amended by deleting Sections 4241 through 4243, and substituting the following:

"CHAPTER 313—COMMITMENT, TREATMENT AND DISCHARGE OF MENTALLY INCOMPETENT PERSONS

"§ 4230. Definitions

"As referred to in this Chapter:

"(a) 'Court' means a United States District Court organized under Chapter V, Title 28 of the United States Code, but shall not include the Court of the District of Columbia or the Territorial Courts.

"(b) 'Secretary' means Secretary of the Department of Health, Education and Welfare.

"(c) 'Panel' shall refer to the panel of qualified psychiatrists created pursuant to Section 4231.

"(d) As used in this Chapter 'incompetent' means mentally incompetent to stand trial. An accused is mentally incompetent to stand trial if he is unable to understand the nature and consequences of the proceedings against him or to properly assist in his own defense.

"(e) As used in this Chapter 'competent' means mentally competent to stand trial. An accused is mentally competent to stand trial if, regardless of whether he is suffering from mental illness, he is able to understand the nature and consequences of the proceedings against him and properly to assist in his defense.

"(f) 'Lack of criminal responsibility' means lack of mental capacity to commit the offense or offenses charged as determined by the applicable law in the federal trial jurisdiction and includes any defense of insanity recognized in such federal jurisdiction.

"§ 4231. Designation of a panel of qualified psychiatrists

"The district court for each judicial district shall designate a panel or panels of qualified psychiatrists, who may but need not be residents of the district, to conduct examinations under this chapter. In accordance with local rules adopted for this purpose, the court shall examine and qualify members of any panel. Members of a panel shall be paid for their services in the manner provided under the Criminal Justice Act of 1964, unless the examination is ordered at the instance of the Department of Justice, in which case they shall be paid for their services by the Department of Justice.

"§ 4232. Psychiatric examinations

"(a) All examinations under this chapter shall be conducted as expeditiously as possible and with as minimal a restraint upon the liberty of the person to be examined as is consistent with the need for proper examination, except as otherwise provided in this Act.

"(b) In all cases in which examination by a qualified psychiatrist is required by this chapter, the court shall refer the person to be examined to a member of a panel.

"(c) If the member of a panel to whom an examination was assigned demonstrates to the court that in order properly to complete examination of a person it is necessary to have that person confined in a hospital or other medical facility, or if the court should determine such action necessary, the court may order him confined in such hospital or facility. For these purposes hospital facilities, including but not limited to those of the public Health Service, the Veterans Administration, and the Department of Defense, may be used.

"(d) The accused shall be represented by counsel at all stages of court proceedings pursuant to this chapter.

"(e) If the court appoints counsel or a psychiatrist for a person under the provisions of this chapter, such counsel or psychiatrist shall be compensated from appropriated funds for the reasonable value of his services as determined by the court.

"§ 4233. Determination of mental competency to stand trial

"(a) Whenever after charge by either complaint, information or indictment, and prior to either the imposition of sentence or the revocation of probation, the court has reasonable cause to believe an accused may be incompetent, the court shall refer the accused to a member of a panel of qualified psychiatrists for examination as to his competency. The scope of an examination under this section shall be limited to the mental competency of the accused to stand trial or proceed with a hearing on revocation of probation. The report of this examination shall state the medical and other data upon which the opinion of the member of a panel is based, which shall be filed with the court, and copies given to the United States Attorney and to the accused or his counsel as soon as possible, but in no event more than ten days after entry of the order for examination unless otherwise ordered by the court.

"(b) After the receipt of the report of a member of the panel the court shall hold a hearing, upon due notice, at which the report and all other evidence as to the competency of the accused may be submitted by the parties, provided, however, that the hearing need not be held if the report indicates that the accused is competent and if the accused, in open court, signs a written waiver. The accused shall have the right to testify, confront and cross-examine adverse witnesses, present evidence and subpoena witnesses in his own behalf. On the basis of the evidence presented, the court shall make a finding with respect to the competency of the accused.

"(c) No statement made by the accused in the course of any examination or hearing into his competency under this section shall be admitted in evidence on the issues of guilt or criminal responsibility in any criminal proceedings. A finding by the court that the accused is competent shall in no way prejudice the accused in a plea of lack of criminal responsibility as a defense on that issue nor otherwise be brought to the notice of the jury.

"§ 4234. Pretrial commitment, custody, case, report and discharge

"(a) Whenever the trial court shall determine that an accused is incompetent, it may commit the accused to the custoday of the Secretary for such care and treatment as is deemed appropriate by the Secretary. The period of commitment under this section shall run until the accused is determined by the court to be competent, or until the charges are disposed of according to law, or until the accused has been committed to the custody of the Secretary pursuant to Section 4238(f) and 4239(d), whichever occurs first. Provided, however, the Secretary may temporarily release the accused from the institution to which he is committed. Notice of such anticipated release shall be sent to the court and the United States Attorney of the district in which proceedings under Section 4233 were held, not less than 10 days before the date of the anticipated release. If the United States Attorney objects to such release, the committing court shall authorize the release only if reason-

ably satisfied that the accused will not flee or pose a danger to himself, or to any other person or to the property of others.

"(b) Whenever the accused shall recover his competency or not later than one year after a determination that the accused was incompetent, the Secretary shall petition the court for a hearing to determine the present competency of the accused. A report on the competency of the accused shall be attached to the petition of the Secretary. If the report indicates that the accused remains incompetent, a prognosis regarding the likelihood of the accused regaining his compentency shall be included in the report.

"(c) Upon receipt of the petition the court, upon due notice, shall hold a hearing at which the accused may testify, confront adverse witnesses and present evidence as to his competency and prognosis. The court shall make findings with respect to the competency of the accused, and, if the accused is found incompetent, with respect to whether the accused is likely to regain competency within a reasonable time. If the court finds that the accused is incompetent, it may order a continuation of custody, but if it finds that the accused is compentent it shall enter an order to that effect and cause the accused to be released from the custody of the Secretary.

"(d) If the court finds that the accused is incompetent and is not likely to regain competency within a reasonable time, it may order the pending charges dismissed, and the accused shall be released from custody at the end of 60 days, unless within said period the Secretary shall file a petition pursuant to Section 4237(a). Upon commitment of a person under Sections 4237(a) or 4238(f), the court shall dismiss the pending charges.

"(e) The court may grant any necessary or reasonable continuance of the hearing described in Subsection (c) for good cause shown in open court, the Government and the accused or his counsel being present.

"§ 4235. Hearing on mental competency of persons committed without pretrial consideration thereof.

"Whenever a psychiatrist and at least one other physician conclude that there is probable cause to believe that a person convicted of a crime against the United States was mentally incompetent at the time of his trial, and the Attorney General concurs (provided the issue of mental competency was not raised during such trial and either a hearing held and a determination made or a written waiver signed by the accused as provided in Section 4233(b) above), the medical report and the concurrence of the Attorney General shall be forwarded to the court in which the person was convicted. The court shall thereupon hold a hearing to determine the mental competency of the accused in accordance with the provisions of Section 4233(b) above. At such hearing such documents shall be prima facie evidence of the facts and conclusions certified therein. If the court shall find that the accused was mentally incompetent at the time of his trial the court shall vacate the judgment of conviction and grant a new trial.

"§ 4236. Disposition of criminal charges on legal issues

"Nothing contained in this chapter shall preclude the court at any time from disposing, upon motion of the accused or otherwise, of the criminal charges pending against the accused whenever the issue of fact or law involved can be resolved, regardless of the mental condition of the accused. Nothing in any such motion, proceeding or ruling thereon shall be used against the accused in any subsequent criminal trial.

"§ 4237. Persons eligible for civil commitment

"(a) When any person who is in the custody of the Secretary pursuant to Section 4234 has been determined by the Secretary to be unlikely to regain competency within a reasonable time and is in the opinion of the Secretary dangerous to himself or to the person or property of others, the Secretary shall petition the court for an order of civil commitment.

"(b) When any person charged with an offense against the United States is accused after raising the defense of lack of criminal responsibility at the time of the commission of the act or acts charged, upon motion of the United States Attorney the court shall order such person delivered to the Secretary who shall examine such person to determine whether, by reason of mental disease or defect, he is dangerous to himself or to the person or proeprty of others. The delivery of such person to the Secretary shall be made by the United States Marshal on court order.

"(c) The Secretary, upon the request of the Attorney General, shall examine any person in the custody of the Attorney General whose sentence is to expire, and who, in the opinion of the Attorney General, may be dangerous to himself or to the person or property of others by reason of mental disease or defect. Such examination shall be held at least 90 days prior to the date of mandatory release of the person and at such other times within said 90-day period as the court may order.

"(d) A person examined under this section may be retained in custody pending the disposition of the proceedings under Section 4238.

"§ 4238. Commitment of persons who by reason of mental disease or defect are dangerous to themselves or to the person or property of others

"(a) If the Secretary petitions the court as provided in Section 4237(a), the court shall give notice of the petition to the person and his counsel and shall appoint a guardian ad litem for said person.

"Proceedings pursuant to Section 4237(a) and 4237(b) shall be conducted in the court for the district in which the criminal charges were brought. If examination is conducted pursuant to Section 4237(c) such proceedings shall be conducted in the court for the district in which the examination is held.

"(b) As soon as is practicable after notice is given, the court shall order a further examination of the person. If the person is unable to provide his own psychiatrist, the court shall appoint a psychiatrist from the panel to conduct a separate examination. The report of examination shall be submitted to the court, the Secretary, the United States Attorney, and counsel for the person not later than fifteen days after the person was referred for examination.

"(c) If the report of the psychiatrist appointed or employed under (b) above states that the person is not, by reason of mental disease or defect, dangerous to himself or to the person or property of others, the court may terminate the proceedings and dismiss the application.

"(d) If the proceedings are not terminated the court shall fix a date for hearing which, unless otherwise ordered by the court, shall be held not more than 30 days from the filing of the examination report.

"(e) The court shall give notice of the hearing to the person, his counsel, his guardian ad litem, the United States Attorney, and the Secretary, and afford the person an opportunity to testify, present evidence, confront and cross-examine witness and subpoena witnesses in his own behalf.

"(f) If, after hearing, the court finds that the person, by reason of mental disease or defect, is dangerous to himself or to the person or property of others, it shall order the person committed to the custody of the Secretary for care and treatment for the period set forth in Subsection (h) below.

"(g) The Secretary or his representative is authorized to enter into contracts with the several states (including political subdivisions thereof) and private agencies under which appropriate institutions and other facilities of such States or agencies will be made available, on a reimbursable basis, for the confinement, hospitalization, care, and treatment of persons committed to the custody of the Secretary pursuant to this chapter.

"No such contract shall be deemed to relieve the Secretary of his obligation to supervise the treatment of any person committed under this Act or promptly to ascertain and report any recovery which would warrant a petition to the court to determine present competence.

"(h) The commitment made pursuant to subsection (f) and the custody provided under subsection (g) shall continue only during such time as the Secretary is not able to have the person civilly committed pursuant to State law of a State. For purposes herein provided the Secretary is authorized and empowered to apply for the civil commitment pursuant to State law of persons committed to his custody under subdivisions (f) of this section.

"§ 4239. Periodic review

"(a) Whenever the Secretary determines that a person committed to his custody under Section 4238(f) is no longer, by reason of mental disease or defect, dangerous to himself or to the person or property of others, the Secretary shall discharge said person unconditionally.

"(b) The Secretary shall, at least once during each year of a commitment made pursuant to Section 4238(f) and (g), file a report with the court for the district in which the person is confined, setting forth the reasons sup-

porting a determination that the person continues to be, by reason of mental disease or defect, dangerous to himself or to the person or property of others. The court shall give notice of this report to the person and his counsel and to the United States Attorney. Such notice shall set forth the right of the person to petition the court within 30 days for a hearing on the need for continued commitment.

"(c) Upon petition of the person, the court for the district in which the person is confied shall, upon due notice, hold a hearing within 30 days to determine if the person, by reason of mental disease or defect, is dangerous to himself or to the person or property of others. The person shall have the opportunity to testify, present evidence, and cross-examine witnesses.

"(d) If, after hearing, the court finds that the person, by reason of mental disease or defect, is dangerous to himself or to the person or property of others, it shall order the continuation of the commitment of the person to the custody of the Secretary for care and treatment for the period set forth in Section 4238(h)

"§ 4240. Motion for referral for examination

"(a) Whenever after charge either by complaint, indictment or information, and prior to verdict, the United States Attorney demonstrates to the court that the mental condition of the accused at the time of the alleged criminal conduct can reasonably be expected to be at issue, the court shall cause the accused to be referred to a member of the panel for examination as to his mental condition at the time of the alleged offense.

"(b) In no case shall an examination of the accused under this Section and an examination under Section 4233(a) be conducted by the same psychiatrist.

"§ 4241. Transfer of custody of previously committed persons

"All persons committed to the custody of the Attorney General under the provisions of Sections 4246, 4247 and 4248 of Title 18, United States Code, prior to the effective date of this Act shall be subject to the provisions of this Act and the amendments made in this Act, and the President of the United States is authorized and empowered by executive order to transfer the custody of and the responsibility for the care and treatment of such persons so committed from the Attorney General to the Secretary.

"§ 4242. Effective date of Act

"This Act and the amendments made by this Act shall take effect on the one hundred and eightieth day after the date of enactment of this Act."

Judge ZIRPOLI. I might say that earlier drafts we have prepared were referred to in the course of the Brown Commission report in the working papers thereof. In this connection, we respectfully invite the committee's attention to what may have been an oversight in section 3611, since it does not cover the situation where the defendant comes up for revocation of probation. We submit that this could be cured by inserting the words, "or revocation of probation" after the words, "sentence on" in line 3 of the section, so that the section would read:

Subsequent to the commencement of a prosecution and prior to the imposition of sentence on or revocation of probation of the defendant, the defendant or the attorney for the government may file a motion for, or the court upon its own motion may order, a hearing to determine the mental competency of the defendant.

Section 551 would codify the defense of entrapment. The defense of entrapment is of judicial origin and from the times of its beginning in *Sorrells* v. *United States*[1] (1932) through *Sherman* v. *United States*[2] (1958) to *United States* v. *Russell*[3] (1973), has

[1] *United States* v. *Russell*, 411 U.S. 423 (1973).
[2] *Sherman* v. *United States*, 356 U.S. 369 (1958).
[3] *Sorrells* v. *United States*, 287 U.S. 435 (1932).

been the subject of sharply divided thought as to its nature. This division is reflected in the approaches of the National Commission and S. 1. The minority view in *Sorrells*, *Sherman*, and *Russell* that the defense must be predicated on the nature of the police conduct is reflected in the National Commission's draft while S. 1 reflects the majority view that the predisposition of the defendant is the key factor. We adhere to our generally expressed view that this defense should not be codified because of the intricacies arising in evolving legal concepts.

Illustrative of such intricacies and difficulties that this evolving concept presents in the case of *United States* v. *Hampton*, out of the eighth circuit in which the Supreme Court granted certiorari on March 31 of this year. We also note that important procedural issues, such as the type of proof needed to raise the issue of entrapment, whether the defense may be pleaded inconsistently and the kinds of evidence admissible to show predisposition, are not codified. Accordingly, we believe that this defense should not be codified at this time.

On the subject of offenses of general applicability, we endorse section 1001 on criminal attempt, as to concept, but suggest substitution of 'intent to commit" instead of "the state of mind required for the commission of a crime," and "substantial step" for "amounts to more than mere preparation for, and indicates his intent to complete."

Our recommended formulation would read:

A person is guilty of an offense, if acting with intent to commit a crime, he intentionally engages in conduct, which, in fact, constitutes a substantial step toward commission of the crime.

We believe that this formulation is clearer and more readily understood by a jury and a defendant pleading guilty, and we also believe that it narrows the breadth of the provision.

Section 1002 on criminal conspiracy occasions two comments. Under present law, it is generally held that acquittal of all but one of the conspirators requires acquittal of the remaining conspirator—*Lubin* v. *United States*, 313 F.2d 419. Section 1002 would not mandate such a result. We believe the concept of agreement in a conspiracy militates against this innovation.

Also, S. 1 requires that the overt act requirement be met by engages in any conduct with intent to effect any objective of the agreement. Present law states: "do any act to effect the object of the conspiracy." Whether any change in result was intended is not clear. In any event, the committee believes the language which is well understood and has been used for many years is preferable.

Section 1003 on criminal solicitation, occasions three criticisms: (1) No need for a general provision on solicitation has been demonstrated; (2) the provision is fraught with the potential for abuse as a prosecutorial tool; and (3) the substance of the proposal is already substantially covered by the provisions on complicity, namely, the provision covering accomplices.

In all three sections, an affirmative defense of renunciation is permitted. In criminal conspiracy and criminal solicitation the de-

fense must include the prevention of the crime by the defendant. In criminal attempt the standard is:

> The defendant avoided the commission of the offense attempted by abandoning his criminal effort, and if mere abandonment was insufficient to accomplish such avoidance, by taking affirmative steps which prevented the commission of the offense.

We conclude that the defense of renunciation is thus too closely circumscribed. For the defendant to prove that he prevented the commission of the offense would render this defense nugatory.

Finally, I would like to comment generally on appellate review of sentences. Section 3725 provides for appellate review of felonies and section 3726 is concerned with capital offenses.

Both the defendant and the prosecution may petition the court of appeals for review of a sentence imposed for a felony under section 3725. A defendant may petition for review of a sentence if it contains either a fine in an amount exceeding one-fifth of that authorized by section 2201(b) or imprisonment for a term exceeding one-fifth of that authorized under section 2301(b). The government standard for petitioning for review is a sentence of less than three-fifths of a fine authorized under section 2201(b), or imprisonment of a term less than three-fifths of the term authorized by section 2301(b). If the court of appeals grants the petition, it will review the entire record of the case to determine whether the sentence is clearly unreasonable.

Here again, I should like to specifically point to section 3725 (b). It provides: "If the Court of Appeals grants the petition, it shall review the entire record in the case, including"—I underscore the words "entire record in the case"—"including: (1) The evidence submitted during the trial; (2) the entire presentence report; (3) the information submitted during the sentencing proceedings; and (4) the findings of the Court under section 2302(b) if the defendant was sentenced as a dangerous offender."

Does the committee actually intend that on review of sentence the entire record including a transcript of all the evidence received during the trial shall go up in every petition for review of a sentence? This would be an expensive, unnecessary, and intolerable burden upon the trial court, the court reporters, and the reviewing court, and would result in interminable delays, particularly if the trial were one of long duration and involved many defendants.

As you know, we too, have long been considering the problem of disparity of sentences. In 1970, the judicial conference referred to its advisory committee on criminal rules the problem of the form that review of criminal sentences should take. In response to that referral, an amendment to Rule 35, Federal Rules of Criminal Procedure, was drafted.

This amendment basically would provide for sentence review by a panel of district judges. You will recall that U.S. Circuit Judge J. Edward Lumbard, Chairman of the Advisory Committee on the Criminal Rules, and Judge Walter Hoffman, appeared before the Subcommittee on Criminal Laws and Procedures on April 16, 1973, and pointed out the reasons for favoring the rule 35 amendment approach.

Briefly stated, appellate review of sentence is opposed because it would create congestion in the courts of appeal. Furthermore, circuit judges have little experience in sentencing defendants. On the other hand, the proposed rule 35 procedure involves the least expense and a more expeditious method of review. We adhere to these views.

I should also point out the method of determining what sentences may be reviewed is unduly complex and arbitrary. For example, a defendant may petition for review if he is sentenced to imprisonment for a term in excess of one-fifth of the maximum term authorized by section 2301 (b). Thus, for a class E felony, would be a sentence in in excess of one-fifth of 3 years or three-fifths of a year. In the case of class A felonies, the authorized trem of imprisonment is the duration of the defendant's life or any period of time. The criterion of in excess of one-fifth appears to have little applicability in this case.

Another problem should be explored. One of those I am going to advert to is the question of a grand jury and size of the grand jury and the additional requirements for sessions of grand jury that arise under the speedy trial bill. We feel that that situation could well be taken care of in rule 6(a) and by changing the size of the grand jury, saying preferably not less than 9 or more than 15 or the concurrence of two-thirds required for return of indictment. That is an additional suggestion of an area that might be explored.

Other problems that should be explored and analyzed before the Code is finally enacted and for which we would hope that another hearing could be held and in which the Judiciary would like very much to participate, relate to the jury instructions which may be mandatorily required under the act. Well in advance of the effective date of the act, such instructions should be carefully drafted in precise language that is understandable to a lay jury.

Furthermore, we would hope that the effective date of the Code could be 3 years, instead of one, after enactment, in order to re-educate the judges and enable the conference to prepare such patterned jury instructions as will be needed to meet the new or changed provisions of the Code.

In conclusion, may I respectfully add that while acknowledging the need for revision of the federal criminal law and applauding the results generally contained in S. 1, I would be doing a disservice to my fellow judges if I did not disaffirm any implicit or explicit suggestion that criminal justice in the Federal courts has suffered markedly under existing statutes and procedures. We deem it important to observe that the Federal courts, on all levels, have acquitted themselves with distinction in meeting the problems of increased workload and responsibility.

We recognize that our burdens will become heavier as the Speedy Trial Act of 1974 is implemented and will increase when S. 1 is enacted. I believe that Federal judges will continue to meet these new challenges with the dedication and learning that characterizes their past endeavors.

Again, I wish to thank the chairman for the privilege afforded me.

I might also add, Mr. Chairman, that I should like to thank your chief counsel, who very courteously called me in San Francisco and advised as to what my time problems would be.

Senator HRUSKA. Thank you for your statement. It can be promptly and accurately reported to those who sent you here that you did an excellent job.

Judge ZIRPOLI. If I may mention one more thing if I may, Mr. Chairman, the members of the staff of the Administrative Office who have worked with the judges over the years have substantial knowledge of the views that we have expressed and the views of the conference and I am sure they would be delighted to offer any assistance that you may request of them at any time.

Senator HRUSKA. We will be calling on them.

Mr. Summitt, do you have any questions?

Mr. SUMMITT. No questions.

Senator HRUSKA. Mr. Rothstein.

Mr. ROTHSTEIN. Judge, if I may I would like to address myself to your comments on the definition of culpable states of mind and preliminarily I might say I personally, and I am sure the rest of us here feel that there is a lot for us to think about and work on in what you say.

As I see it the principal difference between your definition of culpable state of mind and S.1's definition is that S.1 breaks down the components of a crime into conduct, results, and circumstances, and recognizes that you can have a state of mind with respect to each of those three things that is different.

For example, let us take the crime of taking Government property which could be broken down into three elements: the taking; the fact that the property is not yours; and the fact that it is indeed Government property.

With respect to each of those elements it might be possible to have a different state of mind. For example, it might be required that you have a knowing state of mind about the taking, i.e., that you know that you are taking and a knowing state of mind that the property is not yours. But with respect to the element that it is Government property, it may only be required that you be negligent, that you have disregarded certain indicators that would have alerted a reasonable man that it was Government property. Or, indeed, the state of mind with respect to the nature of the property might be zero. It might be no state of mind. It——

Judge ZIRPOLI. Or assaulting a Government officer, for example, the question of your knowledge that he was, in fact, a Government officer.

Mr. ROTHSTEIN. It seems to me that S. 1, in line with the Model Penal Code, sets out that it may be required that you have a different state of mind as to each of the elements. It seems to me that your set of definitions does not cope with that problem. While there are certain problems in some of the culpability provisions of S.1, I feel your definitions, with all respect, make them worse rather than better.

I recognize that your fear is that S.1's definitions will not be able to be communicated to lay people. But the code, since it is drafted to cover thousands of cases, it cannot always be in terms that lay people would understand. It speaks in terms that judges and lawyers understand. And in a particular case it seems to me that the judge will translate into simple terms of S.1, terms that have

to cover only the one case that is before him so that he will be able to do it in simple terms ,where S.1 has to cover the entire spectrum.

Judge ZIRPOLI. The barrier where that may present serious problems comes in the course of the instructing the jury, particularly where the nature of the culpability may differ with relation to the elements. Therefore, you have to cover both phases in your instructions to the jury.

We are not too greatly concerned in the sense that we are satisfied that we can meet that situation. It is not that we cannot meet it. We also feel that the four definitions that we have given you would better serve that purpose ultimately and that they are definitions that have past accepted meaning. If you get "Devitt and Blackmar," the form book on the instructions to the jury, you will find they are all there. Invariably, judges resort to them; invariably, counsel present them to you.

So these are standards that we have applied in the past with which we are familiar. Sure, we can reeducated ourselves. You can apply new standards.

Mr. ROTHSTEIN. How would your definition apply, if I may, to this case of taking Government property. Suppose you wanted to express that intention was required as to the taking; and that as to the fact that the property is not yours only recklessness is required; and as to the fact that it is Government property, negligence is all that is required. Let us say that is what you wanted to define. Could you do it?

Judge ZIRPOLI. I would find it a little difficult finding in the statute there—how negligence would enter in as far as Government property is concerned.

Mr. ROTHSTEIN. Knowing with respect to taking, recklessness with respect to the fact that the property is not yours, negilgence with respect to the fact that it Government property.

I do not think your terminology gives us the tools to define it.

Judge ZIRPOLI. You are saying that you do not feel that the definitions which we have offered you would meet that situation.

Mr. ROTHSTEIN. If you said that crime was knowing taking of Government property, we do not know what it is that the knowing refers to—is it the taking or that the property is not yours or that it is Government property? You see? If you say it is the intentional taking of Government property——

Judge ZIRPOLI. I would not have any difficulty with the knowing taking of Government property. All that would be involved is the knowing taking.

Mr. ROTHSTEIN. Suppose he thought it was his own.

Judge ZIRPOLI. Then it is not a knowing taking.

Mr. ROTHSTEIN. But he took, knowing that he was grasping property. So you could argue that it is a knowing taking. With respect to the fact that property was not his own, he has a different state of mind.

Judge ZIRPOLI. I want to get to our definition of knowing here.

Mr. ROTHSTEIN. It says knowing.

Judge ZIRPOLI. If when he engages in the conduct, he does so voluntarily and not by mistake, accident, or other innocent reason.

Mr. ROTHSTEIN. This man then who took the Government property knowingly doing the grasping but believing that it was his own property, he meets that definition of "knowing."

Judge ZIRPOLI. He meets that definition because he is either taking it by mistake, accident, or other innocent reason. He would clearly meet it.

Mr. ROTHSTEIN. He knows his conduct. He knows he is grasping, taking. But he does not know that it is someone else's property. He does not know it is Government property.

It seems to me that we have to break it down into the act of taking and the fact that it is someone else's property.

Mr. ZIRPOLI. May I inquire into what respect do you feel that the definition as now proposed would meet that situation?

Mr. ROTHSTEIN. Better than under your alternative suggestion. Because the crime would be defined if we wanted to use the definitions of S. 1. To define a crime like I just put to you we would say with respect to the taking it must be knowing. With respect to the fact that it is someone else's property it must be knowing or reckless. And with respect to the fact that it is Government property negligence would be enough. We would either say it in the section on theft of Government property or a general principle of construction set forth in the beginning would supply it.

Judge ZIRPOLI. That is 201, is it not?

Mr. ROTHSTEIN. 301.

Judge ZIRPOLI. 301.

Mr. ROTHSTEIN. I think this is the problem. It has always been the problem in criminal statutes that the drafters of S. 1 tried to clear up. It has always been unclear what the knowing or intention requirement applies to in criminal law to this date, both on the State and Federal level, and this attempts to correct that. While they have not been completely successful, I believe your definition would worsen the situation, with all due respect.

Judge ZIRPOLI. A person's state of mind is knowing with respect to his conduct if he is aware of the nature of his conduct. It is knowing with respect to an existing circumstance if he is aware or believes that the circumstance exists. And it is knowing with respect to a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the results.

So that the word "knowing" under the definition, as you have now fixed it, would cover all three situations presumably.

Mr. ROTHSTEIN. If I said knowing with respect to the result and knowing—you see, the statute itself specifies——

Judge ZIRPOLI. I can only offer one present suggestion and I would say this, that our committee will meet again on May 22, and I have in mind your observations and we will give you the benefit of the consensus of the views of the committee having those observations clearly in mind.

Mr. ROTHSTEIN. Thank you.

Senator HRUSKA. Thank you again, your Honor. We are glad to have had you here.

The committee will stand in recess until tomorrow morning at 10 o'clock in this same room.

[Whereupon, at 3:30 p.m., the committee adjourned, to reconvene on Friday, April 18, 1975, at 10 a.m.]

S. 1, THE CRIMINAL JUSTICE REFORM ACT OF 1975

FRIDAY, APRIL 18, 1975

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

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Senator John McClellan presiding.

Present: Senators McClellan and Hruska.

Aso present, Paul C. Summitt, chief counsel; Dennis C. Thelen, deputy chief counsel: Paul Rothstein, minority counsel: and Mabel A. Downey, clerk.

Senator MCCLELLAN. The committee will proceed with its hearing scheduled for this morning.

I have been waiting for one of my colleages, another member of the committee to come. I think he is on his way.

The first witness scheduled for today is Mr. David Fogel.

Mr. Fogel, please identify yourself for the record.

Mr. FOGEL. David Fogel. I am the exective director of the Illinois Law Enforcement Commission.

Senator MCCLELLAN. You have a prepared statement?

Mr. FOGEL. I do.

What is your pleasure, Senator? Would you like to just enter it in the record and have me talk about the highlights of it, or shall I read it?

Senator MCCLELLAN. You do have a prepared statement?

Mr. FOGEL. I submitted it earlier.

Senator MCCLELLAN. You are willing to have it placed in the record and highlight it?

Mr. FOGEL. Yes.

Senator MCCLELLAN. Very well, so ordered.

You may proceed.

[The prepared statement of Mr. David Fogel follows:]

TESTIMONY OF DAVID FOGEL, EXECUTIVE DIRECTOR, ILLINOIS LAW ENFORCEMENT COMMISSION

THE ILLINOIS JUSTICE MODEL—A PROPOSAL

INTRODUCTION

Sentencing tells the defendant what his penalty will be and it tells the state what its responsibilities are in relation to the defendant. The effects of the sentence carry over heavily into the correctional system. If the sentence is seen as unjust by the inmate, his entire behavior while in prison will be

colored by it. If the sentence is seen as unworkable by the correctional personnel, its provisions will not be carried out. Any serious attempt to modernize corrections must begin with the sentencing structure.

This plan is designed to eliminate the worst features of the present sentencing system. It is built around three general principles. First, persons should be sent to prison only when it is not possible to provide appropriate community sanctions. They should be incarcerated *only when they represent a clear and present danger to society* or their incarceration is necessary to serve some legitimate societal interest. Second, the sentence should be fixed at the beginning of the term by the *Judiciary*. A convicted person should not be made to guess what his actual period of incarceration will be. Third, the *disparities* which now exist in sentencing *should be narrowed*. Persons who commit the same offense in similar circumstances should receive the same sentence, permitting only slight variations in mitigation or aggravation for the individual characteristics of the offender. Unfortunately, that is not the case.

CURRENT JUSTICE PROBLEMS

Two offenders commit similar crimes—one in Chicago, one downstate. The public and particularly the victims expect reasonably similar treatment, but do not get it. In one case we see a 400 day wait for a trial and the offender sentenced to a short prison term. In another, the case may be disposed of in less than 90 days and result in a long sentence. In neither instance can we expect the judge to have received detailed information regarding the nature of the offense and the character of the offender before imposing sentence.

Already we see a major disparity in the treatment received by both victim and offender. In the Chicago case, both the criminal and the victim have been injured by the long pre-trial delay. As witnesses' memories fade with the passage of time, guilty defendants may go free entirely or else take advantage of court congestion to bargain for an unjustifiably lenient sentence. Equally reprehensible, those unjustly accused may languish in custody for many months before they are vindicated.

In our example, however, both offenders were convicted of felonies and will serve time in the State Department of Corrections. What happens when they share a cell at Joliet and compare notes? We think it obvious that their disparate treatment in the courts, especially the lack of sentencing uniformity, will breed resentment and contribute to tension and violence in our prisons.

Both offenders, however, know that the story is not yet over. The wooing of the Parole Board by conning custody and treatment staff alike is the final act in this drama—and in some ways its shabbiest moment. In a hurried and private meeting, a non-judicial board renders a *de facto* sentencing decision based on fragmentary and unreliable data. One man goes free—perhaps the offender with the longer sentence—and the other remains a prisoner. Frequently the prisoner with the shorter sentence does a larger proportion of the judicially determined sentence than the prisoner with a longer sentence. The Parole Board has become more influential in "sentencing" by setting release dates than is the judiciary in imposing a particular sentence of imprisonment. Neither the offenders nor the staff of the prison know why one person is paroled and the other kept. Their senses of justice—not to mention logic—are affronted by this state of affairs.

A SOLUTION

The solution we propose revolves around making the adjudication process fairer and speedier and the post-adjudication process of sentencing and prison release compatible with the rest of the criminal law. To be compatible, each of these elements (i.e., sentencing, prison confinement, release processes) must be *procedurally sound, predictable, uniform,* and *reviewable*. Because the rest of criminal law considers offenders to be volitional, corrections must likewise cast off the so called "medical model" and insist upon responsible behavior from convicts in the context of a just prison stay. Borrowing from the work of many in the criminal justice system who share our concern about injustice, we have developed the model based upon fairness.

We believe our proposed solution is bolstered by the empirical finding that high levels of administrative discretion for correctional officials have not produced either law-abiding offenders inside of prison or law-abiding ex-offenders outside prison, and seem unlikely to do so in the future. Instead

the chief effects have been to produce longer terms of imprisonment, more volatile relations between keeper and kept, and higher costs with very little in the way of positive returns. To improve this situation, we must reduce discretion at two key points—*sentencing* and *paroling*.

We propose to reduce sentencing discretion by instituting a "flat time" sentence system. Although a term of imprisonment would not be mandated for any offense, once the court decided such a disposition was appropriate, for each of five types of felonies as currently classified or as may be modified), a flat sentence would be imposed with variations of a year or more in aggravation or mitigation as indicated. For illustrative purposes, the schedule below could be utilized.

FIGURE. 1.—*Illustrative purposes only*

Crime	Circumstances	Punishment
Class 2, 3, or 4 felonies and misdemeanors.	1st offender; and/or little or no victim injury; and/or little evidence indicating a continuing threat to the community.	Mandatory supervision under the bureau of community safety.
Felony crimes of murder and class 1 through 4.	Repeat felon; and/or significant physical injury to a victim; or a crime which breaches the public trust; and/or strong evidence that the offender is a continuing threat to community safety.	Flat sentences: Murder=25 years ±5 or life or death Class 1=8 years ±2. Class 2=5 years ±2. Class 3=3 years ±1. Class 4=2 years ±1.
Felony crimes of murder and class 1 through 4 felonies (special enhanced sentences).	Habitual repeat offender or offender presenting continuing danger of physical harm to community.	Murder=life, death or 25 years +5. Class 1= up to 15 years +3. Class 2= up to 9 years +2. Class 3 or 4=6 years +2.

For all sentences except life, statutory good time is earned at the rate of one day for each day the offender serves without a serious prison infraction. Most disciplinary infractions would be punishable through loss of good time for set periods of up to 30 days; but for violations of law—those actions which would be considered felonies or serious misdemeanors outside of prisons—a new indictment will be sought and, if the offender is found guilty, a *consecutive* sentence will be set. This good time policy will make prisons easier to manage by providing a tangible and immediate reward for lawful behavior and clearly defined, stringent sanctions for unlawful behavior. Good time will become "vested" at the end of each month; and as a result, a new projected release date can be calculated each month. After some experience with this system, it should be possible to develop a computerized population level and flow model which will markedly improve budget forecasting by reliably predicting population levels in the Illinois Department of Corrections.

We further propose to eliminate both the paroling function and the post-release supervision now provided by parole officers. With a flat time sentence structure all inmates will leave the system by completing their sentence (minus good time)—except in cases involving executive clemency. As a result of rationalizing the process of *imposing* sentence the need for paroling discretion is largely eliminated.

The primary reason for abolishing post-release parole supervision is that it is a demonstrable failure both as a crime prevention strategy and as a service delivery concept. One parole agent with a caseload of 50 to 100 offenders scattered across a sizeable geographic area cannot prevent (and has not prevented) crime. Which man should he "supervise" at any moment in time? How can he, a 9-to-5 worker, be expected to supervise parollees expected to be in school or at work during the same hours? Perhaps most importantly, how can he supervise (under threat of reincarceration) one moment and counsel an offender the next? The degree of role conflict generated by these two tasks makes it remarkable that parole has survived as a structure for so long. In Chicago our parole officers are armed with Freud in one hand and a .38 in the other. We believe that limited correctional resources are best employed by restricting them to "service delivery" functions on behalf of *willing* ex-offenders and leaving supervisory or disciplinary activities to duly constituted law enforcement authorities.

Our proposed system offers the offender a set date for release from "day one" of his incarceration. He knows that he can halve his sentence by good behavior . . . giving him a high stake in law-abiding conduct. He can partici-

pate in education, training and other service if he chooses to—but his release date will not vary in either case. Similarly, after release he is considered a free man—he may choose to go it alone, or else avail himself of a wide range of services. In short, the proposed system is impartial, non-discretionary, definite, and volitional.

PROPOSED CHANGES

Several new structures are required to make this system work. First, the system must have the capacity to process each defendant's case fairly and expeditiously from the time of initial contact through adjudication of guilt or innocence. Consistent with the presumption of innocence, release-on-recognizance and low-money-bail programs will be instituted and made available in all appropriate cases. Pre-trial diversion or pre-trial release programs also will be developed for those eligible defendants desirous of participating in them, thus maximizing their rehabilitative opportunities.

Those who flaunt the system and commit additional crimes while on release will be subject to bail revocation and more severe sentences upon conviction. To expedite the processing of criminal cases, we propose eliminating the necessity for proceeding by indictment in felony cases and shortening the statutory case-processing time from 120 to 60 days. Adoption of those proposals will assure that defendants accused of more serious crimes will be brought to trial far more quickly than currently is the practice. Swift adjudications, followed by fair punishments, will become the rule rather than the exception.

Second, quality community correctional services must be made available. In the short run, reassignment of current parole workers to this task will create the backbone of that system. We anticipate, however, that as the frequency and quality of pre-sentence investigations increase, a steady growth in the number of persons seen as possibly benefitting from such non-custodial dispositions will occur. Conversely, once community correctional programs are established and operational, an increasing number of marginal cases will be referred to them. Judges, however, will be justifiably reluctant to impose a sentence of "probation" (termed "mandatory supervision" under our proposal) in such cases unless assured that adequate programming is available. We see a need for additional personnel and a considerable amount of program development and training before this part of the system really works. We are prepared to make that investment in Illinois.

Third, the entire sentencing process must be made more rational, more visible and more reviewable. In addition to the determinate sentencing structure already discussed, we propose to set forth definite criteria to guide the court in deciding whether or not to impose a term of imprisonment of an offender. To insure that the courts are able to secure the requisite information about each offender and the various feasible sentencing alternatives necessary to such decisions, we recommend the creation of circuit-wide court services departments, comprised of current probation officers, to provide the court with such information. To guarantee that such recommendations are given due consideration, pre-sentence investigations will be mandatory in all felony cases and in all instances where the court imposed a sentence of imprisonment in excess of 90 days.

While we believe that these measures will greatly rationalize and strengthen the sentencing process, we also propose that the sentencing determinations of the trial courts be subject to a close scrutiny on appeal. Aside from questions of legality, all sentences imposed will be reviewable to see if they are:

(1) Commensurate with the offense committed as aggravated or mitigated in the particular case;

(2) Consistent with the public interest and safety of the community and most likely to work a full measure of justice between the offender and his victim, if any;

(3) Commensurate with the sentence imposed on other offenders for similar offenses committed in similar circumstances.

Either the defense or the prosecution may question the propriety of the sentence imposed in a particular case. Upon a proper showing by the defendant, the appellate court may sentence him to a lesser term of imprisonment or to a more lenient-type of punishment; and upon a similar showing by the State, a more severe sentence can be imposed.

In summary, our sentencing proposals will provide the courts with the data necessary to make informed, intelligent sentencing decisions. To insure that proper procedures have been followed, the Appellate Court will be empowered to equalize sentences across circuits by ithr affirming them or by modifying those which seem clearly out of line with normal sentencing practice. Review will occur within 90 days of the original sentence. Increased rationality and fairness of the sentencing process will reduce the sense of injustice in prison, thereby making it a safer work environment for guards and living environment for prisoners.

The third structural change required is the abolition of parole, both as a means of securing release prior to serving a full term in custody and as a status after release from custody. Accumulation of good time at the "day for a day" rate discussed above will become the only method of early release from custody. Although rehabilitative services will continue to be made available on a voluntary basis both inside and outside of prison, they will be divorced from the release process.

CONCLUSION

The shift in the philosophy and organization of state services proposed in this progrim is designed to make the Illinois correctional system more just and safe. That it may improve the quality of services, reduce prison tensions, make possible certain long range economies and avoid litigation are highly attractive fringe benefits, but not the *raison d'etre.*

All current participants gain by the proposed system:

Victims and witnesses see cases adjudicated more quickly and equitably.

Offenders receive a uniform reviewable sentence.

Law enforcement officials need for fear "soft hearted" judges nor do civil libertarians need fear "hanging judges" (flat sentences narrow judicial discretion and openness and reviewability insure that that which remains is exercised soundly).

Guards are given a more "do-able" job in atmosphere in which offenders have a stake in maintaining order.

Professionals have an opportunity to service only those offenders who really want to learn and change.

APPENDIX A

Issue	Current	Proposed
Prison sentences	Highly variable—minimum and maximum represent a wide range.	Reduced judicial discretion—plus 20 percent in most cases.
Sentencing review	Seldom used—Used only in cases where sentences are so unusual as to pose constitutional concerns.	Routine, automatic, under express statutory standards for all serious cases.
Plea bargaining	Great abuse—No standards, no visibility, no reviewability.	Use limited, because of mandatory pre-sentence investigation and record of reasons for sentence.
Parole release	Arbitrary, a cause of inmate unrest	Abolished—All offenders released at maximum minus good time.
Good time	Too little to control behavior of offenders without guard intervention and/or threat of force.	Behavior controllable without as much physical force—One day "good time" awarded for each lawfully served day in prison, vested monthly.
Services to inmates (vocational academic, etc.).	Inmate service use is distorted by their need to "con the board".	Services will be available but use will not affect release.
Post-release supervision of offenders.	Parole officers ineffectively supervise a large number of parolees while experiencing a police/helper role conflict.	Parole is abolished—Services (like employment assistance) are provided by a State-funded agency without sanctions for nonuse.
Sentencing alternatives	Few, except for drug/alcohol abuses	Many, including restitution, periodic imprisonment, etc.
Decision to incarcerate as opposed to probation or other community-centered options.	Discretionary and seldom reviewed	Procedural safeguards instituted; review facilitated.
Costs	High for little apparent return; costs will go up even further as populations rise.	Higher at least for the next 3 to 5 years; long-range economy possible, however.
Guards	Abused, bottom of ladder	By decreasing influence of counsellors, social workers, over decision to release, guard status and safety improved.

I am pleased to support the passage of SB 1. It brings together some of the most significant research findings of the last decade in the form of legislation. I wish to point out my concurrence with SB 1's provisions:

(a) The requirement for mandatory pre-sentence reports (§2002, p. 182).

(b) The reviewability (§2005, p. 184) of sentences by motion by either the defendant or the State (§§3725, 3726, pp. 276–279).

(c) The availability of probation for all offenses except "Class A" (most serious) felonies and the criteria for the imposition of such a sentence in the law (§2101, p. 185).

(d) *Extended terms* for "dangerous special offenders" and the criteria for such classifications are clearly spelled out in the Bill (§2302(b), pp. 191–192). I am asking our experts to review this section in particular to bring even greater clarity to our working drafts.

(e) While SB 1 retains parole and hence indeterminancy during the prison stay, I do support the imposition of definite prison sentences which SB 1 requires. Our program calls for the prisoner to work his way out a definite term by good behavior while SB 1 tries to engage him in rehabilitative programs and leaves discretion to a parole board to determine "progress". We differ a bit here but SB 1 does establish the larger principle of determinate sentencing.

(f) Finally, SB 1 is responsive to one of the most perplexing problems, namely the criteria a judge must use in deciding whether to sentence an offender to imprisonment. The development of such standards is a long-neglected area of the law. We are considering the question in more detail that SB 1 appears to spell out. For example, we are drafting specific standards governing imprisonment for offenders in the area of official corruption, official misconduct and major white collar crimes.

I do not intend invidious comparisons between SB 1 and the Illinois program. I believe SB 1 to be of historical dimension. It not only represents the first codification of the Federal criminal law since the birth of the Republic but also provides progressive leadership by example to the States as they rethink their penal and corrections codes.

Thank you for this invitation to comment on SB 1. You have my best wishes for speedy enactment.

Mr. FOGEL. The prepared statement is itself a summary of a much larger statement submitted to the staff, which is a report done for the Law Enforcement Assistance Administration on the subject of reducing tensions and violence in prison, a study done last summer at the Harvard Law School where I was in residence for 3 months.

The short statement just entered in the record, which I will highlight now, is really a reduction of the larger study into legislation which we refer to as the Illinois plan. It is working its way slowly through the legislature.

What I would like to do, if I may, is simply tell the committee how this came about and highlight it.

In 1971, following Attica, the directors of corrections around the country were brought together by the Department of Justice in San Francisco, just a few month following the September tragedy. The fear at the time was of riot-contagion. It was felt if we got together we could help each other. It was not a very helpful session. I was at that time director of corrections for the State of Minnestota. There was too much tension in the air, and it was more of a discussion on suppression then it was on prevention.

In 1973 each of the States in my region of the Law Enforcement Assistance Administration, which is the largest one in the country, the regional office located in Illinois but it includes Indiana, Michigan, Ohio, Illinois, Wisconsin, and Minnesota. Each one of those State institutions in their maximum custody institutions experienced some sort of riot, disturbance, hostage taking, et cetera from May through September of 1973. The directors of corrections for those States were then brought together in 1973. This time the State planning agency directors of LEAA, my counterparts, were brought in with them. We went into a similar kind of session, minus the tension associated with the one in 1971. It was much more of a deliberative session. We continued for 6 months.

Suppression was very important, but it was handled very quickly because we discovered that we had been doing suppression very well for a few hundred years, and had not done very well on prevention. We now devoted a lot of time to prevention. I had earlier written a paper called, "The Justice Model of Corrections." My colleagues asked me if I would take time out to elaborate it, catch up on the evaluating literature and the most current studies about to be published. That occasioned my stay at the Harvard Law School.

What I found out reviewing some of the literature that is not yet published were studies like Senator Goodell's Committee for the Study of Incarceration, Robert Martinson of New York City University, the studies in England and many others that have to do with rehabilitation and other correctional methods used over the last quarter of a century or more.

We were able to look at all of that, the case law, the literature on sentencing and other new findings, and try to pull it together in this report, to find out how these impinged on prison life. What I found out was that there are two real key issues—but I would just like to put on the record a few of the peripheral issues and then settle down to the two central ones.

First I found that correctional administrators are notoriously ahistorical. They do not know what happened before they took the job, let alone the sweep of history—not everybody, of course, but the largest group, as I reviewed about a hundred years of their literature.

The field now is pretty much demoralized. It has been insulated; it has been isolated; it has suffered a terrible mix of low visibility and high discretion. Role confusion from guards to parole officers is rampant. In Chicago our parole officers make their rounds with Freud in one hand and a .38 in the other.

The field has bounced back and forth from panacea to panacea. We are still housed in the most destructive architectural arrangement, called the fortress prison.

Those are the peripheral issues.

The two key things I find that cause tensions inside of prisons leading to riots are no greater mysteries than how you get in and how you get out—sentencing and parole. At the bottom each has to be tied to a theory or philosophy of the criminal law, which I am now, at least in my own mind, sure should simply be punishment—not onerous punishment, but simply the deprivation of liberty—the granting of all rights to prisoners are consistent with operating maximum custody institutions. The key issues then are sentencing and parole. The studies show that discrepancies abound, that there is practically no review, practically no case law on sentencing.

Judge Frankel of the Second District Federal Court in New York called sentencing the most lawless part of our system. It is still draconian in length in Western society.

We also find from studies that there has been erosion of judicial power in a sentencing. The district attorney at the front end of the

system does more sentencing than a judge through plea bargaining. The parole board does a lot more sentencing than both at the other end of the system by early release. Judges try to second guess either liberal parole boards by doubling minimums or second guessing conservative ones by halving minimums. But inside the prison you have this scene. If you come from Chicago, it is very hard to get into a State prison in Illinois. You really have to go out of your way. You have to overcome a lot of problems—getting caught, getting through the system, spending 392 days in jail awaiting trial and getting sentenced to the time already served. When you go, you really need to go.

In other parts of the State you stick out like a sore thumb. But you both end up in the same cell comparing notes. That is where the sense of injustice and the tension begins—when they talk of their comparative sentences. If that is the first question that arises when you are inside, the second one has to be, as it would be for all of us, how do you get out. You learn that there is a parole board. Parole boards, as you know, are either all political types or all behavioral science types, or a mix of the two. But the research shows that it does not make much difference. Psychiatrists can not predict better than police chiefs. Police chiefs do not do much worse than psychiatrists. When you take a man in Statesville, San Quentin and try to predict how he is going to be on the streets of Chicago or San Francisco, the research findings are unfortunately fairly negative; we do not predict very well.

We have a criminologist in Chicago who has characterized the whole system something like this: parole, that is the process of being paroled from prison has transformed our prisons into great drama centers where convicts are acting and parole board sit as drama critics awarding Emmys or parole. But they pretend to be assessing "clinical progress."

I can give you all sorts of examples, including that of my own experience, of how parole boards in one case will want you to go to Alcoholics Anonymous meetings to demonstrate progress, another one to religious meetings, another one to group therapy meetings. In the last analysis they still take a mix of years and public safety risk probability when they are going to give parole.

What we have come to in this proposal is something like this. We are saying that a tremendous amount of the discretion has to be taken out of the system at each of the levels. We have to reduce our rhetoric, our claims, and narrow our purposes. We have to create high degrees of certainty for everybody in the system and give up the fruitless search for a unified theory of crime or criminals as if they were diseases. Criminal law should simply state the punishment for illegal behavior and prison should simply be the deprivation of liberty, again not to executed retributively. The sentence itself has to have procedural regularity and has to be reviewable.

Now we come to some of the proposals. We have come up with the notion of returning to flat time. Illinois has four classes of felony working their way up in severity from class four to one in Illinois. We are proposing 2-, 3-, 5-, and 8-year flat time terms with about 20 percent on either side of those terms, plus or minus, in

aggravation or mitigation of the offense. The defendant is also able to have that sentence reviewed quite aside from the other questions of merit, 90-day turnaround time by the Appellate Court, so that case law begins to develop around the notion of fairness.

If this is enacted and everybody makes out—everybody does a maximum term and they are out—we see no need for the continuation of a parole board in its present form, except for clemency and pardon-type hearings.

Inside the prison, what we see happening is if a man receives a 4-year sentence, it is determinate; it is flat. When he goes to prison the warden might say to him, "you can do 4 years or you could do 2. We will give you day-for-day good time. For every day that you are not found guilty of violating some prison rule, we will give you a day off your sentence." That we think increases the prisoner's stake in lawful behavior inside the prison.

We do not go with the old ways of giving good time credit, where an official can reach back and take away time already earned. We call this new system vested. The day you get it it is in a bank and cannot be taken away from you. There are some infractions that do not rise to the importance of taking away good time. They are handled differently. There are other offenses like splitting a guard's head open. That should occasion another indictment and consecutive a sentence. But following explicated rules of the prison that state what the penalties are, we would have due process and have decisions of an internal court reviewable by the warden and the director of corrections. It does not need to go to court because it is fully within the range, the number of years, the sentencing judge already ordered.

We also call for a number of other programs to complete what we call a justice model of corrections. That includes an ombudsman self-governance, conflict resolution mechanisms, access to the courts, law libraries, extended private visitation, family visitation, and a number of other things.

The guts of the program I would say is flat-time sentencing, reviewability, a new vested good-time law, and specifically in Illinois this all has to be supported by a revamping and the establishment of State-wide probation systems so that judges do indeed have alternatives to imprisonment.

That is it in a nutshell, Senator.

Senator McCLELLAN. Is it possible to have a uniform sentencing program throughout the Nation, both Federal and State?

Mr. FOGEL. It probably is. I do not see it happening in this century. It is an interesting thought; I would say it is possible, and would be desirable. The politics of it overwhelm me.

Senator McCLELLAN. While we are waiting for Senator Hruska, does staff have any questions?

Mr. SUMMITT. What kind of limits do you see on the discretion of the various persons who make sentencing decisions? For instance, I notice in your chart you break it down into first offender, repeat offender, and then, I guess, by repeat, repeat offender. The discretion is very limited. Is that a limitation on the judge?

Mr. FOGEL. Yes.

This is based on what I think to be a pretty negative experience with permitting very large areas of discretion. I applaud what you have in S. 1 in taking out a determinate number of years, but I do believe that the range is quite high; that will get us back into the old problem of disparities and tension inside the prison itself.

Mr. SUMMITT. What crimes do you see as being in class 1 or class 2?

Mr. FOGEL. In class 1, we would have arson, rape, armed robbery, attempted murder.

Mr. SUMMITT. Major felonies?

Mr. Fogel. Top felonies; we are suggesting the top limit of 8 years, either aggravated, mitigated or reduced by good time inside. We have given up the notion of showing clinical progress and working your way out that way.

Mr. SUMMITT. Eight years is not the norm. The chart gives the impression that 8 years is the norm, and that it would be plus or minus 2 years, based upon the discretion of the judge.

Mr. FOGEL. That is right, and that is further reduced by good time; that can halve whatever time the judge gives you.

We think that then increases the stake in lawful behavior on the part of convicts.

Mr. THIELEN. The period of time that you allow in aggravation or mitigation seems to only pertain to 1 or 2 years as the maximum for your chart.

I wonder, when you are dealing with a Nation composed of heterogeneous communities—the Nation is largely heterogeneous, rather than homogeneous—on a national level—that a limited aggravation and mitigation span would be appropriate.

For instance, certain crimes in some parts of the country are regarded much more heinous than in other parts of the country. And we had a brief discussion with one of the witnesses yesterday on this point that will pose a problem when defendants convicted of the same crimes arrive in the same institution and compare notes, as you pointed out. But, counterbalancing that is the situation where the communities from which these convicted defendants come must also be satisfied with regard to their judgment of the seriousness of the crime.

Perhaps on a national level, would you allow a greater degree of flexibility in sentencing than you would on a State level, say, in Illinois?

Mr. FOGEL. I personally would not. And I will tell you why it was narrowed. Some of the sentencing studies show that when you plead guilty to an offense you get x number of years. If you go to trial for the same offense, you are punished severely for going to trial by catching a prison term of more years. That is why we have limited this. It does not appear appropriate to me that when a person exercises his right to go to trial that he should be dealt with more punitively.

I am not sure that what you are reflecting is accurate; I am not sure that the community is asking for these things, or whether it is that the judge feels he has to go this way. The evidence that is in is not good. It does not meet—at least my standards—of a sense of justice.

Mr. THIELEN. Would you have any studies that you could suggest

for inclusion in the record showing the disparity in sentencing between guilty plea cases and cases when the defendant elects to go to trial?

Mr. FOGEL. Probably in the larger report—the 400 pager. I think references will be found in that.

Mr. THIELEN. Fine.

Senator MCCLELLAN. Senator Hruska?

Senator HRUSKA. Thank you for your statement, Mr. Fogel. It is going to be of great value to the committee as we round out the foundations for our executive sessions of markup on this bill.

What is your thinking on mandatory sentences—not generally but selectively—imposed either by congressional act or by a State legislature in the event, for example, of co mitting a felony or attempting to commit a felony while in possession of a firearm?

Mr. FOGEL. Simply possession of a firearm?

Senator HRUSKA. Yes.

We have had such a measure in the Congress, and it was approved in the Senate. I do not believe it was acted on by the House. My State of Nebraska has such a mandatory sentence in such an instance, and, as it is very short and to the point, I ask that it be inserted in the record at this point.

Senator MCCLELLAN. Very well.

[The information follows:]

REVISED STATUTES OF NEBRASKA: 1974 CUMULATIVE SUPPLEMENT

OFFENSES AGAINST PUBLIC HEALTH AND SAFETY

28-1011.21. Firearms, knife, brass or iron knuckles; used or carried; commit felony; penalty. Any person who uses a firearm, knife, brass or iron knuckles, or any other dangerous weapon to commit any felony which may be prosecuted in a court of this state, or any person who unlawfully carries a firearm, knife, brass or iron knuckles, or any other dangerous weapon during the commission of any felony which may be prosecuted in a court of this state, shall be guilty of a separate and distinct felony and shall, upon conviction thereof, be punished by confinement in the Nebraska Penal and Correctional Complex not less than three years nor more than ten years, and such sentence shall be consecutive to any other sentence imposed upon him.

Source: Laws 1969, c. 204, § 1, p. 808. Effective date April 2, 1969.

Senator HRUSKA. I wonder what your thinking is on this type of mandatory sentencing?

Mr. FOGEL. Several States have that, but I think they run into all sorts of difficulties because, in whose hands it is, how it got there and for what use.

I would be generally opposed to a mandatory sentence for simply possession. However, if you look at the person's police record and he has been in the habit, two or three times carrying a gun, or recklessly even the first time, I would go for a prison sentence there. There are other areas of the criminal law where I would go for a mandatory prison sentence as well.

Senator HRUSKA. That could be spelled out in the statute, could it not? The first time? It could be spelled out in the statute that someone convicted of a felony, or that someone who is now, for the second time, being charged with possession of a gun while in an

attempt to commit a felony, or having committed it, that could be spelled out in the statute. It is not a matter of inflexibility.

But the statute, once the conditions are met, would require the judge to impose a mandatory penalty. What would you think of that sort of thing?

Mr. FOGEL. As you say, if that is spelled out in the statute and not left to a wide degree of discretion, then I would be in favor of it.

Senator HRUSKA. That is all the questions I have, Mr. Chairman.

Senator MCCLELLAN. Thank you very much.

The next witness is Mr. James Q. Wilson.

Mr. Wilson, would you please identify yourself for the record, please.

Mr. WILSON. My name is James Q. Wilson. I am a professor of government at Harvard University. I am also a member of the board of directors of the police foundation here in Washington, and I have served as Chairman of the White House Task Force on Crime under President Johnson, a similar task force for Vice President Humphrey, and I was Chairman under President Nixon of the National Advisory Council for Drug Abuse Prevention.

Needless to say, I am speaking entirely as an individual.

Senator MCCLELLAN. Do you have a prepared statement?

Mr. WILSON. No sir, I do not.

Senator MCCLELLAN. Very well, you may proceed.

STATEMENT OF PROF. JAMES Q. WILSON, SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY

Mr. WILSON. I would like to speak to two questions this morning: First, to the philosophy of sentencing, and second, to what implications might be drawn from that philosophy that might be applicable to the Federal code that you are now considering.

I believe that there are four purposes that sentencing perform or serve: Justice, rehabilitation, deterrence, and incapacitation.

By justice I mean that a sentence must be imposed that is in some measure proportional to the gravity of the offense, whether or not the sentence has any potential for deterrence or rehabilitation. For example, if we can show to our satisfaction that a physician had it in his power on the basis of 1 week's treatment to turn a convicted professional murderer into a law-abiding citizen, I do not think we would be satisfied with sentencing convicted professional murderers to the 1-week attention by a physician. To do so it would undermine the moral seriousness of the crime and cast doubt on the values of the society and its respect for human life.

No more, can we impose sentences if it can be shown that a fine of $1,000 would prevent a professional murderer from carrying out his contract. Even if such a sentence would deter murder, it would weaken or perhaps destroy the moral sensibilities of men and women in this country and around the world in terms of how they regard human life.

Therefore, one purpose of sentencing must be, independently of others, to make manifest common standards of justice. To be sure these standards are always changing. But the sentence must be in some degree, proportional to the moral seriousness of the crime.

Second, rehabilitation. Since the invention of the penitentiary in the early part of the 19th century and certainly continuing in an accelerated way since the passage of juvenile court laws at the beginning of this century, it has been the professed purpose of the criminal justice system to rehabilitate the criminal.

I think we can now say, on the basis of well over 200 scientific studies and efforts here and abroad to achieve rehabilitation, that with almost no exceptions, none has worked. It makes little difference whether we sentence criminals to maximum security or minimum security facilities, to individual psychotherapy or to group psychotherapy, to work release programs, or to maximum confinement programs. These things may be desirable in and of themselves, but as far as we have been able to discover, they have no effect on the likelihood of the person's committing a crime.

Of course, if only the inefficacy of these programs were at issue, we might decide to continue the effort to rehabilitate and hope for better luck next time.

Senator MCCLELLAN. Do you have any statistics or concrete information as to the percentage of prisoners that can be said to be rehabilitated by reason of the punishment of serving time in prison?

Mr. WILSON. No, sir. I believe that it can be shown that a certain proportion of convicted offenders will spontaneously despite what we do cease committing that crime. In fact, age seems to be the most important factor.

Senator MCCLELLAN. Age?

Mr. WILSON. As young men and women grow older, their tendency to commit a crime is reduced, but there is no evidence, after many, many efforts by people who have wanted to find evidence that what we do to a person affects in any material way their prospects for rehabilitation. I think we have to concede as a empirical proposition, that it simply does not work.

Senator MCCLELLAN. If our objective of rehabilitation is unachievable, as is your view from past experience, then what can be the purpose, the objective of society and government inflicting punishment on one who commits a crime?

Mr. WILSON. That is a subject to which I would now like to turn.

Senator MCCLELLAN. All right.

Mr. WILSON. Before I do, let me simply make two more brief comments on rehabilitation. As I said, if it were only the fact that rehabilitation did not work, there might not be such a great issue because we could continue to try harder. But rehabilitative programs in many ways have two other very undesirable side effects. They have been alluded to by Mr. Fogel.

One is a profound sense of injustice created by the prisoners when they realize that the amount of time they serve in prison is based not on the gravity of their offense or on their prior record or in some cases even on their conduct in prison, but is based upon the judgment of somebody—individuals, politicians, psychiatrists—as to whether or not they are ready to return to society. This means that two persons who have committed exactly the same offense under the exact same circumstances may serve very different lengths of time. I believe with Mr. Fogel that this sense of injustice contributes, along with

other things, to many of the tensions and some of the disturbances that we have had in our penitentiaries.

Furthermore, rehabilitation can also contribute to corruption in prisons. Rehabilitation means to the guards, in many cases, access to desirable facilities. They use that access as a way of rewarding and penalizing prisoners, so that if you get along with the guards by whatever means, you may get to go to the prison library. If you do not go along with the guards, you do not.

This affects the prisoners as well. Some of the older convicts, trying to assert their authority over younger convicts, control these same privileges in the same way. As has been pointed out, in the best maximum security prisons, this leads to the corruption of the rehabilitative ideal.

Let me turn to the two other purposes of sentencing: One is deterrence and the other is incapacitation.

By deterrence I mean that the certainty of punishment deters at the margin a would-be criminal from committing that offense. This is a very difficult question to settle by scientific inquiry. There have been perhaps 1 or 2 dozen studies that have tried to measure the relationship between the certainty of the sentence by State and the likelihood that that crime rate for that offense would go up or down.

These studies are, in individual ways, somewhat unsatisfactory, but interestingly enough, they all come to the same conclusion. Whoever has done them, using whatever data, has found that there is a relationship between the certainty of a penalty and the crime rate, such that if the probability of imprisonment goes up for, let us say, robbery, the rate of robbery the following year goes down.

We cannot assert that as a matter of established scientific fact, but we can say that all the evidence with which social scientists are familiar is consistent with that proposition. Clearly, of course, those who are convicted and sentenced to prison have not been deterred by the sentence. Therefore, for them, what is the purpose of prison?

I believe it is to isolate them from society, to incapacitate them from other criminal acts. They may commit crimes on fellow prisoners and that is a serious problem of prison management, but while on the inside they cannot commit crimes on other citizens on the outside.

At the present time, we do not use our prisons very successfully to incapacitate offenders. That is evidenced by the fact that in most States, even for the most serious crimes committed by repeat offenders, only a minority, in many cases a small minority, go to prison at all.

For example, Los Angeles County—if you have been convicted of robbery and if you have a prior record of having been convicted of a felony, the odds are 2 to 1 that you will not go to prison. If the offense is burglary, and you have been convicted of that and have a prior conviction for a felony, the odds are better than 5 to 1 that you will not go to prison.

In New York City, I believe the proportion of convicted robbers that go to prison is substantially below 20 percent. This means a large number of persons are free to commit additional acts while on the outside against innocent victims.

What would be the effect of having more certain sentences, even of relatively short duration, for those who have been convicted of serious crimes? This is difficult to say. I, along with others, are working on some mathematical models, trying to estimate what the effect would be. The preliminary results are clear. The effects would be very large indeed. Depending upon certain assumptions that you make about how many robberies the average robber commits and what the probability of catching the average robber might be, a mandatory minimum sentence of 3 years for robbery could reduce the rate of robbery between 50 and 75 percent in some jurisdictions.

It seems to me by your failure to look at the deterrent and incapacitative consequences of prison, we have allowed the quality of our prisons to deteriorate, some to become overcrowded, all to be overage, many to be run poorly. By having emphasized the supposed rehabilitative effects of prison, we have allowed ourselves to worry about programs, the practical effect of which is questionable at best, nonexistent at worst.

The bill that you have before you I am not familiar with in great detail, but let me draw some inferences which I think are important. The first is this: I do not see how we can call ourselves a government of laws and of men if we have on the books statutes that say for a class C felony, a judge may sentence a person to prison at any time from 0 to 15 years, class A felony, any time from 0 years to life. Enormous discrepancies will result in the application of that law. I think this can already be shown by the result of similar sentencing practices being followed in the States and in the Federal Government today.

It seems to me that for the more serious sentences, we should have mandatory minimum penalties. These mandatory minimums may not be high. In fact, I do not think they should be high for the following reason: A high mandatory minimum will not be imposed. If you deprive, for example, a citizen of his driver's license for 2 years as a result of committing a traffic infraction, the police will not arrest. Prosecutors will not prosecute. Judges will not convict. Unless, of course, the policeman feels ill-disposed to the defendant, the prosecutor got up on the wrong side of the bed, or the judge is in a bad mood. As a result, some people will get some very heavy sentences; most none at all.

The same with most high mandatory minimums. They will be avoided by reduced charging, by failure to arrest, and the like. I am much more concerned at having a high level of certainty that people are incapacitated by confinement for even a brief period of time. Of course, for repeat offenders one would want to increase the mandatory minimum.

I am not arguing that every offense need have a mandatory minimum, but only for the more serious ones, class A, B, and C felonies. I believe there are strong arguments in favor of it, both in order to increase the deterrent power of the criminal law, to increase the incapacitative effect of prisons, and to remove the great injustices that exist through the vast and almost unfettered discretion that judges and parole boards are now exercising.

The second implication I draw from the views that I have expressed is that we should sharply reduce the discretion of the parole

authorities. Parole operates under conditions of low visibility. It is often not subject to meaningful review. Under the present draft criminal code, an offender is eligible, with a few exceptions, to parole any time after he has served 6 months, and he is eligible each and every year after that time.

This means that a judge can choose to sentence a person from 0 to 30 years for a class B felony. Once he is sentenced, a parole board can choose to change that sentence to any time from 6 months to 30 years. It seems to me that this is analogous to authorizing the Commissioner of the Internal Revenue Service to sit down and say that if you have earned $25,000 last year, your tax will be somewhere between 0 and 50 percent, depending upon his assessment of your moral character, his belief that you will continue to pay taxes, and the mood that he is in. If the taxpayer appeals that, the tax court is authorized to change the tax rates to something between 0 and 50 percent.

I do not believe we would vote for that, and I would think that, although the situation here is not precisely analogous, that we should pause and consider carefully before we vote for a similar plan for something that is far more important than money, mainly the life, prospects, and sense of justice of our citizens.

Finally, I would deemphasize the rehabilitative purpose of prisons. I would not cease the effort to improve the life of convicts. If persons have reading disabilities, I would seek to eliminate them; if they have medical problems, I would supply medical help; if they lack job skills, I would supply job skills. I would do all these things because it is right to provide all of our citizens with these services, but I would do none of them under the mistaken belief that by so doing that we will in any way alter the inmate's prospects for committing or not committing new crimes when he is released.

There is one qualification that I want to make to this—that is how we manage the release procedure. It seems to me that it is extremely important that we devote a lot of attention and resources to easing the transition between prison and the community to make sure that we do everything possible to help a person find a job, relocate in his community, get a reasonable start on a new life.

We cannot be optimistic that that will guarantee that he will go straight, but it seems to me that he faces so many barriers that we must do everything we can to overcome it. That, it seems to me, rather than the discussion now given to the parole system, is the proper focus for many of the efforts that we hope the Bureau of Prisons will carry out.

Senator McCLELLAN. Thank you very much.

I wish you would express briefly your views with respect to the deterrent aspect of sentencing. Whether sentencing as a punishment for a felony really operates as a deterrent to crime.

Mr. WILSON. Sir, I believe that on the basis of the studies that have been done so far by a great variety of individuals around the country that the more certain the penalty, the less the likelihood that that crime will be committed.

This is not to say that you can eliminate crime by having highly certain penalties. Some people commit crimes no matter what the

penalty may be—a deranged person, a person in an alcoholic haze, a passionate lover with a gun in his or her hand. Some people even commit crimes in order to prove that they are tough men or tough women. But at the margin I believe there is a substantial deterrent effect. I think we see it in our everyday lives.

We take our hands off hot stoves because they burn us; we consume less gasoline as the price goes up; and laws against jaywalking and running red lights are scrupulously observed in Los Angeles because the policemen enforce those laws—they are not observed at all in Boston because the policemen do not enforce those laws.

I think that although it is not a scientific certainty, the evidence is consistent with the fact that the certainty of sentencing does have some deterrent effect.

Senator McCLELLAN. With respect to the death penalty, what is your view with regard to that—whether or not that serves as a deterrent to the commission of murder or capital offenses?

Mr. WILSON. Here the experts are in disagreement. Most of the studies tend to show that for the crime of common murder, the everyday garden variety murder—of which we have 20,000 a year in this country—the death penalty as administered in this country does not have a discernable deterrent effect. There are some that believe it does.

The argument is now being fought out in scientific publications. Frankly I am skeptical that the death penalty would have a deterrent effect for most murderers, because most murders are acts of passion that begin as a fight and end up as murder only because a weapon happens to be present on the premises.

On the other hand, there is good reason to suppose—although no evidence—that the death penalty might be a deterrent for certain forms of heinous, calculated crimes by the professional killer, the aircraft hijcaker, the spy or saboteur. I do not think we will ever be able to answer the question scientifically. The problem of the death penalty is going to have to be resolved by this Congress on essentially moral grounds.

Does the Congress believe that there are certain offenses so heinous, so destructive of life, property and even the existence of the country, that death is really the only suitable penalty? Or is the opposite the case?

I do not believe that you will be able to resolve this question on the basis of scientific evidence. I do not believe that you will be able to resolve this question by any studies—that I know of—as to the deterrent effect of the death penalty.

Senator McCLELLAN. Do you believe that one can commit such a heinous crime that he forfeits his right to live in a law-and-order society?

Mr. WILSON. Yes sir.

I believe there are certain crimes so heinous that death might be an appropriate penalty. If someone, in full possession of his senses—not mentally deranged—blows up an airline in flight containing 100 small children in order to collect the insurance on one of them, it seems to me that that cuts at the very core of what every civilized

man and woman must believe and that the death penalty might be appropriate.

For acts of espionage and sabotage during wartime——

Senator McCLELLAN. What about kidnaping and murder for the purpose of extortion or blackmail?

Mr. WILSON. Senator, it is not a hedge on my part when I say that I have not through my own position on many of these other cases—specifically on the case of murder. The best I can say is that at one extreme, I believe that there are crimes so heinous that death may be an appropriate penalty; at the other extreme, I am prepared to say that the average murder in the United States probably is not, by its nature and the quality of the act, a crime sufficiently heinous—so intended—such that murder is an appropriate penalty. In between, I must say that I am perplexed and still thinking.

Senator McCLELLAN. Speaking about deterrents, does the law itself deter crime, or is it the enforcement of the law that serves as a deterrent?

Mr. WILSON. I think even the law itself has some deterrent effect. I believe that we act on that principle every time that we pass a civil rights act, every time we pass a statute regarding drug abuse. We are saying that there are certain things that we believe are wrong, even though we know that we cannot enforce the law against those things very frequently, because many of these actions occur invisibly.

Yet, I believe that the existence of the law does have some effect in educating the citizens as to what is expected; it enforces familiar moral judgments, and therefore, has a deterrent effect. The enforcement of the law also has a deterrent effect.

I am now doing some research in which I believe I can show—although I am not prepared to say conclusively I can show—that the rate at which the police arrest persons——

Senator McCLELLAN. Some people would obey the law simply out of consciousness that it is right to do so.

Mr. WILSON. That is right.

Senator McCLELLAN. To that extent that would serve as a deterrent.

Mr. WILSON. Yes, sir.

Senator McCLELLAN. Then for those who would not so conform to the law out of a sense of duty and social responsibility, the element of punishment and certainty of punishment would be necessary to deter.

Mr. WISON. Yes, sir. It would be necessary; it would not deter all those who would be so inclined. For some we may have to assume that incapacitating them in prison is the only thing to be done.

I believe, yes, that the act of arrest, the act of conviction, the act of punishment, if swiftly and fairly done, does act as a deterrent for a substantial number of persons.

Senator McCLELLAN. It is pretty clear to me that the lack of enforcement certainly mitigates against the effectiveness of the law's deterrence.

Mr. WILSON. I agree.

Senator McCLELLAN. We have a lot of proposals today for a gun control law. There are some who offer variations of the extent that it should be applied, the licensing of weapons and confiscation and so forth. I have often thought that most States—and perhaps all—prohibit the carrying of concealed weapons—deadly weapons—if that law were enforced, it seems to me that that would go a long ways toward accomplishing what those who want to prohibit the ownership of arms would accomplish.

The trouble with so many guns today is because the law is not enforced with respect to the carrying of concealed weapons.

Mr. WILSON. That is quite correct.

Senator McCLELLAN. I wonder if we cannot enforce the present gun laws, how can we enforce a new law to prohibit the possession of weapons?

Mr. WILSON. I agree with you about the problems that have arisen in enforcing state laws against carrying concealed weapons. It is because of those problems that my State of Massachusetts has recently enacted a bill providing mandatory 1-year sentences for anyone carrying a concealed weapon, or anyone having in their possession—even in their home—an unlicensed weapon. They can certainly possess weapons, providing they are licensed, but they cannot carry them concealed.

There have already been arrests, and there have been convictions. I believe that one of the reasons why the laws have proved so weak in the past is that most judges are unwilling to pass sentence for that offense alone, and they are unwilling to do so for various reasons. One is that they do not take the crime seriously in some cases; in other cases they believe the prisons are an inappropriate place to put persons who carry weapons. But in a large number of cases, the way the police learn about a weapon is when they have arrected a person on a charge of assault. This assault is usually against a friend or a family member with a knife or gun. The police get there before it results in murder, then they bring the parties before the judge. By this time, they have sobered up, they have made up, and the wife or the husband—whichever is the victim, real or imagined—says, I do not want to bring charges.

So that assault results in no punishment. The existence or the use of that weapon results in no punishment. In my view, and I believe that there is ample evidence on this, is that the casual availability of a weapon, when tempers are riding high, leads to many serious assaults and murders. And I believe that the States—or if not the States, the Federal Government—should move in the direction of having mandatory minimum sentences for people arrested while in the possession of a concealed, dangerous weapon.

And I believe that if this were done, that this would have some desirable effect on reducing the amount of maiming and killing that is going on.

Mr. THIELEN. Professor, you have discussed the problem of discretion in sentencing and what you believe to be an excess of judicial

discretion in this area. You would solve that problem to a certain degree by mandatory minimums.

To what extent do you allow for any discretion in sentencing? Have you given some thought to that?

Dr. Fogel testified that he would allow the court to vary a sentence by up to 1 or 2 years depending upon the agrravating or mitigating circumstances in a case. Do you concur in that approach?

Mr. WILSON. Yes, I do.

Clearly a judge—or a judge and prosecutor working together as in practice—must have some discretion, because a person stealing out of personal want may be different from a person stealing out of malicious intent. And both are different from a person having a prior record of stealing. The circumstances of the act must be taken into account.

I do not think this requires a great deal of discretion. Not nearly as much as is embodied in this legislation or as most laws in the States. What may be aggravating or mitigating circumstances, I am not prepared to say. What Mr. Fogel spoke to is, on the face of it, a reasonable proposal.

Mr. THELEN. You would allow, for example, sentence variation from 3 to five years—a very limited amount?

Mr. WILSON. Yes sir.

In fact, as I indicated, on a more common offense such as burglary or theft from interstate transportation, or the other major common elements that involve Federal law enforcement, the mandatory minimums might even be smaller than that in order to ensure that they are imposed, and we are not sentencing people faster than we have adequate facilities to house them.

Around that minimum, I would allow a rather constrictive range. But some range, yes.

Mr. THELEN. What about the elimination of parole? Dr. Fogel discussed that.

Mr. WILSON. I do not think parole serves any constructive purpose. It does not facilitate the reentry of the convict into society, because parole is simply a judgment. You are in or out; there are no follow-up services. That judgment is capriciously given.

Scientific studies show that persons given parole are no more and no less likely to commit new offenses than persons who serve their full time. Given the opportunities for the improper use of discretion in many state parole systems—let us be candid—given the opportunity for political influence, or even bribery—it seems these costs simply outweigh the nonexistent benefits.

Mr. THELEN. You would favor the system of doing away with parole?

Mr. WILSON. Yes sir.

You have to have some way of giving persons time off for good behavior, and you have to have a procedure whereby people who have been wrongly convicted or wrongly sentenced can appeal and receive clemency.

Mr. THELEN. You would favor, then, something like the flat good-time approach of Dr. Fogel?

Mr. WILSON. Yes, sir.

Mr. THELEN. Thank you.

Mr. ROTHSTEIN. Professor, I have one question.

You mentioned the reluctance of judges to sentence defendants in certain cases—particularly an offender whose only offense is carrying a concealed weapon. I think that we all understand that there are understandable reasons when the heat of the moment is off, and we have a citizen who is fairly law-abiding in some other respects, that a judge may not want to send him to a place where there are hardened criminals, therefore furthering the criminalization of this individual.

Do you think that this situation would be improved if there were separate prison facilities for certain offenders of this variety? That that would make judges more willing to sentence?

Mr. WILSON. We have done far too little in designing a variety of confinement facilities with an appropriate degree of amenities suitable for the different classes of offenders. We have tried to classify offenders in most States, but it is a most primitive process. Persons under 17 are separated, usually, from persons over 17. Pathological offenders are sometimes separated from the nonpathological offenders, but it is quite primitive.

I think that classification and separation principles have to be carried much further. For example, if an ordinary law-abiding citizen is caught carrying a concealed weapon, I think something should be done that is relatively serious to that citizen. I do not imagine that requires sending him to a conventional fortress prison for 6 months; it might be necessary only to tell the person that he must serve time on weekends for a protracted number of weekends so he can continue to hold his job while he reflects on the gravity of carrying a gun.

Mr. ROTHSTEIN. One further question.

Cutting against the whole notion that prison deters—which is the central point of your presentation—what do you have to say to those people, those experts, who have said that criminals often seek the structure and environment of the prison, and when they are released they cannot commit another crime fast enough to get back into prison because they really cannot cope with the unstructured, outside world?

Mr. WILSON. There are such offenders, ranging from the Bowery derelict who wants to be locked up for drunkenness because it is his only home—the jail—to a few offenders who have only know prison life. But they are a very small minority.

I do not know which convicts the experts to which you refer have interviewed. But I have interviewed very few who would rather not be on the outside, for whom the deprivation of liberty is not a very grave penalty.

Mr. ROTHSTEIN. There may be a difference between what they say and what their subconscious creates.

Mr. WILSON. One could say that. I am not persuaded by it. I believe that most persons—especially in a democratic society—cherish their liberty almost more than anything else. Indeed, the whole concept of a prison was meaningless before the early part of the 19th century because of, there then being no liberty in western

civilization, the deprivation of liberty was meaningless. When the Quakers invented the first penitentiary, they knew that they were taking a serious step.

If there are some persons who prefer the structured environment of an institution—and I think it is possible to find out who those persons are, and perhaps for their own benefit to find a different kind of structured environment, a different institution—perhaps they would enjoy a life in a work camp. Perhaps they are eminently suitable candidates for continued service in public employment jobs. I am talking about the average offender who would rather be on the outside than the inside.

Mr. ROTHSTEIN. One final point.

In your presentation you referred to studies showing that the crime rate drops as the punishment becomes more serious. Could you mention for us those studies so we can be sure that we have also included them?

Mr. WILSON. You will find several summaries of them in the following sources: a book, "Thinking About Crime", by James Q. Wilson, which is being published by Basic Books next month; an article by Gordon Tullock, which appeared in the Public Interest last year—I do not have a date; an article by Charles Tittle, which appeared in the Law and Society Review in the last year.

These are three summaries; there are others. I am sorry I do not have copies of them here. Since those publications, I can assure you there are many unpublished studies that all come to the same conclusion.

Mr. ROTHSTEIN. Thank you.

Senator HRUSKA. The questions that I have had in mind have been clearly covered.

Thank you for coming.

Senator MCCLELLAN. The staff calls my attention to the fact that there was published in the New York Times Magazine on March 9, an article written by you. Do you object to that being inserted in the record?

Mr. WILSON. I would have no objection, sir, if it suits you.

Senator MCCLELLAN. Very well.

Without objection, it will be inserted in the record.

[The information referred to follows:]

[From The New York Times Magazine/March 9, 1975]

LOOK 'EM UP AND OTHER THOUGHTS ON CRIME

by James Q. Wilson

James Q. Wilson is Henry Lee Shattuck Professor of Government at Harvard. This article is adapted from his forthcoming book, "Thinking About Crime."

As much as anything, our futile efforts to curb or even understand the dramatic and continuing rise in crime have been frustrated by our optimistic and unrealistic assumptions about human nature. Considering that our society is in the grip of a decade-old crime wave despite a decade-long period of prosperity, it is strange that we should persist in the view that we can find and alleviate the "causes" of crime, that serious criminals can be rehabilitated, that the police can sowehow be made to catch more criminals faster, and that prosecutors and judges have the wisdom to tailor sentences to fit the "needs" of the individual offender.

I argue for a sober view of man and his institutions that would permit reasonable things to be accomplished, foolish things abandoned, and utopian things forgotten. A sober view of man requires a modest definition of progress. A 20-per cent reduction in robbery would still leave us with the highest robbery rate of almost any Western nation but would prevent about 60,000 robberies a year. A small gain for society, a large one for the would-be victims. Yet a 20 per cent reduction is unlikely if we concentrate our efforts on dealing with the causes of crime or even if we concentrate on improving police efficiency. But were we to devote those resources to a strategy that is well within our abilities—to incapacitating a larger fraction of the convicted serious robbers—then not only is a 20 per cent reduction possible, even larger ones are conceivable.

Most serious crime is committed by repeaters. What we do with first offenders is probably far less important than what we do with habitual offenders. A genuine first offender (and not merely a habitual offender caught for the first time) is in all likelihood a young person who, in the majority of cases, will stop stealing when he gets older. This is not to say we should forgive first offenders, for that would be to license the offense and erode the moral judgments that must underile any society's attitude toward crime. The gravity of the offense must be appropriately impressed on the first offender, but the effort to devise ways of re-educating or uplifting him in order to insure that he does not steal again is likely to be wasted—both because we do not know how to re-educate or uplift and because most young delinquents seem to re-educate themselves not matter what society does.

After tracing the history of nearly 10,000 Philadelphia boys born in 1945, Marvin Wolfgang and his colleagues at the University of Pennsylvania found that more than one-third were picked up by the police for something more serious than a traffic offense but that 46 per cent of these delinquents had no further police contact after their first offense. Though one-third started on crime, nearly half seemed to stop spontaneously—a good thing, because otherwise the criminal justice system in that city, already sorely taxed, would in all likelihood have collapsed. Out of the 10,000 boys, however, there were 627—only 6 per cent—who committed five or more offenses before they were 18. Yet these few chronic offenders accounted for *more than half* of all the recorded delinquencies and about *two-thirds* of all the violent crimes committed by the entire cohort.

Only a tiny fraction of all serious crimes leads immediately to an arrest, and only a slightly larger fraction is ultimately "cleared" by an arrest, but this does not mean that the police function is meaningless. Because most serious crime is committed by repeaters, most criminals eventually get arrested. The Wolfgang findings and other studies suggest that the chances of a persistent burglar or robber living out his life, or even going a year, with no arrest are quite small. Yet a large proportion of repeat offenders suffers little or no loss of freedom. Whether or not one believes that such a penalty, if inflicted, would act as a deterrent, it is obvious that it could serve to incapacitate these offenders and thus, for the peroid of the incapacitation, prevent them from committing additional crimes.

We have a limited (and declining) supply of detention facilities, and many of those that exist are decrepit, unsafe, and overcrowded. But as important as expanding the supply and improving the decency of the facilities is the need to think seriously about how we wish to allocate those spaces that exist. At present, that allocation is hit or miss. A 1966 survey of more than 15 juvenile correctional institutions disclosed that about 30 per cent of the inmates were young persons who had been committed for conduct that would not have been judged criminal were it committed by adults. They were runaways, "stubborn children," or chronic truants—problem children, to be sure, but scarcely major threats to society. Using scarce detention space for them when in Los Angeles more than 90 per cent of burglars with a major prior record receive no state prison sentence seems, to put it mildly, anomalous.

In a joint study, Prof. Reuel Shinnar of City College of New York and his son Shlomo have estimated the effect on crime rates in New York State of a judicial policy other than that followed during the last decade or so. Given the present level of police efficiency and making some assumptions about how many crimes each offender commits per year, they conclude that the rate of serious crime would be only *one-third* what it is today if every person con-

victed of a serious offense were imprisoned for three years. This reduction would be less if it turned out (as seems unlikely) that most serious crime is committed by first-time offenders, and it would be much greater if the proportion of crimes resulting in an arrest and conviction were increased (as also seems unlikely). The reduction, it should be noted, would be solely the result of incapacitation, making no allowance for such additional reductions as might result from enhanced deterrence or rehabilitation.

The Shinnar estimates are based on uncertain data and involve assumptions that can be challenged. But even assuming they are overly optimistic by a factor of two, a sizable reduction in crime would still ensue. In other countries such a policy of greater incapacitation is in fact followed. A robber arrested in England for example, is more than three times as likely as one arrested in New York to go to prison. That difference in sentencing does not account for all the difference between English and American crime rates, but it may well account for a substantial fraction of it.

That these gains are possible does not mean that society should adopt such a policy. One would first want to know the costs, in additional prison space and judicial resources, of greater use of incapacitation. One would want to debate the propriety and humanity of a mandatory three-year term; perhaps, in order to accommodate differences in the character of criminals and their crimes, one would want to have a range of sentences from, say, one to five years. One would want to know what is likely to happen to the process of charging and pleading if every person arrested for a serious crime faced a mandatory minimum sentence, however mild. These and other difficult and important questions must first be confronted. But the central fact is that *these are reasonable questions* around which facts can be gathered and intelligent arguments mustered. To discuss them requires us to make few optimistic assumptions about the malleability of human nature, the skills of officials who operate complex institutions, or the capacity of society to improve the fundamental aspects of familial and communal life.

Persons who criticize an emphasis on changing the police and courts to cope with crime are fond of saying that such measures cannot work so long as unemployment and poverty exist. We must acknowledge that we have not done very well at inducting young persons, especially but not only blacks, into the work force. Teen-age unemployment rates continue to exceed 20 per cent and show little sign of abating. Nor should we assume that declining birth rates will soon reduce either the youthful demand for jobs or the supply of young criminals. The birth rates are now very low; it will not be until the mid- or late-nineteen-eighties that these low rates will affect the proportion of the population that is entering the job-seeking and crimeprone ages of 16 through 26.

In the meantime, while anti-crime policies may be hampered by the failure of employment policies, it would be equally correct to say that so long as the criminal-justice system does not impede crime, efforts to reduce unemployment will not work. If legitimate opportunities for work are unavailable, many young persons will turn to crime; but if criminal opportunities are profitable, many young persons will not take those legitimate jobs that exist. The benefits of work and the costs of crime must be increased simultaneously; to increase one but not the other makes sense only if one assumes that young people are irrational.

One rejoinder to this view is the argument that if legitimate jobs are made absolutely more attractive than stealing, stealing will decline even without any increase in penalties for it. That may be true provided there is no practical limit on the amount that can be paid in wages. Since the average "take" from a burglary or mugging is quite small, it would seem easy to make the income from a job exceed the income from crime.

But this neglects the advantages of a criminal income: One works at crime at one's convenience, enjoys the esteem of colleagues who think a "straight" job is stupid and skill at stealing is commendable, looks forward to the occasional "big score" that may make further work unnecessary for weeks, and relishes the risk and adventure associated with theft. The money value of all these benefits—that is, what one who is not shocked by crime would want to cash to forego crime—is hard to estimate but is almost certainly far larger than what either public or private employers could offer to unskilled or semiskilled young workers. The only alternative for society is so to increase the risks of theft that its value is depreciated below what society can afford to pay in legal wages, and then take whatever steps are necessary to insure that those legal wages are available.

Another rejoinder to the "attack poverty" approach to crime is this: The desire to reduce crime is the worst possible reason for reducing poverty. Most poor persons are not criminals; many are either retired or have regular jobs and lead conventional family lives. The elderly, the working poor, and the willing-to-work poor could benefit greatly from economic conditions and government programs that enhance their incomes without there being the slightest reduction in crime—indeed, if the experience of the nineteen-sixties is any guide, these might well be through no fault of most such beneficiaries, an increase in crime. Reducing poverty and breaking up the ghettos are desirable policies in their own right, whatever their effects on crime. It is the duty of government to devise other measures to cope with crime: not only to permit anti-poverty programs to succeed without unfair competition from criminal opportunities, but also to insure that such programs do not inadvertently shift the costs of progress, in terms of higher crime rates, onto innocent parties, not the least of whom are the poor themselves.

One cannot press this economic reasoning too far. Some persons will commit crimes whatever the risks; indeed, for some, the greater the risk, the greater the thrill, while others—the alcoholic wife beater, for example—are only dimly aware that there are any risks. But more important than the insensitivity of certain criminal offenders to changes in risks and benefits is the impropriety of casting the crime problem wholly in terms of a utilitarian calculus. The most serious offenses are crimes not simply because society finds them inconvenient, but because it regards them with moral horror. To steal, to rape, to rob, to assault—these acts are destructive of the very possibility of society and affronts to the humanity of their victims. It is my experience that parents do not instruct their children to be law-abiding merely by pointing to the risks of being caught, but by explaining that these acts are wrong whether or not one is caught. I conjecture that those parents who simply warn their offspring about the risks of crime produce a disproportionate number of young persons willing to take those risks.

Even the deterrent capacity of the criminal-justice system depends in no small part on its ability to evoke sentiments of shame in the accused. If all it evoked were a sense of being unlucky, crime rates would be even higher. James Fitzjames Stephens, the 19th-century British jurist, makes the point by analogy. To what extent, he asks, would a man be deterred from theft by the knowledge that by commiting it he was exposing himself to 1 chance in 50 of catching a serious but not fatal illness—say, a bad fever? Rather little, we would imagine—indeed, all of us regularly take risks as great as or greater than that: when we drive after drinking, when we smoke cigarettes, when we go hunting in the woods. The criminal sanction, Stephens concludes, "operates not only on the fears of criminals, but upon the habitual sentiments of those who are not criminals. [A] great part of the general detestation of crime . . . arises from the fact that the commission of offenses is associated . . . with the solemn and deliberate infliction of punishment wherever crime is proved."

Much is made today of the fact that the criminal-justice system "stigmatizes" those caught up in it, and thus unfairly marks such persons and perhaps even furthers their criminal careers by having "labeled" them as criminals. Whether the labeling process operates in this way is as yet unproved, but it would indeed be unfortunate if society treated a convicted offender in such a way that he had no reasonable alternative but to make crime a career. To prevent this, society ought to insure that one can "pay one's debt" without suffering permanent loss of civil rights, the continuing and pointless indignity of parole supervision, and frustration in being unable to find a job. But doing these things is very different from eliminating the "stigma" from crime. To destigmatize crime would be to lift from it the weight of moral judgment and to make crime simply a particular occupation or avocation which society has chosen to reward less (or perhaps more!) than other pursuits. If there is no stigma attached to an activity, then society has no business making it a crime. Indeed, before the invention of the prison in the late 18th and early 19th centuries, the stigma attached to criminals was the major deterrent to and principal form of protection from criminal activity. The purpose of the criminal-justice system is not to expose would-be criminals to a lottery in which

they either win or lose, but to expose them in addition and more importantly to the solemn condemnation of the community should they yield to temptation.

Anyone familiar with the police stations, jails and courts of some of our larger cities is keenly aware that accused persons caught up in the system are exposed to very little that involves either judgment or solemnity. They are instead processed through a bureaucratic maze in which a bargain is offered and a haggle ensues at every turn—over the amount of bail, the degree of the charged offense and the nature of the plea. Much of what observers find objectionable about this process could be alleviated by devoting many more resources to it, so that an ample supply of prosecutors, defense attorneys and judges was available. That we do not devote those additional resources in a country obsessed with the crime problem is one of the more interesting illustrations of the maxim, familiar to all political scientists, that one cannot predict public policy simply from knowing popular attitudes. Whatever the cause, it remains the case that in New York County (Manhattan) there were, in 1973, 31,093 felony arrests to be handled by only 125 prosecutors, 119 public defenders and 59 Criminal-Court judges. The result was predictable: Of those arrested, only 4,130 pleaded guilty to or were convicted on a felony charge; 81 per cent of the felony arrests were disposed of by pleading guilty to a misdemeanor or by discharging the case.

One wonder whether the stigma properly associated with crime retains much deterrent or educative value. My strong inclination is to resist explanations for rising crime that are based on the alleged moral breakdown of society, the community or the family. I resist in part because most of the families and communities I know have not broken down, and in part because, had they broken down, I cannot imagine any collective action we could take consistent with our civil liberties that would restore a moral consensus, and yet the facts are hard to ignore. Take the family: More than one-third of all black children and 1 in 14 of all white children live in single-parent families. More than two million live in single-parent households (usually the father absent), almost *double* the number of 10 years ago. In 1950, 18 per cent of black families were headed by females; in 1969 the proportion had risen to 27 per cent; by 1973 it exceeded 35 per cent. The average income for a single-parent family with children under 6 years of age was, in 1970, only $3,100, well below the official "poverty line."

Studies done in the late nineteen-fifties and the early nineteen-sixties showed that children from broken homes were more likely than others to become delinquent. In New York State, 58 per cent of the variation in pupil achievement in 300 schools could be predicted by but three variables—broken homes, overcrowded housing and parental educational level. Family disorganization, writes Prof. Urie Bronfenbrenner of Cornell University, has been shown in thousands of studies to be an "omnipotent overriding factor" in behavior disorders and social pathology. And that disorganization is increasing.

These facts may explain some elements of the rising crime rate that cannot be attributed to the increased number of young persons, high teen-age unemployment or changed judicial policies. The age of persons arrested has been declining for more than 15 years and the median age of convicted defendants (in jurisdictions for which data are available) has been declining for the last six years. Apparently, the age at which persons begin to commit serious crime has been falling. For some young people, thus, whatever forces weaken their resistance to criminal activity have been increasing in magnitude, and these forces may well include the continued disorganization of the family and the continued deterioration of the social structure of inner-city communities.

One wants to be objective, if not optimistic. Perhaps single-parent families today are less disorganized—or have a different significance—than such families in the past. Perhaps the relationship between family structure and social pathology will change. After all, for at least a brief while, the heroin epidemic on the East Coast showed signs of abating as law enforcement reduced the supply of narcotics, treatment programs took many addicts off the streets and popular revulsion against addiction mounted. Perhaps other aspects of the relationship among family, personality and crime will change. Perhaps. But even as this is being written, and after the book from which it is taken went to press, there have appeared omnious signs that the East Coast heroin shortage may be ending and the use of heroin once again increasing.

No one can say how much of crime results from its increased profitability and how much from its decreased shamefulness. But one or both factors must be at work, for population changes alone simply cannot account for the increases. Crime in our cities has increased far faster than the number of young people, or poor people, or black people, or just plain people who live in those cities. In short, objective conditions alone, whether demographic or economic, cannot account for the crime increases; ideas, attitudes, values have played a great part, though in ways hard to define and impossible to measure. An assessment of the effect of these changes on crime would provide a partial understanding of changes in the moral structure of our society.

But to understand is not to change. If few of the demographic factors contributing to crime are subject to planned change, virtually none of the subjective ones are. Though intellectually rewarding, from a practical point of view it is a mistake to think about crime in terms of its "causes" and then to search for ways to alleviate those causes. We must think instead of what it is feasible for a government or a community to do, and then try to discover by experimentation and observation, which of those things will produce, at acceptable costs, desirable changes in the level of criminal victimization.

There are, we now know, certain things we can change in accordance with our intentions, and certain ones we cannot. We cannot alter the number of juveniles who first experiment with minor crimes. We cannot lower the recidivism rate; though within reason we should keep trying. We are not yet certain whether we can increase significantly the police apprehension rate. We may be able to change the teen-age unmployment rate, though we have learned by painful trial and error that doing this is much more difficult than once supposed. We can probably reduce the time it takes to bring an arrested person to trial, even though we have as yet made few serious efforts to do so. We can certainly reduce the arbitrary and socially irrational exercise of prosecutorial discretion over whom to charge and whom to release, and we can most definitely stop pretending that judges know, any better than the rest of us, how to provide "individualized justice." We can confine a larger proportion of the serious offenders and repeaters and fewer of the common drunks and truant children. We know that confining criminals prevents them from harming society, and we have grounds for suspecting that some would-be criminals can be deterred by the confinement of others.

Above all, we can try to learn more about what works, and in the process abandon our ideological preconceptions about what *ought* to work. Nearly 10 years ago I wrote that the billions of dollars the Federal Government was then preparing to spend on crime control would be wasted and indeed might even make matters worse if they were merely pumped into the existing criminal-justice system. They were, and they have. In the next 10 years I hope we can learn to experiment rather simply spend, to test our theories rather than fund our fears. This is advice, not simply or even primarily to government—for governments are run by men and women who are under irresistible pressures to pretend they know more than they do—but to my colleages! academics, theoreticians, writers, advisers. We may feel ourselves under pressure to pretend we know things, but we are also under a positive obligation to admit what we do not know and to avoid cant and sloganizing. The Government agency, the Law Enforcement Assistance Administration, that has futilely spent those billions was created in consequences of an act pasesd by Congress on the advice of a Presidential commission staffed by academics, myself included.

It is easy and popular to criticize yesterday's empty hopes and mistaken beliefs, especially if they seemed supportive of law enforcement. It is harder, and certainly most unpopular, to criticize today's pieties and pretentions, especially if they are uttered in the name of progress and humanity. But if we were wrong in thinking that more money spent on the police would bring down crime rates, we are equally wrong in supposing that closing our prisons, emptying our jails and supporting "community-based" programs will do any better. Indeed, there is some evidence that these steps will make matters worse, and we ignore it at our peril.

Since the days of the crime commission, we have learned a great deal, more than we are prepared to admit. Perhaps we fear to admit it because of a new-found modesty about the foundations of our knowledge, but perhaps also because the implications of that knowledge suggest an unflattering view of

man. Intellectuals, although they often dislike the common person as an individual, do not wish to be caught saying uncomplimentary things about humankind. Nevertheless, some persons will shun crime, even if we do nothing to deter them, while others will seek it out even if we do everything to reform them. Wicked people exist. Nothing avails except to set them apart from innocent people. And many people, neither wicked nor innocent, but watchful, dissembling, and calculating of their opportunities, ponder our reaction to wickedness as a cue to what they might profitably do. We have trifled with the wicked, made sport of the innocent and encouraged the calculators. Justice suffers, and so do we all.

Senator McCLELLAN. Our next witness is Mr. Ralph Rudd. All right, identify yourself for the record.

STATEMENT OF RALPH RUDD ON BEHALF OF FRIENDS COMMITTEE ON NATIONAL LEGISLATION

Mr. RUDD. My name is Ralph Rudd. I live at 4777 Wood Street, Willoughby, Ohio 44094. I am a lawyer practicing in Cleveland, Ohio. I appear before you today on behalf of the Friends Committee on National Legislation. I chair its general committe, which meets annually, and serve also as a member of its executive committee and policy committee. The Friends Committee on National Legislation exists to serve the interests of members of the religious society of Friends, commonly called Quakers, in national legislative and administrative activities having to do with both international and domestic policy. This committee is widely representative of Friends' groups around the Nation, but does not purport to speak for all Friends, who cherish their rights to individual opinions. Our primary concerns are for peace, social equality, and justice. I understand the committee was the first and is now, the oldest registered religious lobby in our national capital.

In the areas of sentencing, which I understand to be the subject of this hearing, one of the deepest concerns of Quakers is for the abolition of capital punishment. Capital punishment violates the most fundamental Quaker teaching, that there is something of God in every person, and that no one is ever totally beyond the reach of the spirit of God for spiritual redemption and for the recognition and acceptance of truth. Thus the law should seek to preserve human life, not take it, and we urge deletion of the provisions for capital punishment now contained in Senate bill No. 1, chapter 24. If more practical, though less profound, reasons for abolishing capital punishment are sought, I would point out that it has proved impossible to demonstrate statistically that the prospect of capital punishment is an effective deterrent to homicide. The belief it is a deterrent rests on nothing more solid than the widespread affirmation that it stands to reason. The lesson is that what stands to reason when we are able to reason is of little effect when human beings become unreasoningly homicidal.

I suggest it stands to reason at least equally that for the law to say that it is sometimes right to kill in cold blood lowers for all of us the threshold of inhibition against killing in hot blood. I believe the violence that our country committed in Vietnam taught by example that violence is a legitimate instrument of politics, and so

contributed to the wave of violence and assassination we experienced in the last decade. Just so, I believe the existence in the law of capital punishment augments crime at least as much as it deters it.

The other main idea I want to express has to do with the iniquity of our prison system. It is widely said that it takes young delinquents and turns them into hardened criminals. The National Advisory Commission on Criminal Justice Standards and Goals reported in its 1973 report, A National Strategy to Reduce Crime, pages 173 and 183, two studies that seemed to show that recidivism increases with longer terms in prison. This seems attributable to the basic character of prison life, which, at best, reduces drastically the opportunities for practice of freedom and exercise of responsibility. At worst it reduces one from a person to a number, from a citizen to a subject, from self-reliance to dependency, from hope to frustration. It tends even to degrade the jailers. I have read of an experiment in which a sociology class voluntarily simulated a prison situation and the volunteer jailers, chosen by lot, found themselves becoming brutal and tyrannical. Imprisonment as presently practiced, and perhaps inevitably, is totally undemocratic and fundamentally debasing. It is a monument to the strength and resiliency of the human spirit that so many do come out of prison still able to make their way in normal human society. It is small wonder that so many come out unable to do so.

The gist of our message is that every effort should be made to minimize imprisonment, both the number of prison sentences, and the length of time served.

Thus, we welcome the extensive provisions in S. 1, chapter 21, for probation as an alternative to imprisonment, and the improvement of section 2102 by comparison with section 2101 of S. 1400 in the 93d Congress, which seemed to create a strong presumption against probation. We suggest a probationer's right of counsel be written into section 2105, dealing with revocation of probation.

We commend also the general avoidance of a statutory minimum sentence that must be served before one becomes eligible for parole, sections 2301(d) and 2302(c), urge abandonment of the mandatory prison sentence altogether instead of retaining it for two crimes, sections 3725 and 3726, and commend the requirements for early and periodic consideration of parole for each prisoner and for statements of reasons for the parole commission's decisions. We suggest a prisoner's right of counsel at the parole interview be written more firmly into section 3833 (b), similar to that of section 3835 (d) (1) on revocation of parole. We welcome the allowance of credit for all official detention for the same offense or on any subsequent arrest on any other charge, section 2305 (b). We welcome the provisions for temporary release for family emergencies, job interviews, work, education, and other appropriate activities, section 3822, and suggest these be expanded to allow conjugal visitation.

But when we see the scale of authorized prison terms expressed in section 2301 (b) we recoil in horror: Life, 30, 15, 7, and 3 years respectively for felonies, classes A to E. We realize that each is a maximum and that the court has discretion to sentence to less, but the maximum is used all to often, and we cannot believe that those

figures would yield any more deterrence or rehabilitation than numbers half as high. Prison terms in Western Europe are said to be considerably lower than in the United States even now, and although I have not made a section-by-section comparison, the proposed maximums seem higher, generally, than those presently in effect.

Mr. ROTHSTEIN. If I may interject at this point, the sentences are for the more common crimes that are more commonly committed, and turn out to be lower than under existing law in most instances.

Mr. RUDD. I am glad to be so advised.

Mr. ROTHSTEIN. Because it is a difficult computation to do and is not immediately apparent here.

Mr. RUDD. I did not have time to make the analysis.

Mr. ROTHSTEIN. On the face of it it does look like it is an increase.

Mr. RUDD. Thank you.

We urge they be reduced to one-half the present proposals, or less, much closer to the 5 years that the American Bar Association advises should be a sufficient maximum in most cases.

For extreme cases the authorized extended term proposed in sections 2301(c), and 2302, and proposed rule 32.1 of the Federal Rules of Criminal Procedure [p. 353 of S. 1], would seem to give adequate and well-controlled scope for the discretion of the court.

I have mentioned the gain we see in section 2102 in that it would not create a presumption against probation. We suggest, finally, that this progress be carried forward by writing into the bill, as the American Bar Association wrote into its standards, section 2.3(c), page 353, the direction that,

> A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.

In summary, we urge that capital punishment be abolished and imprisonment be minimized.

Thank you very much.

Senator MCCLELLAN. Do I understand that you would like to see all punishment of crime abolished?

Mr. RUDD. No; I would not say all punishment. I think that probation is a punishment.

Senator MCCLELLAN. You think probation is a punishment?

Mr. RUDD. Yes.

Senator MCCLELLAN. Do I understand that you would like to see all imprisonment for crime abolished?

Mr. RUDD. I am not even sure that I would insist on that. I would say that it should be minimized.

Senator MCCLELLAN. What do you mean by minimized?

Mr. RUDD. I would think that we ought to reduce it as far as we can conscientiously do so.

Senator MCCLELLAN. You can reduce it by eliminating it.

Mr. RUDD. Yes.

Senator MCCLELLAN. Would you eliminate it?

Mr. RUDD. I am not sure I would eliminate it.

Senator MCCLELLAN. Are you sure either way?

Mr. RUDD. Am I what?

Senator MCCLELLAN. Did I understand you to say you are not sure whether you would want it eliminated or not?

Mr. RUDD. I am not sure that I would ask to eliminate it completely. I have not reached a resolution.

Senator MCCLELLAN. Under what degree would you eliminate it?

Mr. RUDD. I would say except in those instances where it seems absolutely essential to do as Mr. Wilson suggested, that is to incapacitate.

Senator MCCLELLAN. Do what?

Mr. RUDD. As Mr. Wilson suggested, to incapacitate a defendant temporarily from early repetition of the crime while other efforts are made to deal with his central problems.

I think that it may be necessary in some instances of that kind to have imprisonment.

Senator MCCLELLAN. We are having heinous crimes committed everyday throughout the country. The two little sisters, the one 11, the one 12, are missing under circumstances that indicate that they have been kidnaped, possibly their lives taken. They may have been molested before they met their death. All of this we do not know yet but circumstances indicate that and we know that such crimes have occurred in the past.

What would be your sentence and judgment of appropriate punishment or treatment of a person, assuming that he is not insane, who would commit such a crime?

Mr. RUDD. It is difficult for me to assume that such a person is not insane, Senator.

Senator MCCLELLAN. You say whoever commits a crime like that is insane?

Mr. RUDD. Very likely there is some kind of insanity involved, most probably, and certainly there are persons who need help to overcome problems that lead them to such crimes as those. And it may be necessary, as I suggested a moment ago, sometimes to confine them.

I think the pattern——

Senator MCCLELLAN. Assuming, under your judgment and viewpoint, that he should not be punished because one would commit a crime like that only if he were insane. What would you do with him? What would be your sentence? What should society do? How should it treat a case like that, an individual who has committed such a crime?

Mr. RUDD. I think that our best approach in this kind of situation is to do what we can.

Senator MCCLELLAN. What is that? What can we do? That is what I am trying to find out.

Mr. RUDD. There is some benefit in psychiatric treatment. I realize that psychiatry is an uncertain and imperfect instrument. At present, I think it is gaining, but I think the efforts at finding the source of a person's aberration should be made. I am not one who says there should be no punishment. I find some response to the idea that has been expressed here this morning, that simple punishment has the virtue from the point of view of asserting society's disapproval of conduct. And I do not disagree that certainty of punishment probably increases deterrence.

Senator MCCLELLAN. You do not think it is a deterrent?

Mr. RUDD. I say I do not disagree that certainty of punishment increases deterrence. I think punishment probably does deter to

some extent. I think the extent of deterrence resulting from punishment may often be exaggerated and that the extent of imprisonment necessary to accomplish the maximum deterrence is usually greatly exaggerated.

I think that present terms can be far shorter than they usually are, or are authorized to be, and still accomplish maximum deterrence.

Senator McClellan. A few days ago, there occurred another incident here in the Nation's capital where a man, apparently for no reason at all went out on the street and started shooting people down and killed two, I believe, and wounded some more before the police were able to apprehend him with a bullet and kill him in order to stop him.

Can such action be justified on the part of the police—taking such action as that in a circumstance like that? Do you feel that such legal authority should be reposed in the police?

Mr. Rudd. Yes, I do.

Senator McClellan. That is taking a life to save a life, is it not?

Mr. Rudd. Yes.

Senator McClellan. Then if a man is inclined to be a murderer and you cannot establish his insanity and he murders in cold blood in a robbery—he walks in, in a burglary, kills somebody in a home, or rapes a woman and then kills her—do you think that society has no right to take his life in order to protect others so that they may live?

Mr. Rudd. I do think that society has no right to take his life under those circumstances, Senator.

Senator McClellan. Even if he will kill others, that it appears to be so?

Mr. Rudd. Let me explain, Senator. In the shooting that you described first, I assume for the sake of getting to the issue that there was no other way by which the police could have protected other people on the street from being shot immediately.

Senator McClellan. It appears to be that way.

Mr. Rudd. Under those circumstances I think that it is right for police have the power to shoot to kill when it is absolutely necessary immediately. There is an immediate, obvious necessity, no other possibility. For the man who has killed in cold blood, as you have described, and has been captured, and has been subjected already to the power of society in imprisoning him, holding him, subjecting him to trial and sentence, for society to kill him then is to kill him in cold blood, and to kill him without necessity.

Senator McClellan. You do not think that one can forfeit the right to live in a law and order society by becoming such an outlaw?

Mr. Rudd. I do not, cannot forfeit the right to be protected against being killed in cold blood.

Senator McClellan. Do you believe that they should be punished by imprisonment?

Mr. Rudd. I think in some cases, yes.

Senator McClellan. In some cases?

Mr. Rudd. Let me say this.

Senator McClellan. I am talking about these cases that I have given as an illustration.

Mr. Rudd. I would think imprisonment would be appropriate in those instances, first of all, for the purpose of prevention, that is, or incapacitation. Second, I think that this is an appropriate instance in which to demonstrate society's disapproval of this conduct by imprisonment.

Senator McClellan. Would you go as far in sentencing as sentencing for life or do you think they should have a less sentence?

Mr. Rudd. Sentence to life is preferable, in my mind, to sentence to death.

Senator McClellan. I was not comparing that. In talking about the sentencing now you have ruled out the death penalty already in any case. What I am talking about in these cases as the extreme instances I have illustrated here—would you give those people a life sentence?

Mr. Rudd. I do not think so. I think, Senator, that the psychiatric problems enters in here. I cannot yet believe that persons such as you have described are sane.

Senator McClellan. Would you confine them to an insane asylum, some institution, mental institution for life?

Mr. Rudd. Not necessarily for life. I would confine them until it is fairly clear that they are no longer dangerous.

Senator McClellan. Do you think that psychiatry has reached that perfection scientifically that it can determine definitely whether one is no longer dangerous?

Mr. Rudd. Not definitely. There are weaknesses and gaps.

Senator McClellan. Your position is that we have to take a risk with these people.

Mr. Rudd. I think that there are risks, of course, in all social intercourse, and I think some risks must be taken probably.

Senator McClellan. Any further questions?

Thank you very much.

Our next witness is Mr. Justus Freimund. Please come up, sir.

All right, would you identify yourself for the record, please?

Mr. Freimund. My name is Justus Freimund, Director, Action Service Division, National Council on Crime and Delinquency. I am here today on behalf of the National Council on Crime and Delinquency, which is a private, nonprofit organization in existence since 1907.

Senator McClellan. You have a prepared statement?

Mr. Freimund. Yes, I do.

Senator McClellan. Would you like to insert it in the record and comment on it?

Mr. Freimund. Yes, I would.

Senator McClellan. Very well.

[The prepared statement of Mr. Justice Freimund follows:]

Statement of the National Council on Crime and Delinquency

The National Council on Crime and Delinquency, organized in 1907, incorporated in 1921, has long had an interest in improving sentencing and the quality of our penal systems. Through surveys and consultation, it has worked in many states, studying existing systems, recommending improved methods, and drafting proposals for legislative reform. It has published a number of model legislative acts, those most relevant to the present Proposed Code being the Model Sentencing Act, authored by the Council of Judges of NCCD, and the Standard Act for State Correctional Association published by NCCD.

The NCCD strongly supports revision and reform of the federal criminal laws. This overall goal of making the federal criminal law more rational and more predictable is a salutory one. Clear, coherent and uniform laws serve the public by making it plain what conduct is lawful and what is forbidden. They give fair notice to citizens, judicial personnel, and law enforcement officials alike, thereby restricting the possibility of arbitrary punishment.

The Senate 1 statutes embody a number of distinct improvements as compared with the current law. We applaud the establishment of the Restitution Fund. Section 2202 clearly establishes criteria for imposition of a fine for individuals and organizations as well. We would submit, however, that the sentence of a fine should be imposed far more extensively in lieu of emphasizing imprisonment. The Council of Judges of the NCCD has issued a policy statement advocating that only the dangerous should be incarcerated. Imposing the sentence of fines would meet the needs of "just punishment," "deterrence," and, possibly, "rehabilitation" in the community, instead of increasing the population in our over-crowded prisons and jails.

In this statement, we are gravely concerned about, and express opposition to, those sentences which deal principally with provisions that affect imprisonment and the prison systems. The proposed legislation is skewed with long maximum sentences and automatic parole components in prison terms. A sentencing system which mandates fifteen, twenty, thirty year and life sentences for a large variety of crimes becomes its own worst enemy. Even given the wide disparity between authorized maximum and time usually served, the system's inevitable effect is to destroy any possibility of rehabilitation for nearly everyone caught in its grasp. High recidivism rates among felons testify to the fact that our prisons are training schools for criminals. By increasing the number of victims and offenders, they present a tragedy of broken and wasted lives.

Maximum Terms, Section 2301, provides for maximum terms for felonies, authorizing a life sentence for Class A, thirty years for Class B, fifteen years for Class C, seven years for Class D, and three years for Class E. Unless one takes pride in a swollen, expensive, wasteful prison system, Chapter 23 requires serious reconsideration.

Although the Committee contends that "this subsection is designed simply to provide a maximum limit on the broad range within which a judge is permitted to exercise his informed discretion * * * [and] is no more intended to indicate the actual sentence a judge is expected to impose in each case than are the analogous provisions of current federal statutes * * * ," it appears very likely that it would encourage the nation that the maximum sentence is a term which accords with a correctional program of rehabilitation. Moreover, subsection 2302 further authorizes higher terms than these if the court finds the defendant to be a "dangerous special offender," defined as follows:

(1) One who has been convicted of two or more felonies on different occasions; one or more of the felonies resulted in his being imprisoned prior to commission of the current offense; one of more of such felonies resulted in his being in imprisonment or parole or probation within ten years of commission of current offense; and no such felony was charged to be a basis for increasing the grading of the offense. (Trafficking in an opiate, trafficking in drugs, possessing drugs, violating a drug regulation, or using a weapon in the course of a crime are not included.)

The Model Sentencing Act rejects the notion that a repeated offender should be subjected to substantially longer terms than a defendant convicted for the first time, if the crime he commits is not a dangerous one. The repetition of offense may have little bearing on dangerousness. The increased penalty for a non-dangerous offender is really an increased term for a nuisance offender. Such studies as have been made of the habitual offender statutes, such as this subsection, reveal that they are enforced without any guiding principle, that most defendants who might be subject to the statutes are not made subject to them, that their principal use is as a bargaining element for a negotiated plea, and that they do not serve the goals of either rehabilitation or public protection.

(2) One who commits a felony as part of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise.

This extended sentence can be imposed on a sole offender, even one whose crimes are limited to property, and are never assaultive. It can be imposed on a first offender, presumably, and the other operative ingredients of the criminal career would be established presumably in the sentencing operation. To call such a defendant a "dangerous special offender" is to exaggerate the term. The Model Sentencing Act would limit any term of over five years to dangerous offenders defined as those who commit serious assaultive crimes, not a property offender under any circumstances (other than racketeering offenses).

(3) Subdivision (3) is a definition applicable in general to organized crime, calling as it does for a felony committed with others as a pattern of criminal conduct.

We support the idea that organized crime is a very serious menace, but if the *ordinary* terms range up to thirty years for felonies, certainly the thirty year term is adequately long, without calling for lengthening every grade of offense.

In brief, the quite long terms provided for in the "general plan" is exceeded in a second set of maximum terms, most of which are needlessly long, not particularly protective of the public since those they affect are not markedly dangerous in the usual sense of the term.

To return to the general structure of terms: In cases in which the judge has not decided that the defendant fits into one of the "dangerous" categories, the maximum terms are—felony A, life sentence; felony B, thirty years; felony C, fifteen years, Class D, seven years; and Class E, three years.

Under the Model Sentencing Act, provision is made for lengthy terms of imprisonment—up to thirty years—imposed on dangerous offenders. But it then provides that the outside limit of a commitment of a non-dangerous offender may be five years, including parole. It permits, indeed requires, that the judge determine the maximum term within that. To provide, as section 2302 does, that even for the lowest grade of felony, Class E, the maximum term must be at least three years, must have the effect, if enacted, of substantially increasing prison terms where the need for it is surely not established for these offenders.

We similarly oppose any provision that authorizes a Class A or B felony sentence except for seriously assaultive crimes. We oppose such long terms for mere property offenses. Scanning the various crimes, we find such a crime in subsection 1741(2), counterfeiting or forgery, has been made a Grade C or D felony. There may be few such offenses. We recommend that it be stated in the code as a general principle governing sentences that any offense not involving a seriously assaultive act or threatening serious bodily harm shall not be classified as more severe than Grade E.

Parole Component, Section 2303, provides that the term of imprisonment in the case of a felony or a Class A misdemeanor automatically includes, in addition to the specified term of imprisonment, collateral consequences:

A. Each such sentence includes a special term of parole to provide for parole upon release from imprisonment for all defendants, whether or not the parole term extends beyond the maximum period for which the offender could have been confined under the sentence given or under the sentence authorized.

B. Each such sentence also includes a contingent term of imprisonment of one year for a felony or ninety days for a Class A misdemeanor that may be ordered to be served instead of the original sentence in the event of recommitment for violation of a condition of parole if the contingent term of imprisonment is longer.

The idea of a mandatory parole component is an innovation in America penology. As built into the proposed sentencing system here, it would (a) impede the free operation of a parole system, and (b) it would once more lengthen actual time served by prisoners.

When a prisoner is released on parole after having served nearly all of the term of imprisonment, except for a period of less than one year, and subsequently recommitted, he may be ordered to serve a year in addition to the remainder of his prison term. Thus, if a defendant is sentenced to a six-year term of imprisonment, is released on parole after five years and ten months, and he subsequently violates parole, he could be confined to serve the remaining two months in addition to the one year contingent term. Thus, the "parole component" will often add to prison time, and the phrase "prison component" is seen to be deceptive. What first appears to be six years of "contingent term" (in our illustration) may turn out to be a few years more, in actual time required to be served.

Or, using the same illustration, the parole board may refuse parole until just short of the end of six years. Again, if parole is violated, the six-year-prison component may turn out to be for eight years or more.

The idea of a contingent parole component is also an innovation in American penology. There is nothing in the history of parole that suggests that such an ingredient is needed. The entire history of parole has been characterized by an undesirable lengthening of terms of imprisonment. In view of the fact that prison terms in the United States are now substantially longer than in any other western country, without any justification in public protection or treatment needs, ingredients that serve to further lengthen terms are destructive. This is especially true for the federal system, which in earlier years was known for its relatively short terms, which were then quite adequate for public protection, and so far as one can see would still be adequate. If there is anything the federal system does *not* need, it is devices that will lengthen prison terms for the general offender.

Probation Sentence, Section 2102. Another issue of major concern is the legal restraints on probation. We urge the Subcommittee not to support such a statute. It goes against the grain of progressive penology. Probation is recognized as the most effective form of sentence in a great many cases, and yet, Section 2101 requires a prison sentence unless the judge is of the opinion that probation "will not fail to afford deterrence to criminal conduct and such disposition will not unduly depreciate the seriousness of the defendant's crime, undermine respect for the law, or fail to constitute just punishment for the offense committed." Although the judge is required to consider the offender's individual circumstances, such provisions implicitly tell the judge that probation is not preferred, but a last resort, to be accorded only the criminal offender who is an extraordinarily good risk. They ignore the fact that prison sentences completely dislocate offenders from the community, cutting off the ties of family and job which alone may provide the incentive to obey the law. Yet since most offenders ultimately do return to the outside world, it is in society's best interest—as well as their own—that these offenders have more to go back to than a life of crime.

Furthermore, it appears that the probation sentences in Section 2101 are disproportionately longer. The maximum probation sentence authorized for many offenses exceeds the maximum penalty authorized for the offense. The maximum authorized terms of probation are (1) felony, five years; (2) misdemeanor, two years; (3) infraction, one year. We concede that distinctions should be made between felonies and misdemeanors; but we cannot support a provision which authorizes longer probationary sentences than outlined in the grading classification. For example, if an offender commits an infraction (disorderly conduct), he can be detained for a maximum of five days in a federal facility; however, he can be placed on probation for one year. In the case of Class A misdemeanors, one year is the maximum authorized penalty, but an offender serving a probation sentence may be subjected to a two year sentence.

Presentence Reports, Section 2002. Similar to the issues raised in the section above, Subsection 2002(B) declares that the defendant may be held in custody for ninety days while the bureau conducts a complete presentence diagnostic report. In many cases, the ultimate sentence will be a commitment, but in others a defendant will be placed on probation. To commit a defendant for ninety days is entirely too long; and yet Subsection B authorizes the court to extend the period for an additional ninety days to complete the study. Surely, 180 days in confinement is destructive.

We would recommend that the provision be included giving the judge the choice of an out-patient diagnostic referral. Certainly, such a strategy would enable the defendant to maintain employment and community ties, if not sentenced to confinement.

Capital Punishment. And last of all, we would like to comment on the capital punishment issue. The National Council on Crime and Delinquency has long opposed the death penalty as cruel and unusual punishment. In fact, the Board of Trustees of NCCD issued a policy statement condemning the use of the death penalty and urging its discontinuance and abolition in states in which it still exists.

We urge the Senate in general and this Subcommittee in particular not to endorse a penalty which will turn our moral clock backwards ten years in the area of equal justice.

Despite views to the contrary, the death penalty is not a unique deterrent. All available evidence shows that in states which have had both the death penalty at one time and abolition at another, a comparison of the two periods reveals no reduction in murders during the death penalty period. Comparison of murder rates in two culturally similar states, one having the death penalty and the other not, again shows that the death penalty has no deterrent effect.

We further believe that:

(1) Many who are executed are persons who have limited intellect and are mentally ill, their crimes being impulsive, not planned, and hence committed without thought of the penalty;

(2) The fallibility of human beings and the legal process has resulted and may again result in the conviction of innocent persons, and their execution so long as the death penalty is used;

(3) Sentences should not be based on vengeance.

Hence, we strongly encourage the members of this Subcommittee to oppose this penalty which has been used to perpetuate racial and economic discrimination in a fashion which degrades our natures.

In summation, we urge the members of this Subcommittee—and the Senate as well—to oppose the sentencing provisions that would very likely worsen the system of prisons and release in the federal jurisdiction. Terms would be needlessly lengthened, release procedures would be more complicated and less flexible. The net effect would be to substantially increase the prison population, already grossly swollen as compared with what might be expected of a prison system limited to federal violations.

We are afraid that the sentencing structure will increase prison time, will increase the number of prisoners in the federal prisons. The federal prison population has increased from 12,904 in 1930, to 19,260 in 1940, 19,134 in 1950, 24,925 in 1961, the highest reached. It dropped in 1962 to 1967, but commenced increasing again in 1968 and at the end of 1968 was 20,183. And yet, in 1975, its population has risen to 22,923. The average length of federal sentences of those committed has risen steadily each year since 1959. In 1968 the average was 77.2 months.

Will the sentencing system proposed in Senate 1 continue to swell the length of terms and the number of prisoners? If our analysis is correct, it will.

Mr. FREIMUND. The National Council on Crime and Delinquency is quite interested in S. 1, for a variety of reasons. But I think today because of the nature of this particular hearing that we will confine our comments primarily to the area of sentencing.

However, before going to that, we would like to note that the real concern we have is the apparent expansion of the Federal authority into a variety of crimes, and a variety of jurisdictions that seems to be inherent in this bill.

To move on, we have mixed emotions to the bill. There are a number of elements in the bill, for example, the restitution, the increased use of fines, or an organized approach to the use of fines; it seems to be very good. We also recognize the move toward recognizing the dangerous offender as separate and different problems for the criminal justice system. A situation that requires, because of the nature of that offender, a different type of response.

When we come to the other issues—particularly these types of sentences—we are impressed by the long length of the sentences. Our comparison, which is not complete at this time find an increase in the maximum amount of time in prison provided in the sentencing categories.

We are aware, as I am sure the committee is aware, of the many studies on this issue. In all other Western countries the period of incarceration is much shorter, with no increase in the public danger.

Mr. ROTHSTEIN. I wonder if I may add a footnote here, because it is a matter that is not immediately apparent, that while the

maximums seem to be higher, it would seem that under the bill the most commonly committed crimes will result in lower sentences than under current law. That is my understanding of it.

Mr. FREIMUND. Yes, as I indicated, we have not completed our own analysis of it, there seems to be some trend in this direction; at the same time, there is an apparent expansion of the Federal involvement of the system.

I note, for example, in the possession of drugs, there is a marked reduction in the amount of sentence called for under this bill than in the existing statute, but more so than currently applied in most States. Another example, prostitution is defined very broadly in the bill. This seems to be an expansion.

As a matter of fact, our Council in reviewing it, has the reaction that as defined in this bill, the activity which is normally a misdemeanor in most State jurisdictions, if not just an infraction, may be defined as a class D felony.

Again, I do not want to pursue this extensively, because we are aware that there are changes. We are trying to compare the changes in terms of the existing Federal law and the State jurisdictions.

Mr. ROTHSTEIN. Well, the major crimes—the most frequent crimes, the ones I would be talking about—would be prosecuted under Federal statutes. I just wanted to point out that because it is not immediately apparent.

Mr. FREIMUND. Perhaps this is not directly related to the subject for today, but I think that it does impact because of the great expansion of Federal jurisdiction. For example, the using of a facility of interstate commerce, in our Council's opinion, this would be using a telephone, even driving on an interstate highway would bring the act into the Federal jurisdiction.

This goes back to the original question about the expansion of this toward, perhaps, moving toward a national police and national law enforcement statute, which we feel is something that should be addressed more fully.

There are some other, more specific points, for example, concerning parole. In general, the parole provision is satisfactory. I can see, because imprisonment is the primary mechanism of this legislation, as in much of the legislation of this country, we are putting an awful lot of the pressure and a lot of responsibility on the rather fragile vessel of incarceration.

This bill includes provisions for parole as a way of mitigating that overload. And these may be satisfactory.

However, the provision for automatic extension of parole under the completion of max time—when a person serves his time and then automatically is placed on parole after he has served out his time, appears to be undesirable. We found also the mandatory time for a violation is undesirable. The question of probation, although there is other language, we still perceive that presumption in this bill is against the use of probation.

We are also concerned about another aspect of the probation language. Where a person, for example, in the case of an infraction where he may be incarcerated for a period of 5 days, may be put on probation for a year. In the case of a misdemeanor, with a maximum sentence of a year, he may be put on probation for 2 years. Again, you are talking about both incarceration and probation; you are talking about restraint and denial of liberties.

We raise the question as to whether or not it is justified to extend for twice the time, or, in the case of the infraction, much more so, this retention of jurisdiction.

We then come to the question, is it possible or feasible to have probation for 5 days for an infraction? We argue it is ridiculous. Perhaps a fine should be considered as covered elsewhere in the statute concerning fines.

Finally, one other point I must also note. The provision in terms of the presentence investigation, which allows for a 90-day period of incarceration, in custody, doubled perhaps by an additional 90-day period of incarceration at the discretion of the judge for a total of 180 days of incarceration in a Federal facility. Again we raise some questions about this one in terms of the time—90 days is more than adequate, if not an excessive, period of time necessary to make such a presentence investigation. And, again, in the Federal courts in the past, 45 percent of the people who are convicted in the Federal courts are placed on probation.

Why, then, do you have the provision for 90 days of incarceration in this case? In other jurisdictions, other than the Federal jurisdiction, as many as 85 percent of the people are placed on probation and never incarcerated at all.

In passing, it should be noted that there is little difference in terms of recidivism between the Federal system using probation 45 percent of the time, and States—such as Wisconsin that use probation as high as 85 percent of the time, raising again the whole question as to the suitability of the incarceration response, as the prime first order response.

On this point of incarceration we argue that one should consider all other alternatives to incarceration first. Then move into incarceration in terms of the goal that you are attempting to accomplish in sentencing—which is the reduction in crime.

Finally, I cannot help but note the inclusion of capital punishment provisions in this legislation. We have opposed capital punishment; you have heard other people today talk about the moral grounds. Our opposition is not from a moral base, but from a simple, more practical, base that capital punishment just plain simply does not work in terms of its intent—for example, as a deterrent. There is no evidence that it does deter. It does contribute to the injustice of the system, because if you are white or wealthy, you are rarely executed.

Studies have been indicating that people who have above average incomes in the United States are not executed. People who do not, are executed. Basically, we cannot support the inclusion of capital punishment. We do recognize, however, that there are people who have committed acts that put them in a situation that they are plain, simply dangerous. There is no denying this. There is overwhelming evidence of their existence and these people simply have to be removed. You remove these people from society—we have recommended in our Model Sentencing Act that you remove these people for a period of 30 years. The simplistic purpose of this sentencing is to stop their criminal activity.

This seems to be a sentence which is interminable; it does not attempt to accomplish any treatment goal. The only thing that seems to work with these people is age; they seem to grow out of their violent and assaultive behavior. We have recommended that these people be locked up securely, without parole, for 30 year periods of time.

That is the end of the summary of my statement. I will be glad to respond to any questions.

Senator McClellan. Are there any questions?

Mr. Rothstein. Mr. Freimund, let me ask you this—and this is exploratory for our information.

With a person who is locked up in prison for an extended period that you mentioned for the most heinous crimes like murder, what is the sanction if he murders in prison a prison guard, if the maximum that he can receive is your 30-year term which he already has?

Mr. Freimund. Thirty years.

Mr. Rothstein. Which I thought I said. Perhaps I misspoke. If the maximum is 30 years, and he already has that, there is not much disincentive to taking the gamble and trying to get out by murdering a prison guard.

In other words, might that not be at least one limited appropriate area for the greatest sanction?

Mr. Freimund. We argue on the broader sense in a case like that. We would add an additional 30 years, for a total of 60 years.

Again, much has been made of the fact that there is a need to go ahead and have all kinds of sanctions for people who are in prison —life terms or what have you. What do they have to lose?

Again, in my own experience, I have run institutions——

Mr. Rothstein. If a fellow is 40 years old and into the slammer when he gets 30 years, he may not care.

Mr. Freimund. You come back to the situation where people are killed, with the exceptions of some of your plotted, coldblooded, calculated murder for hire operations, overwhelmingly in the typical situation the murder takes place when the person is not acting in a rational way. The fear of executing him later simply will not affect him. If it were rational he might as well say, I will soon be out of prison so I might as well get along now.

Mr. Rothstein. Let us talk about those ones that you mentioned —the calculated ones, gangland killings, where there is clearly a computation, and coldblooded computation, that may well take into account the calculus of what I may stand to win and lose from this.

May that not be an appropriate area for capital punishment? Again, let me say this is exploratory for our purposes. Even crimes of passion will not be deterred because they are not thinking about the crime, about the law, they are not thinking about punishment. But these calculated ones may well be thinking about it.

Mr. Freimund. Perhaps. But again, I think if you think about it —let us take the case of murder for hire. You are talking about that if a person commits murder for hire, and assume that he is apprehended, that he is going to be going out of business, as it were, for 30 years. If he is 30, he will be 60 years old before he can enjoy the return on his business endeavor.

This seems to be a sentence which is interminable; it does not attempt to accomplish any treatment goal. The only thing that seems to work with these people is age; they seem to grow out of their violent and assaultive behavior. We have recommended that these people be locked up securely, without parole, for 30 year periods of time.

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I think, again, with these kinds of people you are not going to have very many people who are going to go ahead and offer to trade off for whatever sum for 30 years of their life.

Mr. ROTHSTEIN. Are there some who will be dangerous after 30 years?

Mr. FREIMUND. Some, perhaps. Maybe here is where we come to the fact where it is difficult to guarantee the behavior of anybody. Nobody has ever been able to do it.

Christ had problems with his apostles. We cannot guarantee people's behavior. What you can do is, within some limits, attempt to affect their behavior, and you do have to take some kind of chance. The alternative, of course, is to go ahead and try to control everything. I think we then run into some examples and some lessons from history.

I am sure you are acquainted with the Elizabethan period. With the Elizabethan period there were over 85 capital crimes, and a crime was not deterred at that time in terms of what records that can be recreated from that period.

Mr. ROTHSTEIN. I wonder if I could focus in on something. I think you are in agreement that the question is how much risk—the question for decision by this Congress is, how much risk does society want to take on this.

Mr. FREIMUND. Yes. And this is the question that is inherrent and is frequently ignored in any approach to the criminal justice system, in that we have to balance the need for response and the need for protection of the majority with civil and individual rights of the majority and of the minority.

It has been suggested, for example—not entirely facetiously—that if we wanted to control traffic accidents and automobile vehicle deaths, we should have all vehicular deaths be a death penalty. If you are driving an automobile and somebody is killed, you would also be executed.

Mr. ROTHSTEIN. One of the problems is that no judge would ever convict—or a jury.

Mr. FREIMUND. You have to adjust that with a deterrent argument. If you are using that, you have to go ahead and create a structure that there is no option other than conviction. If you are going to pursue the deterrent argument, and the corollary control argument, that what we intend to do is deter and control, then you say that there will be no option. Then you have to say, all right, is that in accord with the principles of a democracy? Then you are having to deal with the other side of the issue.

I think our organization, and myself personally, feel that you have to take some risks. There is no other way. So you attempt to take some risks in a rational way. There is no foolproof, riskproof way, and to attempt to create such a thing by long sentences through a variety of things is, I think foolhardy. People can very easily be deceived, thinking they are accomplishing something when really they are building castles in the sky.

Mr. ROTHSTEIN. Thank you.

Senator McCLELLAN. What about a hired killer? What kind of punishment should he have? Someone who agrees to kill for money?

Mr. FREIMUND. Again——

Senator McCLELLAN. Thirty years?
Mr. FREIMUND. Thirty years.
Senator McCLELLAN. If he kills again after he gets out?
Mr. FREIMUND. Another 30 years.
Senator McCLELLAN. Another 30 years.
In other words, you can kill as many as you want to—as long as you live—on a 30-year sentence. Do you think that is justice?
Mr. FREIMUND. The question is, what is justice?
Senator McCLELLAN. What is it?
Mr. FREIMUND. Justice, in some definitions——
Senator McCLELLAN. Do you think that someone who is willing to go out and deliberately commit a murder, makes his living that way, do you think justice is 30 years—that that is justice for that kind of crime?
Mr. FREIMUND. Yes.
Senator McCLELLAN. You do. I am sorry we disagree. It is a cheap price on a human life. Are there any questions?
Thank you very much. The Chair will direct that the staff may receive for the record, for the next 15 days, any comments that anyone wishes to make on S. 1, and I would expect submissions to be reviewed and examined. If there is any question about them, submit them to the chairman.
Very well, this series of hearings is concluded. The committee stands adjourned.
[Whereupon, at 11:50 a.m., the subcommittee adjourned, subject to the call of the Chair.]

AMERICAN CIVIL LIBERTIES UNION,
Washington, D.C., April 3, 1975.

MEMORANDUM TO MEMBERS OF THE SENATE JUDICIARY COMMITTEE
RE: S. 1, AS AMENDED

Enclosed is the statement of Melvin L. Wulf for the American Civil Liberties Union on S. 1, as amended.
Mr. Wulf's work complements that of Mary Ellen Gale who provided the ACLU's views on predecessor legislation.
A summary of the document appears prior to the table of contents.
Sincerely,
CHARLES MORGAN, JR.

STATEMENT OF MELVIN L. WULF, LEGAL DIRECTOR,
AMERICAN CIVIL LIBERTIES UNION

Introduction

The ACLU is a nationwide, non-partisan organization of 275,000 members dedicated to the preservation and promotion of individual rights and liberties guaranteed by the Constitution of the United States. One of the ACLU's primary missions is to encourage legislative advancement of civil liberties and to oppose legislative encroachment on them.
The ACLU supports revision and reform of the federal criminal laws. The over-all goal of making the federal criminal law more rational and more predictable is a salutary one. Clear, coherent, and uniform laws serve the public by making it plain what conduct is lawful and what is forbidden. They give fair notice to citizens and law enforcement officials alike, thereby restricting the possibilities of arbitrary punishment. However, obtaining clear and coherent laws at the expense of the rights and liberties of our people would be a step backward.

In the pages that follow, we express our strong opposition to some specific provisions of S. 1, as amended.[1] In particular, we focus on the bill's national security provisions which we believe are especially dangerous to First Amendment freedoms. In some cases, such as parts of the national security section and all of the obscenity sections, we urge that provisions be eliminated altogether. In others, we suggest revisions or express concerns which should guide those who may draft revised sections.
Reform of the federal criminal laws is an important undertaking. It must be done with deep concern for the civil rights and liberties of the individual citizens.

I. OFFENSES INVOLVING NATIONAL SECURITY

A. The "Official Secrets" Act

Five sections of S. 1, would reverse 200 years of democratic decision-making under the Constitution by preferring government secrecy to the freedoms guaranteed by the First Amendment. Sections 1121-25 of S. 1 would deliver into the hands of the Executive complete and final control of information "relating to the national defense." The free flow of facts and opinions on which self-government ultimately depends would be dammed at its source. Our true national security, which springs from "uninhibited, robust, and wide-open" debate on public issues and public officials, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), would be destroyed.
When Congress first debated the Espionage Act of 1917, two Senators marked off for future generations the parameters of debate over the protection of national security:
"Senator NELSON. [While] there are some expressions perhaps in the bill that may seem a little too drastic, yet I hold that when the safety of the country is at stake the rights of the individual must be subrogated to the great right of maintaining the integrity and welfare of the Nation.
Senator CUMMINS. The Senator from Minnesota seems to think this is necessary for the safety of the United States. I do not; nor do I think we have a Nation worth saving if this is necessary. If the power that is here sought to be given to the Executive, coupled with these offenses that are for the first time described in American life are necessary, I doubt whether the Nation could be preserved." 54 *Cong. Record* 3488 (1971).
We submit that Senator Cummins had the best of that exchange and that—so long as we remain a free, outspoken, and democratic society—he will always have the best of it.
Our opposition to the information control provisions of S. 1 begins with the spirit which permeates them—Executive distrust of the American people and the American press. Needless to say, it is ironic that legislation of this kind should be proposed so soon after the fall of the Nixon regime. That administration's obsession with secrecy, its distrust of the American people, and its animus towards the press should surely have taught us the lesson of the need for more not less openness in government, and more not less trust of the people and the press. But Sections 1121–1125 of S. 1, as amended, are written as if Watergate and its fallout never happened. A moment's thought must lead to the obvious conclusion that these provisions must be thought objectionable in principle and practice, and we urge the Congress to reject them and thus refuse to elevate official secrecy to the status of law.
Secondly, we believe that the over-all thrust of these statutes is profoundly unconstitutional. They strike at the heart of free speech and due process of law. They sweep within their prohibitions the collection, communication, or publication of information relating to the national defense regardless of its origin. They set no standard whereby the conscientious citizen, public official, or news reporter may determine whether the information he possesses, gathers, or shares with others is constitutionally protected—or the subject of criminal sanctions. They use terms so broad and vague as to force men and women of good will to guess at the meaning of the law—and act at their peril. They encourage official abuse by inviting selective prosecution and adjudication on political or personal grounds. Coupled with the capital punishment provisions of S. 1, passed earlier this year, they might even provide a mandatory death penalty for individuals who sought only to inform their fellow citizens on the great public issues of our time.

[1] All reference to S. 1 in the succeeding pages are to S. 1 as amended, the version of the bill now before the Senate Judiciary Committee.

Throughout this chapter, the commission of a criminal act is made dependent upon its being committed in "time of war," or the punishment is enhanced if the crime is committed in "time of war." Sabotage as a Class A felony can be committed only "in time of war" (§ 1101); one can impair military effectiveness by false statements only "in time of war" (§ 1112); whether or not espionage is committeed "in time of war," determines whether the crime is a Class A or B felony (§ 1121).

Whenever an offense turns on whether the United States is at war, S. 1 should require that the war is one declared by Congress under Art. I, Sec. 8 of the Constitution.

All of the offenses which require our being at war are not only traditionally thought to be serious indeed, but some of them inevitably implicate questions of freedom of speech. And if the First Amendment is to be so seriously impaired under any of these provisions, those drastic restrictions upon fundamental freedoms should be permitted, if at all, only after a deliberate and explicit declaration of war by Congress, as required by Article I, Sec. 8 of the Constitution. The nation should be insured that imposition of the severe penalties provided in these sections, together with their intrusions into the First Amendment, not be left to the sole determination of the Executive Branch of government.

It would be a substantial retrogressive step to provide that any "war," whether or not it is declared by Congress, may trigger prosecutions and affect sentences under various sections of Chapter 11. Judicial and scholarly opinion is deeply divided on the question of the legality of the Vietnam War and similar questions were appropriately raised by the engagement of our troops in the Dominican Republic in 1965. The formulation of "declared war" makes explicit what is required prior to the application of these penal sanctions particularly since many of them curtail fundamental freedoms normally protected by the First Amendment.

1. Section 1121. Espionage.

The American Civil Liberties Union recognizes that genuine espionage is a serious offense against the nation, requiring criminal sanctions and punishment. Because it is subject to serious abuse in times of national crisis, it must be closely and carefully defined. *See Gorin* v. *United States*, 312 U.S. 19 (1941). Instead, Section 1121 broadly criminalizes the knowing collection or communication of "national defense information," with the "knowledge that it may be used, to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power * * * "

By eliminating specific intent as an element of the crime of espionage, S. 1 invites wholesale abuse of the First Amendment by allowing prosecution and conviction of individuals whose purpose in speaking of so-called "national defense information" is to inform the American people of governmental activities which the public has a right to know, and which they should know, in order to pass judgment on those activities. Without intent to injure, the conduct intended to be prohibited by a valid espionage statute cannot usefully be regulated for the result is to seriously invade rights protected by the First Amendment.

In addition, the terms used in Sec. 1121 to define the crime are fraught with confusion. What is "national defense information"? Or, more to the point, under § 1128(g), what is *not* "national defense information"? The Supreme Court held in *Gorin*, *supra*, 312 U.S. at 31–32, that under a statute listing specific places and things, this was a question for the jury to determine. Sound public policy and constitutional law alike demand a carefully confined legal definition to give advance warning of what conduct is prohibited and to guide jury deliberations. Under the present terminology a newspaper report that bad weather had delayed an Air Force airplane test, that a prominent general was hospitalized for minor surgery, that the North Vietnamese had deployed troops in South Vietnam, or that U.S. troops were using defective rifles, would all be proper subjects for invocation of the espionage provisions. Yet the first two are probably trivial, the last two are not only proper but necessary to informed public debate, and all four are protected by even the narrowest reading of the First Amendment.

Granted that Congress cannot envision every prospective violation, criminal statutes which touch on First Amendment freedoms must nonetheless be written to forbid only the narrow class of conduct which genuinely endangers

the public welfare. *NAACP* v. *Button*, 371 U.S. 415, 433, 438 (1963). The late Mr. Justice Harlan, a strict constructionist of the Bill of Rights, put it like this:

"But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive * * * prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' . . ." *Garner* v. *Louisiana*, 368 U.S. 157, 202 (1961) (concurring opinion) (citation omitted).

There are similar problems with the other statutory phrases. One reason why information about the general's gallstones or the Army's misfiring M-16's (no secret, of course, to the enemy) might be brought within the statute's sanctions lies in the provision that the only required proof is "knowledge" that the information "may be used * * * to the advantage of a foreign power." But any information with some relationship, no matter how tangential, to the national defense, may be to the advantage of some foreign "government, faction, party or military force, or persons purporting to act as such," or "any international organization" (the definition of "foreign power" as given in Section 111 of S. 1). The International Red Cross may be interested to learn of our medical technology—and may use it to help the wounded enemy. A German political party may use statistics about disaffected or drug-abusing soldiers to back up a demand for removal of U.S. troops from German soil. These are among the "dangers" of free speech. The Constitution never guaranteed that free speech would protect us from the ridicule or hostility of foreign nations, or from the use of our ideas beyond our shores. Its authors claimed only that if we were willing to run these risks, we would not be free—and the opinion of others would no longer matter.

Morever, there seems little reason for starting the proposed standard of harm in the disjunctive: injury to the United States *or* advantage to a foreign power. "[I]f a communication does not work an injury to the United States, it would seem to follow logically that no government interest can be asserted to overcome the first amendment's guarantee of freedom of speech." Nimmer, "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case," 26 *Stan. L. Rev.* 311, 330 and n. 92 (1974). *See United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946), where Judge Learned Hand refused to apply a similar clause of a precursor statute to information which had never been classified.

There is no greater certainty in the requirement of knowledge that the information gathered or disseminated may be used "to the prejudice of the safety or interest of the United States." Are we more or less "safe" if the public knows or does not know of our defense needs? Is it in the "interest" of the United States to suppress the facts about our conduct of the war in Southeast Asia or to spread them on the public record for debate? The meaning of the First Amendment is that the government shall not have the power to limit public knowledge, save in narrow circumstances where national survival is in clear and present danger. *See, e.g., Whitney* v. *California*, 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring); *cf. Brandenburg* v. *Ohio*, 395 U.S . 44 (1969). As a former Secretary of State observed in 1822:

"No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured." 1 E. Livingston, Criminal Jurisprudence 15 (1873 ed.), quoted in Nimmer, *supra*, 26 *Stan. L. Rev.* at 333.

2. Section 1122. Disclosing national defense information

Section 1122 makes criminal the knowing communication of "national defense information" to a person "he knows is not authorized to receive it." Section 1126 defines "authorized" as meaning authority to have access to, receive, possess, or control "as a result of the provisions of a statute or executive order, or a regulation or rule thereunder * * * " The statute thus delivers to Congress and the Administration the exclusive power to determine who shall, and who shall not, learn, speak, or write about a vast array of

politically as well as militarily sensitive information. To state this proposition is to refute it. The Constitution permits no such law.

Moreover, by failing to require a specific intent to do an unlawful act, the statute "may be a trap for innocent acts," *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164 (1972). It is so "lacking in ascertainable standards of guilt, that * * * it fail[s] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Palmer* v. *City of Euclid*, 402 U.S. 544, 545 (1971). No standard of conduct whatsoever is specified. Government officials are given a free hand to enforce their own ideas of what the law should be, and enforcement will depend on who is, or is not, annoyed by the disclosure. But criminal statutes this vague are plainly unconstitutional. *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971). In addition, § 1122 is overbroad in a constitutionally fatal sense, for it sweeps within its prohibition conduct which is not only innocent, but sanctioned by the First Amendment. *See, e.g., Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). An overbroad statute may be invalid even though it generally protects vital national interests which can on appropriate occasions outweigh First Amendment rights. *United States* v. *Robel*, 389 U.S. 258 (1967). *Cf. Gorin* v. *United States*, *supra*, 312 U.S. at 28, narrowing an espionage statute to apply only when scienter is established.

3. Section 1123. Mishandling national defense information.

Section 1123 has similar deficiences of vagueness and overbreadth. Had this provision been law at the time of the revelation of the Pentagon Papers, every person through whose hands they passed could have been charged with this offense. Even members of Congress and their staffs might have been prosecuted. *See Gravel* v. *United States*, 408 U.S. 606 (1972). Reporters, editors, publishers, secretaries, and probably even printers could have been swept within the statute's reach. Indeed, the government attempted to use the similar, although perhaps not quite so voluminous, provisions of 18 U.S.C. § 793(e) in prosecuting Daniel Ellsberg and Anthony Russo.

This provision also poses a unique constitutional difficulty, by making it a felony for one in unauthorized possession or control of "national defense information" knowingly to fail "to deliver it promptly to a federal public servant who is entitled to receive it." The Fifth Amendment forbids the enforcement of statutes which infringe the privilege against self-incrimination. The Supreme Court has repeatedly struck down efforts to short-circuit the investigative process (and the Constitution) by criminalizing the failure to register oneself as a probable criminal. *E.g., Haynes* v. *United States*, 390 U.S. 85 (1968) (failure to register a firearm); *Albertson* v. *S.A.C.B.*, 382 U.S. 70 (1965) (failure to register as a Communist Party member); *Leary* v. *United States*, 395 U.S. 6 (1969) (failure to comply with the Marijuana Tax Act). *Cf. Leary*, *supra*, 395 U.S. at 28, holding that the Fifth Amendment establishes a "right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act."

4. Section 1124. Disclosing classified information.

Section 1124 would make it a crime for a "person" to communicate classified information to "unauthorized" persons, regardless of his intent and regardless of the probable or even possible effect of his actions. Mere disclosure, with no shadow of purpose or capacity to damage the genuine national defense interests of the nation, would be a felony punishable by a $100,000 fine and seven years in prison.

Yet it has been estimated by a security consultant with more than 45 years of military and civilian experience in the field of national deefnse information, that over 99½ per cent of classified documents contain information in the public domain or do not warrant protection for other reasons. Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92nd Cong., 2nd Sess., *Hearings on Reform of the Federal Criminal Laws*, Pt. III, Subpart D, at 3045 (Comm. Print 1972) (Testimony of William G. Florence). It may be suggested that the problems Mr. Florence spoke of have been overcome by the new Executive Order No. 11,652 of March 8, 1972, ostensibly reforming the classification process. But Mr. Florence testified before a Subcommittee last year that he had tried—and failed—to obtain from the Department of Defense earlier in 1974 some of the classified documents which were

designated as public records by the presiding judge during the Russo-Ellsberg trial. The reason for denial of his request? The Pentagon Papers—which have been widely quoted in newspapers, discussed at the trial, recorded in the trial transcripts, and spoken, read, and argued about by millions of Americans (and foreigners)—are still classified.

But this is not all. Enactment of this statute would irreparably damage—if not virtually destroy—the freedom of the press upon which an informed public and democratic self-government itself rely. If the press is not to become merely a withered arm of government instead of the adversary force the Constitution intended, it must have sources other than official press releases for the information it publishes.

In a study prepared by the Foreign Affairs Division of the Congressional Research Service for the Senate Foreign Relations Committee, the point is brought home. *See Hearings on Reform of the Federal Criminal Laws, supra,* at 3063–94. The study found "wide agreement that the great bulk of defense material is usually over protected—too highly classified for too long a time." *Id.* at 3077. And, it continued, high government officials—such as former Secretaries of Defense Melvin R. Laird and Clark M. Clifford—frequently "declassify" national defense information when it serves their purposes, revealing it to Congressional committees to justify budget requests or to news reporters to test out public opinion on a wide variety of subjects. *Id.* at 3080–81. There is a "high incidence of leaks of classified information which appear to be approved by some one in authority * * *" *Id.* at 3081.

No wonder, then, that conscientious reporters turn to officials with different opinions and different facts at their command to test out in their turn the Administration's version of the truth. Veteran reporters and editors of the *New York Times* and *Washington Post* filed affidavits in the Pentagon Papers case, *see New York Times Co.* v. *United States*, 403 U.S. 713 (1971), to the effect that official and unofficial leaks were both a necessary source of information for a responsible press. Without the use of classified material, according to *Times* Washington Bureau Chief Max Frankel, "[t]here could be no adequate diplomatic, military, and political reporting of the kind our people take for granted . . ." Excerpts from Affidavit reprinted in *Hearings on Reform of the Federal Criminal Laws*, *supra*, at 3079.

As the Supreme Court declared in another context, the people of the United States: "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).

And see Justice Douglas' concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 723–24 (1971):

"The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."

The statute as written invites abuse. Every "person" who handles classified information would speak in peril of violating its technical commands, and be subject to prosecution for politically embarrassing the government. Officials could be punished for expressing political views distasteful to the government, if a single classified fact could be found within their statements. Granting that the government has the right to protect limited categories of information from unauthorized disclosure by its employees, it need not make such transgressions criminal. Dismissal of those who release information with culpable intent or for personal gain should be a sufficient sanction.

The allowance of a defense that the information communicated "was not lawfully subject to classification" is, of course, desirable if the offense is to exist at all. But invocation of that defense requires the defendant first to have exhausted his remedies before the classification review agency to be established under Sec. 1124. The difficulty with that condition is, however, that no provision is made requiring the agency to act promptly. Consequently, the agency could sit on material for weeks or even months, during which time the materials relevancy would have passed by.

5. Section 1125. Unlawfully obtaining classified information.

This section makes it a crime for an agent of a foreign power to obtain or collect "classified information." Insofar as the section also precludes the defense that the information was improperly classified, and since it does not require proof of culpable intent, it would be subject to due process and free speech objections similar to those outlined above.

6. Section 1128. Definitions for section 1121 through 1125.

Objections to the definitions of "authorized," "classified information" and "national defense information" have been noted above. We strongly urge that if the latter phrase is retained, it be closely restricted to military or defense material which the government has a legitimate interest in keeping secret from the outside world as well as from the American people—*e.g.*, technical details of military weaponry, tactical details of military operations, the conduct or product of specific foreign covert intelligence gathering operations, and military contingency plans in respect of foreign powers.

The First Amendment requires that Sections 1122–1125 be removed entirely. There are no equivalents in present law, and adoption of the provisions proposed in S.1 will seriously impair First Amendment rights without providing any compensating benefits to the nation's security or welfare. The only purpose that would be served by these provisions would be to have sent Daniel Ellsberg and Victor Marchetti to prison. Those who think that those men should have been imprisoned should vote up §§ 1122–1125. Those who believe that Ellsberg and Marchetti have served the highest interests of the First Amendment by supplying information of the greatest importance to all citizens, will vote down those sections.

7. ACLU Proposed Espionage Statute

Section 1121. Espionage.

(a) Offense—A person is guilty of an offense if, with intent that classified national defense information be used by a foreign power to injure the national defense, he or she knowingly:

(1) Communicates such classified national defense information directly to a foreign power or agent; or

(2) Obtains such classified national defense information in order to communicate directly to a foreign power or agent; or

(3) Enters a restricted area with intent to obtain such classified national defense information in order to communicate it directly to a foreign power or agent.

(b) Grading—An offense described in this section is:

(1) A class A felony in time of declared war;

(2) A class A misdemeanor at all other times.

Section 1122. Definitions for sections 1121

(a) "National defense information" means:

(1) Technical details of tactical military operations in time of declared war;

(2) Technical details of weaponry;

(3) Defensive military contingency plans in respect of foreign powers;

provided that such information would, if obtained by a foreign power, be used by that power to injure significantly the national defense of the United States, and that at the time of the offense the information had not previously been published.

(b) "Agent" means one in the employ or service of a foreign power who is acting on instructions of that power.

(c) "Classified" means properly classified pursuant to a valid statute, executive order, or regulation, and not declassified prior to the time of the alleged offense. It is a defense to a prosecution under this section that the information was not classified in conformity with the requirements of the statute, executive order, or regulation, or that the information was not reasonably subject to classification under the statute, executive order, or regulation.

(d) "Previously been published" means made public in any form. It is not a requirement of this section that publication was officially made or authorized by an officer of the government with authority to do so.

8. Other sections of S. 1 which could be used to censor the press and withhold information from the public

Aside from the provisions included in the so-called "national security" chapter of S. 1 two other sections of the proposed Criminal Code could be used to stifle the flow of vital information to the press and choke off public debate through lack of knowledge and fear of censure.

Section 1301, Obstructing a Government Function by Fraud, creates a new offense for one who "intentionally obstructs, impairs, or perverts a government function by defrauding the government in any manner." Since "government function" and "defrauding" are nowhere defined, the section grants wide prosecutorial discretion to harass the press for "impairing" efficient operations by exposing official decision-making processes or even outright chicanery on the basis of information which was the government's "property." *See Haas* v. *Henkel*, 216 U.S. 462 (1910) ("defraud of the United States" defined to include impairing any government function).

Section 1744, Unauthorized Use of a Writing, could similarly result in broad—and unconstitutional—suppression of information. The offense, which originally was limited to forgery of securities and the like, has been rewritten to criminalize a much wider class of behavior. Under §1744, one may be guilty of a felony "if with intent to deceive or harm a government or person he knowingly * * * (1) issues a writing without authority to do so; or (2) utters or possesses a writing which has been issued without authority." There is federal jurisdiction if the writing *is* or purports to be "made or issued by or under the authority of . . . the United States . . ." It may be argued that the inclusion of this section with the commercial offenses precludes its use in a wider context. But the language of the statute—and the government's far-ranging briefs in the Russo-Ellsberg case—support no such complacence. The statute should be narrowed to reach commercial offenses only.

B. Other offenses against the Nation

1. Treason.

The National Commission on Reform of Federal Criminal Laws (hereinafter the Brown Commission), in trying to narrow the definition of treason, *see Working Papers of the National Commission on Reform of Federal Criminal Laws*, Vol. I, at 419–27 (1970) (hereinafter *Working Papers*), reworded it so as to reach more broadly than ever before into areas of speech and conduct protected by the First Amendment. *See Testimony of the American Civil Liberties Union Before the Senate Subcommittee on Criminal Laws and Procedures on the Final Report of the National Commission on Reform of Federal Criminal Laws* 70–73 (1972) (hereinafter *1972 ACLU Testimony*).

S. 1 has substantially returned to statutory formulas which would presumably preserve the limits of existing law, including the necessity of an "intent to betray," *Cramer* v. *United States*, 325 U.S. 1 (1944). But the contours of present law are unclear. *Id.* at 40–47. *See, e.g.*, the comment in *United States* v. *Stephan*, 50 F. Supp 738 741–42 (E.D.Mich. 1943) to the effect that "In times of peace it is treason for one of our citizens to incite war against us." Incitement without proof of intent could well be no more than advocacy protected by the First Amendment even under a restrictive reading of present law as requiring an unequivocal "call to violence now or in the future" before advocacy may be punished. *Noto* v. *United States*, 367 U.S. 290, 298 (1961). *See, Yates* v. *United States*, 354 U.S. 298 (1957). Under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), the only speech which may be punished is that "directed" toward causing imminent lawless action and likely to produce it.

Similarly, the treatment of propaganda broadcasters as traitors, *Chandler* v. *United States*, 171 F. 2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); *Gillars* v. *United States*, 182 F.2d 962 (D.C. Cir. 1950), raises grave constitutional doubts. One man's propaganda is another's free speech, as the bitter controversy over the war in Southeast Asia taught the nation. In order to avoid the prosecution and persecution of those who espouse unpopular doctrines, the crime of treason should at least be limited, as the Brown Commission suggested at one point, to "actual participation in a foreign war against the United States." *Working Papers*, Vol. I, at 419–23.

A salient provision of S. 1, is its application to persons "in fact owing allegiance to the United States," a formulation which is clearly ambiguous and overbroad. Citizens of other nations should not be chargeable with treason against the United States. The need for clarification is illustrated by *Carlisle* v. *United States*, 83 U.S. 147, 154 (1873), which declared that aliens domiciled in the United States are covered because they owe temporary allegiance.

S. 1 provides a mandatory death penalty for treason under certain circumstances. The ACLU is unalterably opposed to capital punishement on moral,

constitutional, and practical grounds. Inflicting the death penalty, as has so often been demonstrated, does not deter serious crime more effectively than severe prison sentences. It is a barbaric anachronism which diminishes the moral and political legitimacy of the society which practices it. *See, Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring).

2. Inciting overthrow or destruction of the Government.

Section 1103 of S. 1 re-enacts the Smith Act, punishing mere advocacy of revolutionary change. The ACLU opposes such legislation in any form. According to *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969),

"the Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The incitement section of S. 1 is a prescription for governmental tyranny. Under its loose language, entirely innocent conduct informed by not even a breadth of suspicion of possible illegality, could be the basis for a major felony. "[T]he most theoretical proposals in the most unlikely circumstances carry penalties up to 15 years * * *" Schwartz, "The Proposed Federal Criminal Code." 13 Crim. L. Rep. 3265, 3273 (1973).

Section 1103 punishes one who "with intent to bring about the forcible overthrow or destruction of the government of the United States or of any state as speedily as circumstances permit," "incites other persons to engage in conduct which then or at some future time would facilitate the forcible overthrow or destruction of such government." One is similarly liable who, with the prescribed intent, "organizes, leads, recruits members for, joins, or participates as an active member in, an organization or group that has as a purpose the incitement" forbidden in the first subsection.

S. 1 permits—indeed, encourages—the finding of criminal intent without the commission of a single act beyond speech itself. The connection between advocacy and "overthrow * * * of the government" is made yet more tenuous by the failure to require either imminent danger or substantial likelihood of success. No "armed insurrection" is necessary. And the word "facilitate" could embrace incitement of others to make speeches or posters, or write letters, critical of government policy. Section 1103 is a blueprint for, in Justice Jackson's phrase, "coercive elimination of dissent" and "extermination of dissenters." "The First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Barnette, supra*, 319 U.S. at 641. This statute, which sanctions the punishment of mere "belief in an idea," *Scales, supra*, 367 U.S. at 274 (Douglas, J., dissenting), paves the way for destruction of our society more surely than the incitement it condemns.

3. Sabotage.

Sections 1111 and 1112 of S. 1 prohibit impairing military effectiveness by damaging property; it reaches out to embrace virtually everything and every activity that might be taken in relation to it. Section 1111 prohibits damage to or delay or obstruction of any United States property or that of "an associate nation," almost any other property, facility, or service that is or might be used in the national defense, or production or repair of such property. The required intent is "to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities." "Associate nation" is defined in Section 1111 as "a nation at war with a foreign power with which the United States is at war." "War" is not defined.

Under the vague terms of §1111, anti-Vietnam war demonstrators who "interfered with" public transportation by their very numbers could have been prosecuted for sabotage, a major felony. Nothing in the statute's language prohibits a jury from deducing "intent * * * to obstruct the ability of the United States * * * to * * * engage in war or defense activities" under such circumstances. Nothing would prevent prosecution under the general criminal attempt, conspiracy, and solicitation sections for speech encouraging such a demonstration. The section could be used to destroy the rights of association and assembly guaranteed by the First Amendment. It would make every public demonstration, no matter how peaceful and orderly, subject to criminal sanctions at the iron whim of official power. *See, Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965), where the Supreme Court, in striking down a similarly vague and overbroad statute, observed:

"It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."

Section 1112 essentially repeats the offense outlined in §1111, but lowers the level of required intent to "reckless disregard." It thus extends still further the opportunities for official suppression of that vigorous and effective dissent on which democracy relies.

To be even arguably fair, Section 1112 should be dropped and Section 1111 should be narrowed to apply only to culpable physical damage to military hardware.

4. Impairing military effectiveness by false statement.

Setcion 1114 makes it criminal for a person, in time of war and with intent to aid the enemy or interfere with the United States' ability to engage in war or defense activities, knowingly to communicate a statement "which in fact is false" about "losses, plans, operations, or conduct of the military forces of the United States," of an associate nation, or of an enemy. It similarly punishes factually false statements about civilian or military catastrophe or "any other matter of fact which, if believed, would be likely to affect the strategy of tactics of the military forces of the United States or likely to create general panic or serious disruption."

Enactment of § 1114 would effectively destroy perhaps the most important function of a free press—the obligation to report fully and fairly in times of national crisis the discoverable facts about that crisis. It would make punishable as a major felony good-faith errors in news reports about a wide range of activity.

Moreover, there is nothing to prevent high-level official concealment of such facts as the bombing of Cambodia while a prosecutor pursues, tries, and obtains a conviction in the erroneous belief that such "facts" were false. The history of our involvement in Vietnam suggests that when the choice is between the official and the press version of the facts, the citizen is better off trusting the press. Without it, we might never have learned of the massacre at My Lai, the widespread corruption and oppression of the South Vietnamese government, or the strange discrepancy between many battlefield reports and the observable facts.

A free press is going to make mistakes. Occasionally it is going to make major mistakes. Criminal liability for such errors cannot be made dependent on so vague an intent as "interference with" the "defense activities" of the United States. Such a standard would permit official harassment of poltically disfavored publications. It would, in effect, impress the press into government service until such time as the state of "war" came to an end.

Section 1114 should be dropped.

II. OFFENSES AGAINST PUBLIC ORDER

A. Rioting

Although the Brown Commission Consultant's Report persuasively recommended sharp limitations on federal riot law because of constitutional difficulties and overlapping state jurisdiction, *see Working Papers*, Vol. II at 991–1029, the Commission's *Final Report*, Secs. 1831–1834 of S. 1 contain anti-riot provisions which could substantially interfere with First Amendment rights. Like many of the offenses against national security, the anti-riot laws are broad and vague, sweeping within their terms conduct clearly protected by the First Amendment, failing to notify the law-abiding of what conduct is properly forbidden, and providing a convenient tool for discriminatory prosecution and governmental oppression of political adversaries.

Yet the Supreme Court has affirmed time and again that public peace cannot be preserved at the price of sacrificing public discourse and dissent, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). In *Terminiello* the Court declared that:

A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people

to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, * * * is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. * * * There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." 337 U.S. at 4–5.

Rioting, of course, is not protected by the First Amendment. But only violent activity itself or conduct clearly and immediately productive of such activity should be punishable by the criminal law. Speech alone is constitutionally insufficient. *See Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), holding that the government may forbid speech only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Speech which is the occasion for violence is not necessarily the cause of it. *See Working Papers*, Vol. II at 1000: "What is obviously lacking is any requirement that the prescribed *speech* pose a clear and present danger of violence. The statute * * * refers [only] to the danger that the *violence* * * * on the part of the *rioters* will cause injury to person or property." [Emphasis in original.] A statute which allows government officials to determine when the connection suffices can only lead to the dangers the Court warned against in *Cox* v. *Louisiana*, 379 U.S. 536, 557–58 (1965): "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not * * * ." *And see Hess* v. *Indiana*, 94 S.Ct. 326 (1973), in which the Court majority and dissenters read exactly opposite meanings into the same words uttered by a demonstrator in a moment of confusion and potential violence. Recovery of the actual meaning of speech in such moments from the memories of participants after the fact is at best an extraordinarily difficult task. A society which assigns criminal liability on the basis of such fragile distinctions run too high a risk of penalizing the innocent.

1. Inciting or leading a riot.

Section 1831 prohibits inciting five or more persons to riot. The statute does not distinguish between major and minor disorders in setting the penalty, as recommended by the Brown Commission. See § 1801(3) of its *Final Report*. Section 1924 defines a riot as a disturbance involving violent and tumultuous conduct which creates a grave danger of injury or damage to persons or property.

The formulation is an improvement over the even more vague wording of the Civil Rights Act of 1968, the first federal riot law. But it does not approach the constitutional standard enunciated by the Supreme Court in *Brandenburg* v. *Ohio*, *supra*, 395 U.S. at 447 (1969) (even advocacy of force or violation of law is protected speech except when it aims at and is likely to produce "imminent lawless action").

The statute can be used to punish mere advocacy, even where no riot in fact occurs or where the connection between speech and violence is merely temporal. They thus substantially invade territory governed by the First Amendment. Tumultuous conduct may be no more than a noisy but peaceful demonstration which is well within the constitutionally guaranteed right of assembly and petition.

Additionally, the statute punishes the giving of "commands, instructions, or directions in furtherance of" a riot, and makes it criminal to "urge participation in" or "lead" a riot. Again, *Hess* v. *Indiana*, 94 S.Ct. 326 (1973), amply demonstrates the difficulties encountered in determining who is trying to further a riot and who is trying to limit it. Such speech is protected not only by the First Amendment, but also by the Fifth Amendment guarantee of due process of law. The standards for punishment are so vague as to require potential violators, law enforcement personnel, and judge or jury to guess at their meaning. *See Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938).

S. 1 would substantially broaden federal riot jurisdiction. Interstate travel, use of the mail, or use of interstate commerce facilities, regardless of intent, "in the course of the planning, promotion, management, execution, consummation, or concealment of the offense," would be sufficient. There would be

jurisdiction where "the riot obstructs a federal government function." Any realistic attempt to enforce such provisions would involve the creation and maintenance of a national riot police, since nearly every "tumultuous disturbance" of whatever description would fall into one or another of the jurisdictional categories. What such provisions really do is give the federal government unfettered discretion to second-guess state law enforcement officials and to decide, perhaps for purposes far removed from legitimate law enforcement concerns, to prosecute those whom the state fails to charge or convict, or sentence in a manner acceptable to federal officials. Civil libertarians have long opposed the establishment of a roving federal police force as a substantial step toward governmental tyranny.

In order to bring this section into tolerable constitutional boundaries, and to decrease the possibility of arbitrary enforcement, subsections (c)(3) (4) and (5) should be dropped from Section 1831.

2. Disorderly conduct.

Section 1861 of S. 1 would make it a violation of federal law to behave tumultuously, violently or threateningly, cause "unreasonable noise," use abusive or obscene language or behave obscenely in a public place, solicit a sexual act in a public place, or engage in "any other conduct which creates a hazardous or physically offensive condition for no legitimate purpose." The required intent is merely to alarm, harass or annoy another person or reckless disregard of the fact that another person is alarmed, harassed or annoyed by the prohibited conduct.

The offenses encompassed by Section 1861 are limited only by imagination. Is it a violation to yell or run in the halls of a federal building? To swear loudly enough to be overheard? To impede passersby by standing on a busy street corner in "Indian country"? To be noisy on an airplane? Such a law violates the rule of *Cox* v. *Louisiana*, 379 U.S. 536 (1965), by giving law enforcement officials virtually unfettered discretion to apply a broad prohibitory statute against those whose speech or conduct is "annoying" to them or others. But the exercise of constitutional rights cannot be limited to those occasions on which it does not annoy others. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). The Supreme Court has repeatedly overturned statutes which chill First Amendment rights. Such statutes cause the public to steer far wider of the prohibited zone of conduct than necessary, because they fail to give clear warning of what the law forbids. They give police the power to enforce them selectively "against those whose association together is 'annoying' because their ideas, their life-style, or their physical appearance is resented by the majority of their fellow citizens." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 616 (1971). *See NAACP* v. *Button*, 371 U.S. 415 (1963). Even public obscenity, at least where it is essentially expressive conduct, is protected by the First Amendment. *Hess* v. *Indiana*, 94 S.Ct. 326 (1973); *Cohen* v. *California*, 403 U.S. 15 (1971) (reversing a state conviction for "offensive conduct" for use of a word, generally thought of as obscene, to express strong emotion about a political issue). And the general rule on solicitation of sexual contact, at least in tort law, has long been that "there is no harm in asking." *See, e.g., Samms* v. *Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961).

At most only subsections (1) and (4) should be retained, but even those are debatable. The other subsections should unquestionably be dropped.

B. Drugs

The Brown Commission recommended that possession of marijuana be treated as a mere regulatory infraction, subject to a fine only, *see* Comment in its *Final Report* at 255. The final report of the National Commission on Marijuana and Drug Abuse recommended that marijuana possession be decriminalized altogether. *See Marijuana: A Signal of Misunderstanding* (1972). But Sec. 1813 of S.1 makes possession of marijuana a misdemeanor, with the penalty for a first offense 30 days in jail and a $10,000 fine. An offender previously convicted of violating state or federal drug laws may be punished by 6 months in jail and a $10,000 fine.

As the Brown Commission observed:

"Available evidence does not demonstrate significant deleterious effects of

marijuana in quantities ordinarily consumed; * * * any risks appear to be significantly lower than those attributable to alcoholic beverages; * * * the social cost of criminalizing a substantial segment of otherwise law-abiding citizenry is not justified by the, as yet, undemonstrated harm of marijuana use; and * * * jail penalties for use of marijuana jeopardize the credibility and therefore the deterrent value of our drug laws with respect to other, demonstrably harmful drugs." Comment to *Final Report* at 255.

We strongly endorse the decriminalization of marijuana possession and use. Important constitutional rights are at stake, including the right to privacy. *Cf., e.g., Stanley* v. *Georgia*, 394 U.S. 557 (1969). The fact that marijuana use may be morally "annoying" to many persons is not sufficient basis for making it criminal. *See Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971). The existence of such arbitrary penalties for conduct not clearly shown to be harmful encourages selective enforcement, police corruption, and the use of such police techniques as entrapment and illegal searches. It diverts millions of law enforcement dollars and thousands of manhours away from investigation and prosecution of serious crime.

Although we approve of the special sentencing provisions in § 3808 of S.1, adding 18 U.S.C. § 5101 to permit court discretion in placing first offenders on probation without entering a conviction on their record, as a step in the right direction, we believe that decriminalization is long overdue.

In addition, the ACLU believes that criminal punishment of hard-drug addicts, where use and possession of the drugs is fundamentally a result of illness rather than criminal intent, is a violation of the Constitution. *See Robinson* v. *California*, 370 U.S. 660 (1962), holding it unconstitutional to make addiction *per se* a crime; *Powell* v. *Texas*, 392 U.S. 514 (1968) (dissenting opinion). If the Eighth Amendment ban on cruel and unusual punishment forbids punishment for "an irresistible compulsion," according to Justice White, concurring in *Powell, supra*, 392 U.S. at 548, "I do not see how it can constitutionally be a crime to yield to such a compulsion." We agree.

C. Obscenity

Section 1842 makes it a federal felony to disseminate obscene material, thereby punishing the freedom of speech and press guaranteed by the First Amendment. The ACLU opposes any restriction on expression on the grounds that it is somehow obscene, immoral, shameful, or distasteful. The Constitution requires that such judgments be left to the individual rather than to the government. Justice Douglas, dissenting from the Supreme Court majority in *Miller* v. *California*, 93 S.Ct. 2607 (1973), outlined the dangers of determining that some forms of expression are beyond the protections of the Constitution:

"The idea that the First Amendment permits government to ban publications that are 'offensive' to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. * * * To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. * * * the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some." *Id.* at 2626.

A definition of obscenity that would both give fair warning of what is prohibited and limit itself to the truly pornographic has defied the best legal minds of the century. In *Miller, supra*, the Court majority confidently predicted that its newest test would single out protected "commerce in ideas" from punishable "commercial exploitation of obscene material." *Id.* at 2621. The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed movie "Carnal Knowledge" was obscene. *Jenkins* v. *State*, 13 Crim. L. Rep. 2386 (July 2, 1973). In reversing that decision, *Jenkins* v. *Georgia*, 42 U.S.L.W. 5055 (U.S. June 24, 1974), the Supreme Court of the United States failed to relieve itself of "the awesome task of making case by case at once the criminal and the constitutional law." *Id.* at 5058 (Brennan, J., dissenting). The constitutional definition of obscenity remains uncertain.

Moreover, as the Supreme Court held in *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), "a man's home is his castle" when it comes to determining what

books he shall read there or what films he shall see there. Even obscenity laws which do not directly invade the home interfere with constitutionally protected privacy, for they limit the availability of materials for private use.

Section 1842 embodies the classic defects of obscenity law. It prohibits distribution of and advertisements for material containing explicit representation or detailed description of sexual intercourse or explicit close-up representation of human genitals. The only exception is for such material as "a minor portion * * * reasonably necessary and appropriate * * * to fulfill an artistic, scientific, or literary purpose." Even that exception fails if the material was "included primarily to stimulate prurient interest." Only a limited class of students and teachers in "institutions of higher learning" and persons with a medical prescription for pornography are exempt from the prohibition. It is no defense that the distributor did not believe the material to be obscene if he had general knowledge of its contents.

Such standards are plainly impossible for policemen, prosecutors, judges, juries, counsel, publishers, or private citizens to apply. Everything from the Bible to "The Joy of Sex"—both national best-sellers—could be swept within their prohibition.

Neither statute distinguishes between adults and children as targets for distribution of obscene material, between willing and unwilling adults, or between the full-time dealer in pornography and the man who lends a book to a friend. But even if they did, the ACLU believes that they would violate the First Amendment. Censorship of children's reading or viewing must be left in the hands of individual parents, not turned over wholesale to the state. The effort to distinguish the adult panderer from the adult interested reader for purposes of punishment is one the Constitution clearly forbids. The state that begins by restricting access to sexually-oriented expression may end by restricting access to all expression that offends those in power.

No less than government attempts to control information about its own behavior or to stifle political dissent directly as "incitement," obscenity statutes strike at the heart of due process and free speech. They attack the foundations of our constitutional democracy. Sec. 1842 should be dropped.

III. OFFENSES AGAINST GOVERNMENT PROCESSES

Under the guise of protecting the integrity and neutrality of government operations, S. 1 would permit governmental interference with First, Fifth, and Sixth Amendment rights. There is a genuine need to protect judicial and administrative proceedings from corruption and intimidation. But this need must not be used to invade constitutional rights where the behavior curbed has, at most, slight chance of deleterious effect. Public demonstrations directed primarily at public opinion must not be suppressed on the theory that they interfere with the sanctity of the judicial process. Vigorous advocacy must not be stifled under the label of criminal contempt.

A. Obstructing a Government Function

Section 1302 of S. 1 makes physical interference with federal government functions a felony. This is another potential weapon in the government's arsenal of criminal provisions which could be misused against lawful and peaceful demonstrations. Virtually every mass demonstration would, at one moment or another, fall within their prohibition. Yet such demonstrations can be an important contribution to the public debate on a wide variety of topics.

Under the unfettered terms of the statute, it would be up to the prosecutor to determine whether a large demonstration on federal grounds or near federal buildings was or was not "physically interfering" with some government function. Even an influx of cars carrying demonstrators to the chosen site might constitute the proscribed felony. Since mass arrests on the basis of group behavior are constitutionally forbidden by the particularity requirements of the Fourth Amendment, the statutes would lend themselves to selective abuse by law enforcement officials who object to life-styles different from their own. *See e.g., Coates* v. *City of Cincinnati*, 402 U.S. 611, 616 (1971).

S. 1 also contains a companion provision, Section 1301, prohibiting obstruction of a government function by "defrauding the government in any manner." This provisio could seriously curtail freedom of the press. See Part I.A.8 of this Testimony, *supra*.

B. Demonstrating To Influence a Judicial Proceeding

Section 1328 of S. 1 follows present statutory law in forbidding pickets and other similar demonstrations with intent to influence a judicial proceeding if done within 200 feet of a courthouse. S. 1 includes the residences of judges, jurors, and witnesses within the prohibition. Although the ACLU generally endorses such statutes as necessary to protect due process right, we believe the statute should be written so as not to apply to demonstrators who have no possibility of influencing or intimidating the court, and whose primary intent is to express opinions of the judicial process which are protected by the First Amendment.

C. Criminal Contempt

Section 1331 of S. 1 basically continues present law regarding criminal contempt. It permits a sentence of up to six months, and specifies that a criminal contempt proceeding does not bar subsequent prosecution for another federal offense based on the same conduct, in face of the fact that the double jeopardy clause of the Fifth Amendment forbids more than one prosecution based on the same conduct. The statute does not provide for trial by jury. See Comment in the Brown Commission *Working Papers*, Vol. I at 602.

Because the criminal contempt power is unusually subject to judicial abuse, may evade impartial judicial review, and has been too often invoked against politically controversial defendants and their counsel, we endorse the recommendation in the original Brown Commission study draft that penalties be sharply curtailed to no more than five days imprisonment and a $500 fine. We also believe that a criminal contempt trial must be held before a neutral judge—not the one in whose court the alleged contempt occurred. *See Working Papers*, Vol. I at 603. If longer penalties are to be imposed, there can be no substitute for the intervention of a jury between the court and the accused. Indeed, Supreme Court decisions require a jury trial in criminal contempt cases where a sentence longer than six months is imposed. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968) (jury trial must be granted in contempt cases where "serious punishment * * * is contemplated").

The criminal contempt section of S. 1 punishes one who "misbehaves in the presence of the court or so near thereto as to obstruct the administration of justice." The statute does not offer any further guide to judicial discretion. But the Supreme Court has held that before the "drastic procedures of the summary contempt power may be invoked," it must be clearly shown that the court has actually been obstructed in "the performance of a judicial duty." *In re McConnell*, 370 U.S. 230, 234 (1962).

Under the proposed statute, as under the present statute, there is a significant danger that vigorous representation or self-representation may be held subject to summary punishment, thereby chilling the Sixth Amendment right to effective assistance of counsel. *See Powell* v. *Alabama*, 287 U.S. 45 (1932); *McConnell*, *supra*. The vagueness of the term "misbehavior" or "misconduct" violates due process rights by leaving the trier of fact "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402–03 (1966). *See Smith* v. *Goguen*, 42 U.S.L.W. 4393, 4397 (U.S. March 25, 1974).

D. Refusing To Testify

Section 1333 of S. 1 would increase the maximum penalty for unprivileged refusal to testify before Congress or in court from one to three years imprisonment. It would also permit a fine of up to $100,000. Raising of the maximum penalty can only increase the pressure to testify on witnesses whose claim to the privilege is marginal or uncertain, or who do not have the benefit of counsel to advise them. *See, e.g., Yellin* v. *United States*, 374 U.S. 109, 123 (1963); *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929), holding that in a congressional hearing the witness who refuses to answer takes the risk of violating a statute penalizing unprivileged refusals to testify even if his belief in his right to the privilege, although wrong as a matter of law, was in good faith. The three-year sentence permitted by S. 1 chills the exercise of protected rights, and promotes disrespect for the law as a mere guessing game between witnesses, counsel, and courts.

The immunity scheme of S. 1, contained in §3111, is substantially the same as that of immunity statutes the ACLU has long opposed. Immunity is no substitute for the constitutional privilege not to incriminate oneself. A witness forced to testify by a grant of immunity may, under S. 1 and current Supreme Court rulings, be prosecuted for the conduct he testifies about if the evidence used against him is neither his testimony nor information obtained by use of that testimony. *See Kastigar* v. *United States*, 406 U.S. 441 (1972); *Zicarelli* v. *New Jersey State Investigation Commission*, 406 U.S. 472 (1972). Despite federal guarantees, it is difficult if not impossible to be certain that tainted evidence has not been put to some prohibited use somewhere within the prosecutorial machinery. *Kastigar*, *supra*, 406 U.S. at 469 (Marshall, J., dissenting). Moreover, it is not legally clear whether Congress can protect a witness against state prosecution. Such a decision may be within the state's authority to make.

Nor can a grant of immunity compensate for the damage done to a witness' privacy, especially where he is required to testify about his associations with others or to reveal his political or other opinions. Nothing in the immunity statute protects a witness from losing his job because his employer dislikes his notoriety. Compelling testimony invites trial by publicity without any of the safeguards required by the Constitution for criminal trial and conviction.

IV. DEFENSES

A. Entrapment

The present state of entrapment law is a disgrace to our system of justice. The most egregious police misconduct will not bar prosecution of an offender who might never have engaged in criminal conduct if the police had not led him into it. The Supreme Court has recently reiterated its past approval of a "predisposition" test under which the prosecution may refute entrapment by detailing the accused's past misconduct or criminal activity—thereby violating the principle that an accused should be tried solely on the offense charged and not required to justify his entire life. *See United States* v. *Russell*, 411 U.S. 423 (1973); *Working Papers*, Vol. I at 319–20.

To its credit, the Brown Commission attempted to remove the predisposition question from the law and to establish an objective test of entrapment. *See* §702 of its *Final Report*. The provision of S. 1 weakens the prohibition against entrapment and thus encourages police misconduct and corruption.

Under Section 551, entrapment is a defense only where "the defendant was not predisposed to commit the offense charged and did so solely as a result of active inducement by a federal public servant. * * * [M]ere solicitation that would not induce an ordinary law-abiding person to commit an offense, does not in itself constitute unlawful entrapment."

The proposal does not require probable cause to believe that the suspect is a likely potential offender. Yet as the Brown Commission *Working Papers note*, Vol. I at 319, inducement of criminal conduct violates privacy in much the same way as unfounded searches prohibited by the Fourth Amendment. Such inducement makes "inroads upon the freedom of the will." A government policy sanctioning unlimited police intrusion into the decision making processes of individuals or groups for the purposes of ferreting out unsuspected crime can easily metamorphose into a justification for relentless pursuit of those considered "predisposed" by political opinions or associations to commit crimes. The "Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman* v. *United States*, 356 U.S. 369, 372 (1958)." *Russell*, *supra*, 411 U.S. at —, 36 L.Ed. 2d at 378 (dissenting opinion).

It is no doubt necessary on occasion for law enforcement officials to use disguise and deception to procure evidence of serious criminal misbehavior. But such conduct should be strictly limited. Instead, S. 1 contemplates its expansion, by restricting the entrapment defense to offenses committed "*solely* as a result of *active* inducement * * *," making proof of entrapment virtually impossible. In *United States* v. *Russell*, *supra*, the Supreme Court, while approving present entrapment law, plainly left the way open to Congressional reform. 36 L.Ed. 2d at 374 & n. 9. Congress should take the opportunity to curb official lawlessness.

B. Public Duty

Sections 541–544 would insulate public officials and those acting at their direction from the prohibitions of the criminal law. The statutes would effectively divorce personal responsibility from official action, thereby setting a lower standard of conduct for every federal employee from the President on down the scale. Such statutes are an invitation to official lawlessness.

For more than two years we have heard high federal officials attempt to justify perjury, wiretapping, and burglary—offenses that would be felonies if committed by ordinary citizens—on the grounds that they were doing their duty as public servants. Under present law, which contains no provisions comparable to the proposed ones in S. 1, United States District Judge Gerhard A. Gesell refused to countenance any exception to the Constitution or criminal laws for public officials on national security grounds:

"The Government must comply with the strict constitutional and statutory limitations on trespassory searches and arrests even when known foreign agents are involved * * *. To hold otherwise, except under the most exigent circumstances, would be to abandon the Fourth Amendment to the whim of the Executive in total disregard of the Amendment's history and purpose." *United States* v. *Ehrlichman, et al.* Crim. No. 74-116, Memorandum and Order (D.D.C. May 24, 1974).

If Congress changes the law to permit justification for an illegal act by a federal official on the ground that he "believed * * * that the conduct charged was required or authorized," unless his belief was reckless or negligent, no innocent citizen will be really secure from government lawlessness

Such a standard offers virtually no guidance to law enforcement officials, judges, or juries. It does not even suggest that conduct plainly lawless if done without official jurisdiction should have to overcome any higher hurdle of reasonableness than conduct which is ordinarily legal and within the scope of duty. It offers every defendant the opportunity—eagerly accepted by many of the Watergate defendants—to claim that he was merely a good soldier.

But public officials are not soldiers. The Brown Commission *Working Papers* are simply wrong when they equate the soldier's duty to obey commands with the public official's duty to carry out his superior's orders. *Id.* at 263. The public official's highest duty is to the public. He cannot escape the law's commands by reference to administrative permission to ignore them. *See Westbrook* v. *United States*, 13 F.2d 280 (7th Cir. 1926). *Cf. Screws* v. *United States*, 325 U.S. 91, 120 (1945) (Rutledge, J, concurring). One fundamental lesson of Watergate is that we must encourage public officials to exercise independent judgment when faced with a supervisor's order which raises doubts in their minds. Especially in light of current events, Congress should take a firm stand against limiting official responsibility for criminal acts. Public respect for public officials is already frighteningly low. Undermining it further may well destroy the bedrock of confidence on which democratic self-government rests.

V. WIRETAPPING AND ELECTRONIC SURVEILLANCE

The ACLU has long opposed wiretapping and electronic surveillance by anyone—including the government—for any reason. The use of electronic devices to invade the privacy of conversations in homes and offices, in telephone booths, and nearly anywhere else is a flagrant violation of the Fourth Amendment ban on dragnet searches and seizures, the Fifth Amendment privilege against self-incrimination, and the constitutional right of privacy. The electronic ear does not discriminate between conversations about criminal activity and conversations entirely within the protection of the First Amendment. It does not separate the intimate discussions of friends from the clandestine plotting of criminals. It sweeps up everything in its way.

Despite studies indicating that, from the government's point of view, the costs of electronic surveillance far outweigh its purported benefits, Schwartz, *Report on Costs and Benefits of Electronic Surveillance* (ACLU 1973), S. 1 essentially re-enacts the electronic surveillance provisions of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-20. The ACLU vigorously opposed Title III at the time it was under consideration by Congress. We oppose its re-enactment now. Despite its requirement that a neutral magistrate issue a warrant based on "probable cause" and on the failure of ordinary investigative techniques, Title III has greatly expanded the use of electronic surveillance. The number of "intercept applications" authorized has risen from

174 in 1968 to 864 in 1973. State participation in the government's wiretapping and electronic surveillance program has steadily increased. Report of the Director of the Administrative Office of the United States Courts, printed in Cong. Rec. S 7104–05 (May 6, 1974). Further, the typical federal wiretap in 1972 involved the interception of 1,023 conversations among 66 persons over an average period of more than three weeks. See Cong. Rec. S 7934 (April 30, 1973) (remarks of Sen. McClellan). As Senator McClellan noted in inserting the 1973 report into the Congressional Record, only two applications for intercept orders were denied in 1973. In the overwhelming majority of cases, then, the neutral magistrate has accepted the government's word that such surveillance was necessary and would be carefully limited within statutory guidelines.

Yet there have been extraordinary abuses—abuses involving wholesale deception of the courts by the Administration. Despite the requirement that only the Attorney General or an Assistant Attorney General specially designated by him could authorize federal applications for intercept orders, 18 U.S.C. §2516, a requirement designed by this Congress to insure that only a "publicly responsible official" would set law enforcement policy in this sensitive area, S. Rep. No. 1067, 90th Cong., 2d Sess., 96–97 (1968), a large number of such orders were routinely approved by an executive assistant to the Attorney General and submitted to the courts in the name of an Assistant Attorney General who had, in fact, nothing to do with their authorization. As a result, the Supreme Court has now held that evidence gathered under those orders cannot be admitted in court. *See generally, United States* v. *Giordano*, 416 U.S. 505 (1974).

Moreover, the Administration interpreted the Congressional authorization to permit electronic surveillance of political dissidents without court order, under the rubric of national security. It persisted in this practice until the Supreme Court unanimously ruled that the Fourth Amendment forbids such warrantless searches in "domestic security" cases. *United States* v. *United States District Court*, 407 U.S. 297 (1972) As the Court there noted,

"National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. * * * Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" *Id.* at 313–14.

The Court emphasized that:

"The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society." *Id.* at 314.

In reaching its decision, the Court held that the existing legislation did not attempt to confer surveillance powers on the President. *Id.* at 308. But Section 3108 would reverse this ruling by excepting the President from the statutory restrictions. The ACLU believes that all language reserving inherent Presidential power should be eliminated. However, if any such power at all is reserved it must be consistent with the holding in *United States* v. *United States District Court, supra*, that the Fourth Amendment controls where "there is no evidence of any involvement, directly or indirectly, of a foreign power." 407 U.S. at 309. If it is to exist at all, this concept needs to be carefully and narrowly defined in the statute. Such a definition should, as a minimum, incorporate the guidelines offered by the Justice Department two years ago and confirmed by Attorney General William Saxbe last summer: "substantial financing, control by or active collaboration with a foreign government or agencies thereof in unlawful activities directed against the government of the United States." Testimony of Deputy Assistant Attorney General Kevin T. Moroney, *Hearings on Warrantless Wiretapping before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 92nd Cong., 2d Sess., 12 (June 29, 1972); Washington Post, May 24, 1974, at A 20.

If such narrow authority is reserved to permit electronic surveillance in the absence of probable cause, that reservation should not be total. Such elec-

tronic surveillance should remain subject to statutory-established warrant and judicial review requirements in order to obtain some accountability in this very sensitive area.

S. 1 would continue present law authorizing electronic investigation of a long list of federal offenses. The previous version of S. 1 [8-10C1-5] shortened the list and confined surveillance to major crimes, and to that extent were less intrusive into constitutional rights.

S. 1 continues the Title III provision for emergency surveillance without court order for up to 48 hours, and adds a provision [§ 3104(b)(2)(A)] which authorizes such government surveillance with respect to "national security interests"—clearly in violation of the holding in *United States* v. *United States District Court, supra.* Nothing in that opinion permits warrantless "domestic security" wiretaps even in alleged emergency situations. S. 1400 limited such emergency searches to "conspiratorial activities characteristic of organized crime," and that is continued in S. 1. The ACLU strongly believes that this loophole too should be eliminated. Either formula is so vague as to permit warrantless surveillance of political dissidents or other disfavored groups of people.

S. 1 authorizes the use of evidence of crimes other than those specified in the court order authorizing the interception. This provision only exacerbates the dragnet qualities of electronic search and seizure. It permits law enforcement officials "to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines," *United States* v. *United States District Court, supra,* 407 U.S. at 325 (Douglas, J., concurring) in an effort to uncover evidence of criminal activity. It makes a mockery of the requirement for a warrant specifying in advance the offense of which evidence is ostensibly sought.

Section 4102 continues the present specific authorization of recovery of civil damages by those whose conversations are illegally intercepted, which we of course support. But we oppose the provision in Sec. 4102 that good faith reliance on "legislative authorization" is a "complete defense" to any civil proceeding based on illegal electronic surveillance. Since bad faith is extremely difficult to prove, such a provision would prevent the recovery of damages by those whose privacy was invaded for years by government surveillance without court order.

Section 1521 provides some protection from electronic eavesdropping by private persons or unauthorized government officials, by making it a felony to intercept or disclose the contents of private communications. However, it continues the present law's exception where one party to the conversation gives prior consent to the interception. The ACLU opposes this restriction on the citizen's right to be free from unreasonable search and seizure of his private thoughts. Consent by one party should not be allowed to bypass the constitutional rights and privileges of another.

VI. SENTENCING, PROBATION, AND PAROLE

S. 1 sets harsh retributive sentences for many crimes, and provides for the death penalty, which the ACLU has long opposed as cruel and unusual punishment in violation of the Constitution. *See Furman* v. *Georgia,* 408 U.S. 238 (1972). Although the Senate has already approved the reinstitution of capital punishment by passing S. 1401 on March 13, 1974, we believe that if this bill becomes law, it will not survive challenge in the courts. We urge the Senate not to endorse yet again a penalty which has been used to perpetuate racial and economic discrimination in a fashion which degrades our nation in the eyes of civilized men and women. Our claims to moral progress and to equal justice under law are mocked by the infliction of savage and final retribution against those least able to defend their cases in court.

The sentencing schemes of S. 1 are skewed in favor of long-term prison sentences, despite the overwhelming recommendation of penologists and lawyers who have studied the correctional system that sentences instead be sharply reduced. *See, e.g.,* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 348–351 (Avon. ed. 1967); Brown Commission *Working Papers,* vol. II at 1255–57, 1269; Schwartz, "The Proposed Federal Criminal Code," 13 Crim. L. Rep. 3265, 3266 (1973). Although such sentences may be aimed at the most egregious offenders the Brown Commission reported:

"They have a psychological tendency to drive sentences up in cases where such a tendency is unwarranted. Long, incapacitating terms can do great damage if imposed in the wrong cases, both in terms of injustice to the individual and in terms of positive, harmful effects to the public upon release of the prisoner. Long sentences imposed on the wrong people can lead to more offenses rather than less. *Working Papers,* vol. II at 1257.

A sentencing system which mandates fifteen, twenty, and thirty year sentences for a large variety of crimes becomes its own worst enemy. Even given the wide disparity between authorized maximums and time usually served, see *Working Papers,* vol. II at 1255, the system's inevitable effect is to destroy any possibility of rehabilitation for nearly everyone caught in its grasp. High recidivism rates among major felons testify to the fact that our prisons are training schools for criminals. By increasing the number of victims and offenders, they present a tragedy of broken and wasted lives Section 2302(b), which provides for extended terms of imprisonment, is particularly harsh. Most experts are agreed that extended sentences for special offenders is a penological experiment that does little good, operates unfairly, and should not be undertaken.

S. 1 sets high mandatory minimum sentences for traffickers in heroin or morphine, see Part II, B, *supra,* despite widespread criticism of such sentences as interfering with the judicial discretion vital to fairness in our criminal justice system. Such sentences deny the sentencing court the power to place the offender on probation. Federal judges, prosecutors, and correctional personnel, as well as the American Law Institute, the National Council on Crime and Delinquency, and the American Bar Association, have vehemently opposed mandatory minimum sentences. *Working Papers,* vol. II at 1252.

Even if it were desirable to limit discretion, mandatory minimum sentences do not do so. They merely displace discretion from the judge to the prosecutor, who retains the power to determine the charge. As the Brown Commission noted, prosecutors often charge drug offenders with a least one offense carrying a mandatory sentence and one carrying a lesser penalty which permits probation and parole. "The guilty plea process, supposedly resting upon the uncoerced consent of the offender, is clearly distorted when the prosecutor can hold the threat" of a mandatory minimum sentence over the offender's head. *Working Papers,* vol. II at 1254. This practice unconsitutionally chills the Sixth Amendment right to trial by jury, and the Fifth Amendment right to plead not guilty, burdening the defendant's choice with heavy consequences if he should be convicted. *See United States* v. *Jackson,* 390 U.S. 570 (1968).

The ACLU supports the long-overdue establishment of appellate review of criminal sentences, now provided for in § 3725 of S. 1. Appellate review permits correction of seriously excessive sentences and tends to equalize sentences for like offenders and like offenses. At the same time, it allows more than one court to consider individual circumstances in determining an individual's fate. The exclusion of drug and gun offenses from the provision is unfair and should be eliminated.

But even the limited reform S. 1 grants is seriously undermined by its provisions for appeal by the government as well as by the defendant. Although S. 1 properly forecloses higher sentences when the offender alone takes an appeal, it permits imposition of more severe sentences when the government takes an appeal. Such a provision plainly violates the constitutional guarantee against double jeopardy. *See, e.g., Ex parte Lange,* 85 U.S. (18 Wall.) 163, 173 (1873); *Blackledge* v. *Perry,* 42 U.S.L.W. 4761 (U.S. May 20, 1974). *Cf. North Carolina* v. *Pearce,* 395 U.S. 711 (1969). Whatever the exact scope of the guarantee, *Lange, supra,* 85 U.S. at 168, there has never been any doubt that the Constitution prohibits a second punishment on the same facts for the same statutory offense. The constitutional protection against more than one trial would be of no avail if "there can be any number of sentences pronounced on the same verdict[.]" *Id.* at 173.

Since S. 1 does not require the sentencing judge to state his findings and reasons on the record, the defendant's decision about appeal will not only be chilled by his fear that the government will take an appeal as well,

but also by his lack of knowledge as to the reasons which the judge actually relied upon in sentencing him. Where the original sentence is based on an erroneous reading of the facts, he will have no way of so discovering and demanding correction.

Despite the Brown Commission's finding that "probation is likely to be the most effective form of sentence in a great many cases," *Working Papers*, vol. II at 1268, S. 1 creates substantial legal hurdles to the imposition of probation instead of a prison sentence.

Section 2102 instructs a judge, in granting probation, to consider the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner." Such factors only reinforce the criminal justice system's discrimination against the poor, the sick, and the uneducated. The constitutional guarantees of due process and equal protection of the law requires courts to weigh evenly the claims of rich and poor, skilled and unskilled. Freedom from imprisonment and the chance to try again should not depend on an absence of past sufferings. "Effective" provision of job training and medical care in most cases does not require isolation of the offender from the community in which he will ultimately have to learn to live. The Congress should legislate to provide these services outside of prison, instead of incarcerating people just to obtain them. S. 1 similarly stacks the decision-making process against the granting of parole and fails to provide for a preference to parole over continued imprisonment. Yet parole, like probation, can be crucial in encouraging offenders to establish law-abiding lives. *See Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972).

AMERICAN LIBRARY ASSOCIATION,
Washington, D.C., May 2, 1975.

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

DEAR SENATOR MCCLELLAN: On behalf of the American Library Association, I should like to request that the attached statement be made a part of the hearing record on S.1, the Criminal Justice Reform Act of 1975.

Sincerely,

EILEEN D. COOKE,
Director, ALA Washington Office.

STATEMENT OF THE AMERICAN LIBRARY ASSOCIATION

Founded in 1876, the American Library Association is the oldest and largest library association in the world. It is a nonprofit, educational organization representing over 35,000 librarians, library trustees, and other individuals and groups interested in promoting library service. The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. It seeks to improve libraries and librarianship and to create and publish literature in aid of this objective.

THE RIGHT TO KNOW: LIBRARY SERVICE IN THE UNITED STATES

Libraries are repositories of knowledge and information, and are established to preserve the records of the world's cultures. In the United States, under the First Amendment, libraries play a unique role by fulfilling the right of every citizen to have unrestricted access to these records for whatever purposes he might have in mind. According to the Library Bill of Rights (attached), the Association's interpretation of the First Amendment as it applies to library service, it is the responsibility of the library to provide books and other materials presenting all points of view concerning the problems and issues of our times. The Library Bill of Rights further states that no library materials should be proscribed or removed because of partisan or doctrinal disapproval, and that the right of an individual to the use of the library should not be denied or abridged because of age, race, religion, national origin or social or political views.

In sum, libraries foster the well being of citizens by making information and ideas available to them. It is not the duty or role of library employees to inquire into the private lives of library patrons, nor is it their duty to act as mentors by imposing the patterns of their own thoughts on their collections. Citizens *must* have the freedom to read and to consider a broader range of ideas than those that may be held or approved by any single librarian or publisher or government or church.

Several sections of S.1 would, if enacted into law, adversely affect library service in the United States. Among these provisions are a section on obscenity, and various sections dealing with national defense and other government information which, taken together, represent a veritable "official secrets act."

ALA'S POSITION ON OBSCENITY LAWS

The American Library Association rejects anti-obscenity laws as intolerable intrusions upon those basic freedoms which Mr. Justice Cardozo once described as the *matrix* of all our other freedoms. Anti-obscenity laws, which are directed not at the control of anti-social action but rather at the content of communicative materials, clearly represent a form of censorship ultimately aimed at the control of the thoughts, opinions, and basic beliefs of citizens in an ostensibly free democracy.

The view of the American Library Association was succinctly stated by Mr. Justice Marshall in *Stanley* v. *Georgia*, 394 U.S. 557 (1969):

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the state has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment."

While the Court's judgment in *Stanley* applied to reading in the privacy of one's home, we submit that the arguments pertain to reading *per se*. We accordingly conclude that reading ought not to be hampered in any respect by laws on obscenity.

SECTION 1842: DISSEMINATING OBSCENE MATERIAL

Section 1842, unlike its predecessor in S.1 in the 93rd Congress is apparently in accord with the latest constitutional test for obscenity as set forth by the U.S. Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973). However, Section 1842 clearly fails to reflect the realities of the responses to *Miller* as they occurred in the various states.

Whereas some states, e.g., Oregon, responded to *Miller* by enacting a law that is more restrictive than its pre-*Miller* predecessor, others, such as Iowa, decided to eliminate all anti-obscenity laws for adults.

In *Miller*, the United States Supreme Court clearly intended to allow the various states to control so-called obscenity according to local standards. Ironically, the result of a federal law like the one envisioned in Section 1842 would permit the federal government to annul the choice of the citizens of Iowa as reflected in laws enacted by their legislature—at least to the extent that books, films, etc., are mailed or shipped into Iowa.

Regrettably, Section 1842 also fails to include provisions which the American Library Association finds essential. If one accepts, as we do not, the inevitability of anti-obscenity laws, such laws must include basic safeguards, including fair notice to reasonable men of the kind of conduct prohibited. However, anti-obscenity laws have been afflicted with notorious problems of vagueness. It is a position of the ALA that in order to remedy this defect anti-obscenity laws must mandate prior civil proceedings with adversaries to determine obscenity, and that such determinations must be made the prerequisite of criminal prosecutions for acts of dissemination that occur after the determinations.

North Carolina's anti-obscenity law, enacted April 1974, includes the following provision: "No person, firm or corporation shall be arrested or

indicted for any violation of (these provisions) until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm or corporation is a respondent, and wherein such material has been declared by the court to be obscene * * * and until such person, firm or corporation continues, subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth."

Again, it would be ironic if the rights and safeguards of North Carolina citizens as determined by them were to be abrogated by federal prosecutions under a law with provisions like those in Section 1842.

Sadly, Section 1842 is fraught with other defects that require correction. Indicative of the failures of the section is the lack of any specification of the community whose standards are to be applied with regard to "patent offensiveness." If, for example, a publisher in New York City mails a book to a small community in California, and the book is intercepted in the mails in, for example, St. Louis, and the publisher is charged with disseminating obscenity, is he to be tried under the standards of New York City, the community in California, or St. Louis, or are national standards to be applied? Confusion, as great as it is predictable, could be avoided by a simple provision specifying that national standards are to be employed.

Finally, the members of the American Library Association find no refuge in the distinction drawn between commercial and noncommercial dissemination. Virtually every library open to the public serves minors. In order to escape prosecution under Section 1842, it would be necessary for librarians to establish a comprehensive system of *sub rosa* censorship which would impede fulfillment of First Amendment rights, and which would not permit constitutionally required judicial review.

One major problem of the librarian was discussed by the U.S. Supreme Court when it addressed itself to the issue of a bookseller's knowledge of his stock:

"If the content of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, *would be a censorship affecting the whole public, hardly less virulent for being privately administered.* Through it, the distribution of all books, both obscene and not obscene, would be impeded." *Smith* v. *California*, 361 U.S. 147 (1959). (Emphasis added.)

These remarks, applied to the bookseller, are even more applicable to the librarian.

In *Blount* v. *Rizzi*, 400 U.S. 410 (1971), the U.S. Supreme Court established procedures to govern official censorship:

"* * * to avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and proving that the material is unprotected expression on the censor; require "prompt judicial review"—a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determiantion.

In the opinion of the Association, such safeguards are absolutely vital to the preservation of the freedom of expression guaranteed by the First Amendment. However, it is to be noted that librarian-censors would have no obligation to seek review of their decisions, nor would such an obligation be reasonable. Librarians have no economic incentive to seek such review; indeed, there is a strong economic disincentive.

The foregoing duly considered, the Association urges Congress to reject all federal legislation—if there is to be any—that does not mandate such basic safeguards as prior civil proceedings, or that does not allow as an affirmative defense the fact that the dissemination occurred in a bona fide nonprofit library established for the educational, research, and recreational needs of its users.

In deliberations of this kind it is surely axiomatic that the U.S. government is exceedingly—not to say excessively—complex, and that a citizen's attempt to learn about its operations commonly results in little more than bewilderment. This fact is all the more to be regretted in a nation where the citizenry is considered the ultimate sovereign.

The American Library Association not only insists upon the right of the citizen to know everything about his government absent a strong demonstration of a need for secrecy, but would also lend its cooperation and expertise to the public in devising systems to assure the effective delivery of information about government to all citizens. The Association would, in addition, join the associations of journalists and authors whose members are responsible for the origination of articles, books, etc., about our government, in vigorously protesting the abrupt and unwarranted change in our law as proposed in Sections 1121–23.

It is not absurd to suggest that the United States might consider prejudicial to its "interest" the publication of information about "intelligence operations" like those which were revealed in 1974, involving activities undertaken against the regime of Salvado Allende in Chile.

We submit that the free flow of information to citizens as ostensibly protected by the First Amendment requires, at minimum, that offenses be restricted to acts of communication with the intent to harm the security of the United States, and that the harm be both immediate and demonstrable.

The government should not be permitted to harass the press, and restrict the dissemination of information adverse to it, through prosecutions based on speculations about remote damages to the "interest" of the United States.

While librarians would not be immediately threatened in their professional activities by the adoption of these sections, it is clear that the quality of information service regarding our government would be. As a *pro bono publico* organization dedicated to improving every citizen's access to information, we therefore respectfully request the review of these sections with the interest of government by and for the people held uppermost in mind.

Attachment.

LIBRARY BILL OF RIGHTS

The Council of the American Library Association reaffirms its belief in the following basic policies which should govern the services of all libraries.

1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.

2. Libraries should provide books and other materials presenting all points of view concerning the problems and issues of our times; no library materials should be proscribed or removed from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibility to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgement of free expression and free access to ideas.

5. The rights of an individual to the use of a library should not be denied or abridged because of his age, race, religion, national origins or social or political views.

6. As an institution of education for democratic living, the library should welcome the use of its meeting rooms for socially useful and cultural activities and discussion of current public questions. Such meeting places should be available on equal terms to all groups in the community regardless of the beliefs and affiliations of their members, provided that the meetings be open to the public.

Adopted June 18, 1948.

Amended February 2, 1961, and June 27, 1967, by the ALA Council.

Statement of Associated Builders and Contractors

This statement is made on behalf of Associated Builders and Contractors, Inc., a non-profit corporation sometimes called ABC. Most of this Association's approximately 9100 members are construction contractors, with a substantial number of other members who do business with the construction industry. ABC's headquarters office is in Maryland, and it has 49 chapters with members in 47 states. It also maintains an office in Washington, D.C.

ABC members have on numerous occasions been victims of wanton destruction of property. On this account ABC is deeply interested in the efforts through S. 1 to make the federal Criminal Code more effective with respect to these problems. ABC also has a deep concern as to the sections regarding extortion, theft, and robbery, as these crimes are always a potential threat to construction contractors.

Construction contractors have been especially victimized by wanton and malicious destruction of property. At times in the heat of a labor dispute at a single construction site such damage done the construction project runs into hundreds of thousands of dollars. It has been estimated that during 1973 such damage to ABC construction contractors on 123 projects came to approximately $3,197,150.

ARSON

The statement here made is consequently directed in the first place at arson and other destruction of property during a labor dispute and what protection Section 1701 and other provisions of S. 1 would afford. As ABC understands the purpose in the bill, it is to make significant instances of such conduct a federal criminal offense.

ABC has long taken the position that whoever obstructs or intereferes with commerce by wilfully damaging property of an employer or owner to the extent of $2,000 or more by arson or otherwise should be held criminally liable under federal law. We are glad to see that S. 1 moves in that direction.

In this connection ABC suggests that with reference to the use of fire or explosion the language in Section 1701(c)(5) should be made more definite and inclusive. The language could readily be amended to state: "The property that is the subject of the offense is any facility that is used in an activity affecting interstate or foreign commerce or a property under construction for such use."

The reason for this suggestion is that the language in the bill as presently drafted might fall short of bringing a construction site project under jurisdiction of the statute. For instance, a hotel, a motel, or a warehouse for storing goods to be shipped in foreign or interstate commerce would obviously come within the language of the bill as presently drafted. However, if such a building were under construction it would not be *presently used* in an activity affecting interstate or foreign commerce. Because ABC believes this possible loophole should be closed, the suggestion is made to broaden the language.

We fear too that the words "by a destructive device" might cause worlds of controversy as to their meaning. We doubt, moreover, that they add anything important when included, and we suggest that they be deleted.

AGGRAVATED PROPERTY DESTRUCTION

In Section 1702(a)(3) it is suggested that the word "any" be inserted before "property" so that the language would read "(3) damages any property in an amount that in fact exceeds $500." Similarly the word "any" might well be inserted in Section 1703(a) before the word "property". The reason for the suggestion is to make clear that at these points the concept is not limited to "public facility."

ROBBERY AND EXTORTION

ABC has a deep interest in Sections 1721 and 1722 regarding *Robbery* and *Extortion*. More especially with respect to Extortion it is submitted that Congress long ago actually intended through the Hobbs Act to outlaw such conduct in labor disputes. With respect to the Hobbs Act we agree with the four-justice minority opinion in the Enmons case which stated:

"Seeking higher wages is certainly not unlawful. But using violence to obtain

them seems plainly within the scope of 'extortion' as used in the Act, just as is the use of violence to exact payment for no work or the use of violence to get a sham substitution for no work. The regime of violence, whatever its precise objective, is a common device of extortion and is condemned by the Act."

This minority observation, ABC submits, is completely sound. By following the court majority's reasoning, the absurd result of legalizing any crime when prosecuted under the Hobbs Act, even murder, could be the result as long as the objective was to promote a legitimate collective bargaining objective. We believe Congress intended through the Hobbs Act to outlaw such conduct, not legalize it. Hence we completely approve of the stated purpose of the Committee "to overturn the result" in the Enmons case.

As we study Section 1721 and 1722, we assume that if jurisdiction attached over robbery or extortion at a private construction site, it would derive from Section 1721(c)(5). We fear that a persuasive argument could be made that the language in the bill as presently drafted would not cover such construction site property. For that reason we suggest revision of the language in Section 1721(c)(5) to read:

"(5) the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce, the movement of an article or commodity in interstate or foreign commerce, or the construction of a facility for use in an activity affecting interstate or foreign commerce."

With this language or similar language we believe the dastardly acts of extortion at times committed in connection with construction site activity would be covered.

ABC is gratified that the Committee has expressed an intention to overrule the Supreme Court's Enmons decision. In order that there may be no doubt on this point, the following language is suggested as an addition to Section 1722(a) after the final word "damaged":

"Notwithstanding that the same acts or conduct may also be a violation of State or local law, and notwithstanding that such acts or conduct were used in the course of a legitimate labor dispute or in the pursuit of legitimate union or labor ends or objectives."

We commend the Committee for the outstanding piece of work it has done and hope the legislation will be enacted in such form as to achieve the results envisioned in the Committee Report.

Weil, Gotshal & Manges,
New York, N.Y., May 7, 1975.

Paul C. Summitt, Esq.,
Chief Counsel, Senate Subcommittee on Criminal Laws and Procedures, Senate Judiciary Committee, U.S. Senate, Washington, D.C.

Dear Paul: It has just come to my attention that the Subcommittee is planning to close its records on S. 1 at the end of this week. While I have noted that certain groups have taken advantage of the opportunity to testify in the short series of hearings recently held, I had not realized you were finishing up the work so efficiently.

As you know, we testified at some length on S. 1 and S. 1400 as originally introduced and, I am afraid, simply have not carved out the time to prepare a similar thorough analysis of S. 1 as it now stands. Nonetheless, we remain concerned with various aspects of the bill. So that our official silence to date not be deemed an acceptance of the legislation in its present form, we have prepared a brief statement to file at this time.

That statement is enclosed and I would greatly appreciate your assistance in having it entered into the record. Also, if the Subcommittee determines to reopen the record or extend the deadline, I would appreciate knowledge of same so that we will have an opportunity to amplify some of the positions set forth in the statement.

As always, I would love to hear from you and I continue to be grateful for your cooperation. With best personal regards, I am

Sincerely yours,

By Heather Grant Florence.

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
Washington, D.C., May 21, 1975.

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

DEAR SENATOR MCCLELLAN: I take the liberty of calling to your attention the attached statement recently submitted by this Association to the Sub-Committee on Criminal Laws and Procedures of the Senate Committee on the Judiciary. As the voice of an industry highly dependent on the freest possible interchange of ideas and information, our Association is deeply concerned by certain provisions of S. 1, the so-called "Criminal Justice Reform Act of 1975."

As the statement indicates, our concern arises principally from what appears to us as the dangerous breadth and vagueness in provisions dealing with (a) secrecy of government information, and (b) the limitation on freedom of expression implicit in provisions governing dissemination of allegedly obscene material. (The definition of such material continues to elude jurists and therefore would require, in our view, case-by-case determination in a civil proceeding before criminal penalties are invoked.)

We recognize both the need and the extreme difficulty of attempting a wholesale revision and codification of federal criminal laws. We are glad to offer the assistance of our counsel—the firm of Weil, Gotshal and Manges of New York—in drafting reasonable and equitable revisions of the sections of S. 1 that concern us.

Sincerely,

TOWNSEND HOOPES.

STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.

The Association of American Publishers, Inc. (the "AAP") is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, religious books, textbooks and educational materials. Its more than 260 members, which include many university presses, publish in the aggregate the vast majority of all general, educational and religious books published in the United States.

The AAP appreciates the opportunity to have delivered testimony and filed statements with the Subcommittee in June 1973 when S. 1 and S. 1400 were before the 93rd Congress. Since that time the Subcommittee clearly has devoted substantial time and effort in consolidating and revising those bills into S. 1 in the form in which it was introduced in the 94th Congress. The AAP notes, with some satisfaction, that some of the views expressed in its earlier testimony have been incorporated.

Notwithstanding some of the salutary changes, the AAP remains concerned with the severe impediments to freedom of expression and the free flow of information which remain in the bill. Its statement at this time is submitted to register that concern, to note the sections to which it relates and to highlight the problems they raise.

Chapter 11, Subchapter C (§§ 1121–1128) continues to concern the AAP. The statutory scheme, although improved in some respects from the earlier bills, still creates a network of government secrecy which is impossible to escape without incurring substantial criminal penalties. It seems to ignore the benefits the Founders recognized and we, today, know derive from access to information and an informed citizenry.

While a provision such as § 1121 appears designed to cover actual espionage situations, its language is sufficiently broad to be used, for example, against the publisher of information coming from the State Department which results in embarrassment to the Department and hence can be deemed to be "used to the prejudice of the safety *or interest* of the United States". Practically, a generally available or widely disseminated book can be read by a foreign power as easily as by a U.S. citizen.

The same factual example is even more clearly a violation of § 1122, since there need be no showing that the information was communicated to a foreign power. The same is, of course, the situation with § 1123 which would require a publisher, who has been given such information by an author, to return it to the proper federal official under the threat of criminal sentencing.

To a large extent the overbreadth of these provisions results from the sweeping definition of "national defense information" contained in § 1128. Those categories of information would encompass much of what we read about everyday; the CIA's work in retrieving the sunken Soviet submarine is one current example.

Section 1124 does not rely on the definition of "national defense information"; instead it relies on the discretion of thousands of executive branch officials in determining that information should be "classified". In its present form, S. 1 does seem to acknowledge that greater, more centralized and higher level control over what is classified is required before prosecutions may be instituted. Yet, the defendant may not assert a defense of improper classification, absent the exhaustion of all administrative remedies, and is thereby relegated to a position inferior to that of a plaintiff seeking information under the Freedom of Information Act (5 U.S.C. § 552(b)(1)), as recently amended.

The impediments to a free flow of information noted with regard to Chapter 11 are enhanced by other sections giving the government proprietary control over facts and information, the interference with which constitutes punishable criminal activity. Taken together with the provisions of Chapter 11, Sections 1301, 1344, 1523, 1731 and 1733, dealing in part, with theft and receipt of "stolen" government documents and interference with government operations would tighten the noose of government secrecy beyond that conceivably required for any purpose. Together, the entire scheme can be used to inhibit the very kind of reporting, writing and publishing the First Amendment is designed to protect and enhance.

The other aspect of the bill which concerns the AAP is Section 1842 entitled "Disseminating Obscene Material". The conflict between effective law enforcement and the constitutional protection of freedom of expression has surfaced over and over again since 1957. While the existing prohibitions in Title 18 are more defective in their vagueness and sweep than the proposal in S. 1, Section 1842 tries to do the impossible and hence it fails. Indeed, it adds to the existing confusion.

In the Supreme Court obscenity decisions of 1973 and 1974, the Court has given states and localities far greater latitude in regulating in the area. As a result, the statutory schemes in many of the 50 states have been changed and there has been a great divergence from state to state. The imposition of a federal standard, the jurisdiction of which is invoked by virtually every transaction as far as nationally disseminated books and other materials are concerned, simply adds another layer to a series of inscrutable laws.

Largely because of the virtual impossibility of determining whether or not material is "obscene", until after a conviction and appeals, the Association believes that both the interests of the First Amendment and due process require that such determination initially be made in the context of a civil and not a criminal action. In many cases it is the librarian or the bookseller, who often has no knowledge as to the contents, let alone the legality of the materials, who is threatened with the criminal prosecution. This problem is not cured but, instead, is exacerbated by the absence of a *scienter* provision in Section 1842.

While the Association perceives the logic of considering dissemination to minors (as contained in (a)(1)(A)) and "thrusting (as contained in (a)(1)(B)) as deserving separate consideration from distribution to willing adults, it is concerned with the lack of specificity in both regards. If nothing else, the affirmative defenses should cover situations where the minor has parental consent, is emancipated or has provided convincing evidence that he or she is of age. Similarly, the "thrusting" provision gives no guidance as to what would fall within its terms.

Because of the ambiguities, the uncertainties and the threat of a felony conviction in the dissemination of almost any material, the Section as a whole can only result in a "chilling effect" on the free flow of material throughout the country. While the intention of the Section presumably is to deal with the type of "hard core" pornography discussed by the Supreme Court, experience has shown that everything, from classics of literature to textbooks to news magazines, can be brought within the terms of a statute as vague as the one at hand.

Although the Association recognizes that a task as overwhelming as a total revision and codification of the Criminal Code is bound to entail problems, it believes that the First Amendment problems created by S. 1 require further consideration before the bill should be allowed to proceed along the legislative path.

Respectfully submitted,

TOWNSEND HOOPES, *President.*

UNITED STATES COURT OF APPEALS,
CHAMBERS OF DAVID L. BAZELON, CHIEF JUDGE,
Washington, D.C., May 8, 1975.

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

DEAR SENATOR MCCLELLAN: Enclosed is a statement I wish to submit for the hearings record on S. 1's criminal responsibility provisions. Despite its tardiness, for which I apologize, I hope you will be able to accept it. My office is available to respond to any questions the Subcommittee may have in regard to the statement or its subject.

Sincerely,

DAVID L. BAZELON.

During the past twenty-six years, I have gained a significant body of experience in the judicial administration of concepts of criminal responsibility. This experience was gained in large part through the unusual combination of local and federal criminal jurisdiction enjoyed by federal courts in the District of Columbia prior to passage of the D.C. Court Reform Act. This experience has led to the development of distinctive views on the legal definition of criminal responsibility. The purpose of this prepared statement, submitted for the hearings record on S. 1, is to consider Subchapter C, Chapter 3 of that bill in light of my views. I particularly direct my attention to § 522 which purports to codify the so-called "insanity" defense. My comments, in theory, however, encompass all of the defenses termed by S. 1 to be "based on lack of culpability." I will refer to these defenses generally as "criminal responsibility" defenses. My discussion will include criticisms of the "insanity" defense proposed by a majority of the American Law Institute commissioners,[1] which in a modified form was contained in an earlier version of S. 1. The discussion will further concern itself with the criminal responsibility defense proposed by the dissenting ALI commissioners, as well as by the British Royal Commission on Capital Punishment, a formulation which the Subcommittee has considered in the preliminary drafting stages.[2]

The latest version of the "insanity" defense contained in § 522 marks a studied departure from the traditional course of the defense. Just what direction that departure takes, however, is not at all clear from the language of the section. The section is derived, I take it, from the proposal of the Nixon Administration, contained in S. 1400 of the last Congress. That proposal was trumpeted by some as a restriction of the "insanity" defense. But as Professor Abraham Goldstein points out in hearings in the last

[1] Model Penal Code § 4.01(1) (Tent. Draft No. 4 1955):
"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."

[2] *See id.* alternative (a):
"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is *so substantially impaired that he cannot justly be held responsible.*"
Royal Comm'n on Capital Punishment, 1949–53, Report § 333(iii) (1953):
"[A person is not responsible for his unlawful act if] at the time of the act the accused was suffering from disease of the mind (or mental deficiency) *to such a degree that he ought not to be held responsible.*
These versions of the "insanity" defense comprised one of the alternatives circulated to state mental health officials by the staff of the Subcommittee. *See Hearings on S. 1 & S. 1400 Before the Subcomm. on Criminal Laws & Procedure of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 6382 (1973).

Congress,[3] one may doubt whether the proposal accomplishes its intended goal. And, as I will discuss, I do not think that goal, even if desirable, may appropriately be achieved through § 522 as it is presently formulated. Of course, my comments on the meaning of the Section are, limited to inferences that may be drawn from its language and from the public statements of those who have supported proposals similar to the Section. Further explication of the Section, if it is approved by the Subcommittee and the Senate Committee on the Judiciary in its present form, will no doubt be forthcoming.

Section 522 establishes as a "defense" that "as a result of mental disease or defect", the defendant "lacked the state of mind [or 'intent' as I may sometimes refer to it] required as an element of the crime charged." One is immediately struck by the redundancy of this formulation in light of §§ 301–02. Seemingly, if the defendant lacked the "state of mind" or intent required as an element of the offense charged, as those states of mind are defined in §§ 301–02, *for whatever reason*—because of a mental defect, drug addiction, intoxication, somnambulism, whatever—then there would be no liability wholly apart from § 522. Erection of a "defense" based on a mental disease or defect which on its face goes only to the state of mind or intent required for the offense, a requirement that exists apart from the "defense", is mere surplusage. On its face, then, § 522 is a decidedly opaque provision.

In order to avoid the conclusion that § 522 is simply duplicative of §§ 301–02, one would assume that the phrase "as a result of mental disease or defect" adds substantively to the concept of state of mind or intent. That is, § 522 defines or purports to define certain occasions when a defendant may be exonerated even though he would otherwise have the requisite intent, as defined in §§ 301–02, because of a mental disease or defect. The terms "mental disease or defect" would thus read back into the concept of state of mind or intent "required as an element of the offense charged." In sum, § 522 pries open the concept of intent or state of mind and allows a more extended inquiry than that contemplated by §§ 301–02.

If I am wrong about this, we face serious problems indeed. Such a strict view of § 522 would effectively eliminate any inquiry into the subtleties of the concept of "knowledge", a concept erected in §§ 301–02, ignores the problem of the defendant's ability to control his actions and, more important than these specific, appears to avoid the central moral issue raised by punishment of those suffering from mental disabilities. These subjects of inquiry are also relevant to a consideration of the more expansive view of § 522 I have presented previously. I have grown familiar with these subjects in the development of my own thinking about criminal responsibility and the "insanity" defense. Indeed, I began in 1954 in a posture similar to that assumed by § 522, although the gleam in my eye was most remarkably different from that in the eyes of those who drafted the Section. In Monte Durham's case,[4] my court enunciated a new test of "insanity": if a crime were the "product of mental disease or defect," the defendant could not in the eye of the law be held responsible for it. Despite the promise of this formulation, it did not achieve its intended goal, although it taught us a great deal about the criminal responsibility defenses and their administration. It did not succeed because the response it engendered from behavioral scientists and the legal profession did not allow it to succeed. In 1972, I wrote a trilogy of opinions, none of them for a majority of the court, which reflected the changes in my thinking since *Durham*[5] and which sought to respond to the difficulties discovered in administration of the *Durham* rule. Most relevant to my discussion of § 522 was my dissent in Archie Brawner's case.

I believe the experience gained in my journey from *Durham* to *Brawner* will be of some aid to the Subcommittee in its consideration of § 522. This is not because that experience led me to any particular conclusions but because it pointed up the issues, the unavoidable questions, that must be

[3] *Id.* at 6380–81.
[4] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
[5] *United States* v. *Brawner*, 471 F.2d 969, 1010 (D.C. Cir. 1972) (Bazelon C.J. concurring in part, dissenting in part); *United States* v. *Dougherty*, 473 F.2d 1113, 1139 (D.C. Cir. 1972) (Bazelon, C.J. concurring in part, dissenting in part); *United States* v. *Alexander & Murdock*, 471 F.2d 923 (D.C. Cir. 1972) (Bazelon, C.J. opinion for the Court in part, dissenting in part).

seriously confronted if we are to make decisions about criminal responsibility. The purpose of my statement is most of all to delineate those issues as I have come to perceive them, to raise the questions that must be raised if the Congress is to enter the criminal responsibility thicket. I claim no expertise beyond this.

FROM DURHAM TO BRAWNER—THE ISSUES OF CRIMINAL RESPONSIBILITY DELINEATED

The essential context of both *Durham* and *Brawner* is the moral basis for the notion of criminal responsibility. The criminal law, it has eloquently been asserted, "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[6] The law imposes punishment only on the free choice to do wrong. If a person chooses wrongly either because he or she did not appreciate that the choice was wrong or lacked the capacity to choose to do right, then the act of choice is not blameworthy and hence not suitable for punishment. This concept of moral blameworthiness as the predicate for criminal responsibility is no transient notion discovered by twentieth century federal judges. It draws on the entire "legal and moral tradition of the western world."[7] "Our collective conscience does not allow punishment where it cannot impose blame,"[8]

But the law, like the rest of us, "promises according to [its] hopes" but "performs according to [its] fears."[9] Although it has been asserted again and again that only a free choice to do wrong is the occasion for punishment, the law in practice presumes a free choice to do wrong from commission of an act and from a law declaring that act to be contrary to public policy. Justice Holmes stated it this way:[10]

"If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

The point is that the law's only inquiry into the free choice to do wrong consists of inquiry into what are generally known as "mistakes of fact." If a person does not correctly perceive his circumstances and thus accidentally commits an act forbidden by law, exculpation will be permitted.[11] Other than this very limited inquiry, the law presumes a free choice to do wrong from the commission of a forbidden act. I take it that §§ 301–02 as presently written adopt this view of intent or state of mind.

In order to relax the rigidity of this rule, the law with its talent for ambiguity permits the concept of intent or state of mind to be pried open and its subtleties examined on extremely limited occasions. The "insanity" defense at common law was the chief vehicle used to pour some real content into the law's fictional presumption of intent from a knowledge of circumstances. The "insanity" defense pursued two avenues, limited though they were: first, that the defendant did not know the difference between right and wrong; or second, that even if he did, he acted under an irresistible impulse such that his knowledge of right and wrong would not aid him in choosing rightly.[12] The insanity defense so viewed extended the inquiry permitted by "mistake of fact" doctrine. While it is theoretically possible for a person to be so demented that he would not understand the circumstances of his actions, *i.e.* believe the gun in his hand is a toothbrush, one may doubt whether there ever "was an idiot so low, * * * a diseased man so demented.[13] Thus, traditional insanity defenses carried the law beyond "mistake of fact." Then came

[6] *Morissette* v. *United States*, 342 U.S. 246, 250 n.4 (1952), *quoting* R. Pound, *Introduction* to F. Sayre, Cases on Criminal Law (1927). *See* 4 W. Blackstone, Commentaries 20–21, 27 (1854).
[7] *Durham* v. *United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).
[8] *Id. quoting Holloway* v. *United States*, 148 F.2d 665, 666–67 (D.C. Cir. 1945).
[9] Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 *Ky. L.J.* 404 (1966) *quoting* La Rochefoucauld.
[10] *Ellis* v. *United States*, 206 U.S. 246, 257 (1907).
[11] Indeed, this was not always the case. In the early common law, liability was absolutely strict. *See United States* v. *Barker*, No. 73–2185 (D.C. Cir. Feb. 24, 1975) (Bazelon, C.J. concurring) at 3.
[12] *See Durham* v. *United States*, 214 F.2d 862, 869–74 (D.C. Cir. 1954); A. Goldstein, The Insanity Defense 45–79 (1967).
[13] E. Conrad, Mr. Seward for the Defense 263 (1956) *quoting* the summation of William Seward, later Lincoln's Secretary of State, in an 1846 insanity trial.

Durham.

Durham altered these two avenues of insanity mentioned above, stating that they were based on a "misleading conception of the nature of insanity."[14] By holding that in the future, criminal responsibility was negated if an act was "the product of mental disease or defect", we sought to permit behavioral experts to testify in a more meaningful fashion on the subtle issue of intent. The old concepts of "right-wrong" and "irresistible impulse" were "obsolete" in terms of contemporary behavioral understanding and did not convey the true nature of a behavioral impairment or the relation of that impairment to criminal actions. Psychiatrists thus found it difficult if not impossible to convey their understanding and experience in a meaningful manner to judge and jury. But more than this, the *Durham* change sought to open the law to more sophisticated concepts of free will, of the free choice to do wrong. Our postulate was: even if the defendant understood the difference between right and wrong and even if his action was not an irresistible impulse, there still was question whether his action was the result of a free choice to do wrong. Prior to *Durham*, the law had told behavioral experts what it thought were the limits to the law's inquiry into free will and the free choice to do wrong. After *Durham*, the law asked behaviorists what they thought were free choices to do wrong, what their understanding of free will entailed. We sought in this manner to approximate the law's promise, given according to its hopes.

Pausing at the *Durham* crossroads, we might take a look backwards at § 522. The Section, strikingly similar to *Durham* in this respect, also references the medical concepts of "mental disease and defect". The ambiguity I mentioned previously thus now appears as a confusion whether § 522 pushes the law back to pure "mistake of fact" doctrine and exculpates the mentally disturbed only if the defendant did not know the gun in his hand was a gun and not a toothbrush; or whether it pushes the law into a *Durham*-like experimentation to pour genuine behavioral content into the law's inquiry into the free choice to do wrong.

If § 522 is equivalent to an enactment of *Durham*, I fear it comes twenty years too late. The *Durham* experiment gave birth to a problem which has various names but which has generally been called "expert dominance." Insanity trials under the *Durham* rule came to be dominated by conclusory expert testimony on the two related issues posed by the rule—whether the defendant suffered from a "mental disease or defect" and whether his criminal action was a "product" of that mental disease or defect. Psychiatric testimony in terms of a legal conclusion that act was or was not the product of a mental disease of defect invites the jury to abdicate its function and acquiesce in the conclusion of the experts. *Durham* had called upon behavioral scientists to aid in the decision of whether a person was morally blameworthy, not to usurp that decision through conclusory testimony. My court quickly perceived the need to reassert the primacy of legal standards.

We first sought to rescue the terms "mental disease or defect" from the grasp of the experts. Whether or not behavioral scientists considered a particular mental impairment a "disease" or something less than a disease often turned on the treatment needs of the impaired individual or on scientific or theoretical concepts of what is a "disease". These issues had little if any relevance to issues of moral blameworthiness and criminal responsibility. Thus in Ernest McDonald's case,[15] we held that a "mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral controls."

While this functional definition of mental disease or defect made a valiant attempt to focus attention on the extent of impairment and its relation to moral blameworthiness, it did not succeed. First, behavioral scientists continued to speak in conclusory terms, using psychiatric labels developed for other purposes as the equivalent of the functional *McDonald* test. But more important, *McDonald* pointed up another, unresolved problem and indeed accentuated the importance of this problem in the administration of the "insanity" defense. This problem was conclusory testimony on the relationship between the mental disease or defect and the criminal act, *i.e.* whether

[14] 214 F.2d 871, *quoting* Royal Comm'n Report, *supra* note 2, at 80.
[15] *McDonald* v. *United States*, 312 U.S. 847, 851 (D.C. Cir. 1962).

the act was a "product" of the disease. Shortly after *Durham*, we had clarified this "productivity" requirement to mean that the "act would not have been committed if the person had not been suffering from the disease."[16] But this requirement did little to ease the problem of conclusory testimony. In 1967, we forbade any expert testimony on the issue of whether an act was the product of a mental disease or defect in order to reduce expert domination on the "productivity" issue.[17]

As I gained more experience with the "producivity" issue, I began to perceive the source of the problem of expert dominance on the issue. The question whether a certain mental impairment caused a particular criminal act is itself a determination of moral blameworthiness. Let me attempt to explain. Obviously, any mental impairment will have some effect on one's actions. The issue is whether the effect is sufficient for us to determine that the act was not the result of a free choice to do wrong, that is, not the act of free will. In turn, whether a particular impairment negates free will or the free choice to do wrong depends on one's concept of moral blameworthiness and these conceptions varied. In sum, the "gravity of an impairment and its relevance to the acts charged are both questions of decree, which can only be resolved with reference to the community's sense of when it is just to hold a man responsible for his act."[18]

This led me to an exploration of the concept of moral blameworthiness and its relation to the concept of free will or the free choice to do wrong. I was aware, as I mentioned above, that the law did not permit a complete inquiry into the free choice to do wrong, relying on a fictional presumption of intent. But consideration of the conclusion of moral blameworthiness led to reflect on why this was. Justice Holmes had written:[19]

"If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in the criminal classes."

However, he was quick to affirm that the law did not stand on this moral basis:[20]

"Public policy sacrifices the individual to the general good. * * * It is no doubt true that there are many cases in which the criminal could not have [made a free choice to do wrong], but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey. * * *"

Or the concept may be put in the language of a contemporary judge:[21]

"The judgment of a court of law must further justice to the community, and safeguard it against undercutting and evasion from overconcern for the individual. * * * Justice to the community includes penalties needed to cope with disobedience by those capable of control, undergirding a social environment that broadly inhibits behavior destructive of the common good. An open society requires mutual respect and regard, and mutually reinforcing relationships among its citizens and its ideals of justice must safeguard the vast majority who responsibly shoulder the burdens implicit in its ordered liberty."

The point of these arguments is that the criminal sanction must have a harsh visage. It must reinforce the "complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society."[22] This involves encouraging those without mental impairment to obey the law, by withdrawing any possibility of a feigned excuse, and encouraging those with a mental impairment to exercise that amount of free will which they do possess.[23] This reinforcement also involves public perception of the

[16] *Carter* v. *United States*, 252 F.2d 608, 615–16 (D.C. Cir. 1957).
[17] *Washington* v. *United States*, 390 F.2d 444 (D.C. Cir. 1967).
[18] *United States* v. *Eichberg*, 439 F.2d 620, 628 n.40 (D.C. Cir. 1971) (Bazelon, C.J. concurring).
[19] O. Holmes, Jr., The Common Law 45 (1881).
[20] *Id.* at 48.
[21] *United States* v. *Brawner*, 471 F.2d 969, 988 (D.C. Cir. 1972) (Leventhal, J.)
[22] A. Goldstein, *supra* note 12, at 224.
[23] Wechsler, *The Criteria of Criminal Responsibility*, 22 *U.Chi. L. Rev.* 367, 374 (1955): "So long as there is any chance that the preventitive influence may operate, it is essential to maintain the threat. If it is not maintained, the influence of the entire system is diminished upon those who have the requisite capacity."

system of criminal justice by victims and potential victims (and their kin) and of the seriousness with which it performs its appointed task of protecting lives and property. The tag word for this group of reinforcements is "deterrence."

The concept of deterrence serves both to define and balance against the concept of moral blameworthiness. When we ask whether an impairment of will was sufficient to negate free will and hence blameworthiness, we ask not only whether the act would have occurred but for the impairment but also whether the act could possibly or should have been avoided despite the impairment. Even if we are absolutely sure of the answer to these questions, we still "balance" moral blameworthiness against the perceived effect of acquittal on other potential wrongdoers and victims. The conclusion of this task of defining and balancing moral blameworthiness and deterrence is the substantive definition of criminal responsibility.

Having come to this end, I questioned the morality of the concept of deterrence. Use of an individual defendant as a means to achieve a social goal, as Holmes recognized, does not comport with the moral premises of our Judeo-Christian heritage, so boldly asserted—that human beings are ends in themselves, worthy of concern in and of themselves, and may not be used as means to some social end, no matter how utilitarian the means may be. When the criminal law deals only with a person's property, the moral force of this premise is lessened considerably.[24] But when the criminal law asks for a substantial portion of a person's life, if not his life itself, the moral issue is directly joined.

Some persons, including myself, would question whether the concept of deterrence has any utilitarian value in the context of control of violent street crime. That sort of crime, which engenders the most concern among the populace and the loudest cries for social control, is bred of desperate social conditions and not the lack of harsh sanctions. Recent correlations between rising unemployment and associated economic travail in depressed areas with a sharply rising rate of crime strongly suggest that economic, social and cultural deprivation are the true causes of violent street crime—as well as the causes of much mental impairment affecting issues of criminal responsibility. Of course, there would be violent crime even if there were no deprivation and many of those who suffer deprivation do not turn to crime. Indeed, the miracle is that so few do. But I believe close attention to available data indicates that social, economic and cultural deprivation are a necessary if not sufficient cause for our crime problem, and that no "toughening" of the law through reliance on concepts of deterrence will aid in resolution of this crime problem. I have recently explored this subject in prepared address to the Northwestern University Law Alumni group. I attach that speech as an appendix to this statement.

I have a further difficulty with the concept of deterrence and that lies in its selective administration. Our perception of whether we need to use an individual defendant as an object lesson to other potential wrongdoers and to calm the fears of potential victims depends, if we are to be brutally honest with ourselves, in large part on our ability to empathize with the individual defendant. In short, our rawest biases come into play when we balance individual justice to the accused based on moral standards of blameworthiness against the uses of criminal law as an instrument of social control, whose banner is the rhetoric of efficiency and order. When deterence is utilized in a selective manner, it ceases to be genuine deterrence [25] and becomes a selective form of retribution on those against whom our deepest fears are directed. Whether to permit such retribution is a sharp question indeed for a moral society in today's chaotic and frightening world.

It is important to distinguish the amorphous concept of deterrence from an individual determination that a person is dangerous to himself or others and hence suitable for commitment. The threat to social order posed by a particular person acquitted of criminal responsibility may be handled through the "dangerousness" determination and need not be fed back into the definition of criminal responsibility in the manner in which the concept of deterrence is. I shall discuss this point in more detail later in my statement.

Conclusory expert testimony on *Durham's* "productivity" requirement served as a convenient means of papering over these unresolvable problems of morality

[24] *Cf. Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960); People *ex rel.* Price v. Sheffield Farms Co., 225 N.Y. 25, 32–33, 121 N.E. 474, 477 (1918) (Cardozo, J.).
[25] See *Furman* v. *Georgia*, 408 U.S. 238 311–13 (1972) (White, J. concurring).

and social control. The law had no answers or even approaches to answers to these problems in general or in specific cases. Behavioral scientists readily, too readily I believe, assumed the task of making judgments the law could not make. Judgment on whether the defendant suffered from a "mental disease or defect" and whether an act was the "product" of a mental disease or defect were influenced by the experts' own views on the threat to social order posed by a particular defendant and by their views on whether the defendant should be treated or punished.[25a] The biases of experts toward certain groups of defendants were reflected in their conclusions: many experts would find that a poor defendant's crime was not the product of his admitted mental disease or defect because poor people would commit crime anyhow.[25b]

Indeed, I came to realize that the very parameters of the *Durham* formulation—the terms "mental disease or defect"—were tied to what medical experts defined as a "disease." The "medical model" of mental disease excluded many known mental impairments because expert witnesses did not consider that impairment or group of impairments a "disease." Moreover, there is increasing criticism within the psychiatric professions as to the validity of the "medical model" of mental impairment.[25c] Some argued that psychiatric labels of "disease" were merely a form of rationalized social control over political and social dissidents. Finally, a finding of a "disease" was often based on inadequate examination of the patient's impairments; the label of "disease" thus disguised the central issue of the nature and extent of the person's impairment. To tie the definition of criminal responsibility to this frail reed appeared quetsionable.

Some prominent behavioral scientists took the forthright position that the purposes behind a diagnosis of a mental "disease"—essentially the treatment needs of the patient—did not and could not incorporate the moral and social judgments associated with a finding of criminal responsibility. Not only would it be inappropriate for a behavioral scientist to testify on such moral and social questions in the guise of medical expertise, but also behavioral scientists simply do not have the knowledge or understanding which is necessary to begin to resolve such questions.

The chief victims of the "medical model" of the "insanity" defense are those mental impairments associated with social, economic and cultural deprivation and with racial discrimination.[26] Impairments of choice associated with such factors are generally labelled "personality disorders" or "emotional disturbances", a psychoneurosis. According to behavioral scientists who testified in two recent cases, such impairments are not a "disease." While the American Psychiatric Association diagnostic manual is vague in its definition of personality disorders, it does not indicate whether the profession recognizes certain personality disorders or all such disorders as a "disease" or something less than a disease. The matter is in flux apparently within the profession itself. But by accepting expert opinion to the effect that mental impairments caused by social, economic and cultural deprivation are not a "disease", the law shut its eyes, refused to consider whether these sorts of mental impairment affected criminal responsibility. My concern with this result was not that it produced one balance between moral blameworthiness and social order or another balance, but that the matter was not even inquired into, not even considered. The law, fearful of the consequences of confronting the difficult questions associated with impairments resulting from social deprivation, hid behind the "medical model" of mental disorder.

II. THE BRAWNER ANTICLIMAX AND CRITICISMS OF IT

In Archie Brawner's case, three years ago, we once again sought to reassert the primacy of legal standards for the "insanity" defense and to consider the proper balance to be struck between concepts of moral blameworthiness and concerns of social order. The other members of the court believed it necessary

[25a] *See Washington* v. *United States*, 390 F.2d 444, 452–56 (D.C. Cir. 1967); Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 *Wash. U. L.Q.* 87. *See also United States* v. *Brawner*, 471 F.2d 969, 1018 n.21 (D.C. Cir. 1972) (Bazelon C.J. concurring in part, dissenting in part).

[25b] *Id.* at 1019–21.

[25c] *United States* v. *Eichberg*, 430 F.2d 620, 626 & n.31 (D.C. Cir. 1971) (Bazelon, C.J. concurring) and authorities cited.

[26] *See United States* v. *Robertson*, 507 F.2d 1148 (D.C. Cir. 1974); *United States* v. *Alexander & Murdock*, 471 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 1044 (1973).

to supply a rule of law that limited inquiry into the question of free will. They sought to accomplish this goal by defining in more detail the relation between the mental disease or defect and the criminal act necessary for exculpation. Only if the defendant "lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" would exculpation be permitted. This standard is, of course, that proposed by the ALI and formerly contained in S. 1. The court's decision to adopt this formula was explicitly premised on the court's belief that the law should permit only a limited inquiry into free will; only after the law had identified specific conditions of the mind characterized by a "broad consensus that free will does not exist" in relation to action caused thereby would inquiry be permitted.

I saw then and see now little difference in substance between *Durham* and *Brawner*. Despite the court's contentions to the contrary, the *Brawner* does little to confront the central issue of expert dominance. *Brawner* only identified in phrases what had been implicit in *Durham*, as modified by *McDonald*—that mental illness must reduce the actor's ability to choose between right and wrong either by affecting his cognitive perception of "right" or his ability to transform his perception into control of his actions. Other than the addition of these phrases, the *Brawner* rule is virtually identical to *Durham*, changing only the term "product" to the term "as a result." [27] It follows that the problem of psychiatric dominance must remain intact.

Furthermore, *Brawner* explicitly retained the "medical model" of mental impairment and strongly indicated impairments outside of this model could not be the basis for a successful "insanity defense.[28] Thus, the court did not even purport to address the problem of expert dominance on what constitutes a mental disease or defect. Its sole action in that regard was to retain the *McDonald* functional formulation which had proved largely unsuccessful since it simply shifted attention to the "productivity" requirement. Since the court did not significantly remedy conclusory testimony on the productivity requirement, as I have discussed in the previous paragraph, it has left the problem of expert dominance largely untouched.

In a dissenting opinion, I suggested another approach to the problem of expert dominance which emphasized the institutional role of the jury in the balance of concepts of moral blameworthiness and concerns of social order. The conclusion of my experience, discussed in Part I above, was that *Durham* "focused the jury's attention on the wrong question—on the relationship between the act and the impairment rather than on the blameworthiness of the defendant's action measured by prevailing community standards." [29] The fact was that the "medical model" of mental impairment combined with conclusory testimony on the "productivity" or causation issue purported to substitute, to be the ground rules, for the blameworthiness determination. I would have instructed the jury in "insanity" cases that "a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavioral controls were impaired to such an extent that he cannot be justly held responsible for his act." [30] This instruction is similar to that accepted by a minority of the ALI and by the British Royal Commission on Capital Punishment.[31] This proposed instruction frees the test of "insanity" from the "medical model" of mental impairment while retaining the concept of mental impairment to direct the jury's attention to the general realm of impairment in dispute. Expert testimony on the nature and extent of mental impairments, gained from the experience of behavioral scientists, would be freely received. The jury would be directed to ascertain the nature and extent of the defendant's impairment from this testimony. Whether the impairment was sufficient to negate free will, an issue of moral blameworthiness, would be for the jury alone, not obscured by any conclusory expert testimony.

[27] *See United States* v. *Brawner*, 471 F.2d 969, 1023–30 (D.C. Cir. 1972) (Bazelon C.J. concurring in part, dissenting in part) for a detailed treatment of this issue.

[28] *United States* v. *Brawner*, 471 F.2d 969, 995 (D.C. Cir. 1972).

[29] *United States* v. *Brawner*, 471 F.2d 969, 1031 (D.C. Cir. 1972) (Bazelon, C.J. concurring in part, dissenting in part).

[30] *Id.* at 1032.

[31] *Compare* the quoted versions in note 2 *supra*. The distinction between my suggested instruction and these versions lies in their retention of the concept of "mental disease", i.e. the "medical model" of mental illness.

This instruction delegates to the jury—traditionally the embodiment of community input in the criminal justice system—the task of defining moral blameworthiness. This task, as I discussed in Part I, will inevitably involve a consideration of the extent to which morale blameworthiness should be defined in light of or balanced against concerns of social order. The question posed by the instruction—whether the defendant should "be justly held responsible for his act"—incorporates the concept of justice to the community.

The court in *Brawner* rejected this proposed instruction largely because of a distrust of the jury. This distrust is manifested first by the objection that the instruction leaves the jury at large with the uncomfortable task of judging the defendant on the basis of personal feelings. But I submit the proposed instruction does nothing of the sort. The instruction requires the jury to measure the defendant's impairment and to judge whether under community standards the impairment was sufficient to negate free will. The standard does not depend on personal whim, unless we are to take an unnecessarily pessimistic view of the jury's capacity to follow instructions.[31a] Of course, the proposed instruction does not tell the jury what the community standards are because it is for the jury to tell us what the community standards of blameworthiness are in an individual case. Such a task is not all that onerous and to allay anxiety about the jury's capacity or will to ascertain community standards, we might reference the method of assessing fault in negligence cases. There the law adopts the "reasonable man" formulation which is, of course, simply another way of stating that the jury must ascertain community standards of care in awarding or denying damages.

The second objection is that the proposed instruction interferes with the primary role of legislatures and courts in determining what the "law" is. This objection in one sense is not persuasive since it is clear that a court or Congress by adopting the proposed instruction would be holding that the law is community standards of blameworthiness as ascertained by the jury. The true import of this second objection, which goes a long way toward explaining the basis of the first objection, is that juries *should not* be given the power to define the extent of impairment necessary to determine that community standards of blameworthiness have been negated. Behind this objection is the belief that juries may show an "overconcern for the individual"[32] and shortchange concerns of social order. The distrust of the jury is that it will hew too closely to moral concepts of blameworthiness.

But one may ask whether the *Brawner* rule is itself successful in manifesting a balance different from any that might be struck by the jury. If our experience under *Durham* tells us anything, it is that the medical model of mental impairment and conclusory testimony on the causation or "productivity" requirement are the true source of the present balance struck between concepts of moral blameworthiness and concerns of social order. Surely no one argues that behavioral scientists are a better institution than the jury to ascertain community standards of moral blameworthiness. And I have not yet been advised of any "test" of insanity passed down by appellate judges which does not suffer from the problem of expert dominance, except a "test", if it may be so named, which forthrightly recognizes the role of the jury in making the blameworthiness determination.[33] I perceive three reasons for this.

The first is that striking a balance between moral concepts of blameworthiness and concerns of social order is really a matter of individual cases. The issue resists confident generalization either by appellate courts or legislatures. The reason is that we cannot discern the nature of our commitment to punishing only the free choice to do wrong until we are actually confronted with doing so; until we look the defendant in the eye and pronounce judgment in open court. When we balance moral concepts of blameworthiness in the *abstract* its power and our commitment to it are lessened considerably. Concerns of social order, on the other hand, seem to gain in prominence and plausibility as they become more abstract.

Furthermore, any balance short of "abolition" of the "insanity" defense cannot truly incorporate the range of mental impairments that will wend

[31a] *See* Note, *Towards Principles of Jury Equity*, 83 *Yale L.J.* 1023 (1974).

[32] *United States* v. *Brawner*, 471 F.2d 969, 988 (D.C. Cir. 1972).

[33] Of course, the minority ALI test and the Royal Commission test, *see* note 2 *supra*, do retain the "medical model" of mental impairments and are subject to expert dominance on that issue. *See* note 31 *supra*.

their way into court or, indeed, the range of social reactions to those impairments. For example, how do we balance the concerns of social order against the blameworthiness of a manic depressive mixed psychotic; or an epileptic personality disorder; or a psychopathic personality; or schizophrenia; latent type; or a personality disorder of some kind. Are these impairments lesser or greater than that of a retarded person? And for each of these labels, rough categories utilized for treatment purposes, there are infinite variations on the degree and nature of the impairment. It takes more confidence than I repose in the inclusiveness of legal rules to assume that a single "test" of "insanity", reflecting a judicial balance of blameworthiness and social order, can be devised to cover these multivarious situations. No matter how sincere is one's abstract commitment to a particular balance of blameworthiness and social order, no "test" can be devised to contain it. At best, the "test" will serve as an admonition to the jury to pay particular attention to blameworthiness or social order, a hortatory goal of sorts; at worst the "test" will, as I fear the *Brawner*–ALI test does, deflect the jury attention from the core issue of when an individual may be justly held responsible to subsidiary issues, the determination of which is subject to expert dominance.

This truth explains the pervasive generality of the *Brawner*–ALI rule. Perhaps some judicial or social anxiety is quieted by trumpeting new insignias for the insanity banner in the name of social order. But one may seriously doubt whether these new insignias are lost in translation to individual cases. Only the expert behavioral scientists will know for sure. The jury suffers none of the disadvantages associated with the promulgation of a general rule, since it must weigh the evidence in individual cases. Of course, the trial judge could perform the same task, subject to limited appellate review, under the assumption that community standards of responsibility are "questions of law" to be decided in each case. But unless the right to a jury trial is waived, exclusive delegation of this task to the trial judge would seemingly raise serious questions concerning abrogation of the right to a jury trial.

The second reason supporting the institutional role of the jury I have suggested is that the responsibility determination is dependent on our developing knowledge as to behavioral impairments and our developing moral tradition. Today one balance between blameworthiness and social order might seem acceptable. Years from now the matter may appear differently. As Judge Tuttle has noted, "the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts. . . ."[34] The steady pace of developments in the behavioral sciences is best illustrated by the present controversy over the somatic cause of many mental impairments once thought to be the product of social or familial conditions.[35] Somatic researchers tell us, for example, that schizophrenia and manic depressive illness may be caused by enzymes or genes. Such information surely would affect the balance between blameworthiness and social order. And not only would it be inappropriate to change a legislative or judicial balance with the advent of new scientific knowledge, it may well be impossible to confidently do so, since the knowledge would be tentative and disputed within the scientific community. A jury, on the other hand, presented with new evidence on impairment of mental processes and behavioral controls could in individual cases give appropriate consideration to developing behavioral learning.

Finally, there is the issue of bias. I have mentioned this point before in connection with our perception of deterrence and of productivity I speak of it with some diffidence, but cognizant of its importance, I must address it seriously, It is in one sense an enlargement of my first point above concerning the necessity of evaluating moral blameworthiness in the concrete and not the abstract. Many people could understand the actions of the Cuban-Americans who burglarized the Watergate office of the Democratic Party under a mistaken belief that the CIA or other Executive Branch officials

[34] *Novak* v. *Beto*, 453 F.2d 661, 672 (1971), *rehearing en banc denied*, 456 F.2d 1303 (5th Cir.), *cert. denied sub nom. Sellars* v. *Beto*, 409 U.S. 908 (1972) (Tuttle J. dissenting).

[35] *See, e.g.*, Kety, *From Rationalization to Reason*, 131 *Am. J. Psychiat.* 957 (1974).

had the authority to order such burglaries.[36] Even though the Cuban-Americans understood their acts and their acts were forbidden by law, many believed they were not blameworthy because they did not understand they were choosing to do wrong. In so believing, many were making an implicit balance of blameworthiness and social order in regard to the rich man's insanity defense—mistake of law. Of course, if one operates under a mistake of law, one does not, in the *Brawner*–ALI terminology "appreciate the wrongfulness" of one's conduct. Perhaps some members of this Committee were among those who so believed that moral blame should not be imposed on the Cuban-Americans.

But contrast one's reaction to the following circumstances:[37] a group of white marines entered a cafe and there encountered two young blacks. One of the blacks sought to provoke one of the marines through acts of bravado and attempted intimidation. The marine responded by calling the black a "nigger." Thereupon, one of the blacks pulled a gun and killed two of the marines, seriously wounded another and a woman companion. Evidence adduced at trial indicated one of the blacks suffered a mental impairment, a neurotic, obsessive hatred for whites gained in the Watts ghetto.

Our different reactions to the two cases is determined in part by the difference in the nature of the crimes and the threat to social order posed by each. But I suspect part of our reaction lies in differing ability to understand the defendant's situation and to gauge the morality of imposing blameworthiness and punitive incarceration. I question whether appellate judges or a majority of Congressmen should be permitted to strike a balance in the abstract to cover these situations. Rather a jury of the defendant's peers in the community in which the crime took place appears a more proper institution to measure the moral blameworthiness of the defendant and the threat to social order he poses. The right to a jury trial, which includes the power of the jury to render a verdict of innocent despite the command of the law,[38] reflects "the community participation and shared responsibility that results from that group's determination of guilt or innocence."[39] "The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame should be imposed."[40]

III. THE INADEQUACY OF SECTION 522 FROM THE DURHAM-BRAWNER PERSPECTIVE

Against the *Durham-Brawner* perspective, let us take another look back at § 522. As I indicated previously, the Section would seem to give us little guidance on what the proper balance between concerns of moral blameworthiness and social order should be. While there is a very vague intent to restrict the insanity defense, the use of the terms "mental disease or defect" ambiguously indicates some form of *Durham*-like experimentation. But how far that experimentation is to be carried is a question not seriously addressed and most certainly not answered by § 522. Moreover, the Section does not concern itself with the institutional issues or the expert dominance problem, all of which have been delineated post-*Durham*. Indeed, as I will discuss, the Section could be read as endorsing either the view of the court in *Brawner* on the role of the jury or the view expressed in my dissenting opinion.

Before entering that thicket, I should make this point: the institutional concerns I have mentioned should lead the Congress to forego any attempt to codify the "insanity" defense or any of the defenses named in S. 1 as "culpability" defenses. The courts at least suffer from these institutional disabilities less than Congress (except on the community standards of responsibility, of course) and have a body of experience, institutional or personal, which provides some measure of guidance in making "insanity" determinations. The Congress does not have a similar body of experience and could not have no matter how many hearings are held. Justice Frankfurter told me privately that he intended to make every effort to avoid a Supreme Court

[36] *United States* v. *Barker*, No. 73-2185 (D.C. Feb. 24, 1975).
[37] *United States* v. *Alexander & Murdock*, 471 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 1044 (1973).
[38] *See United States* v. *Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).
[39] *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *see Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968); A. Goldstein, *supra* note 12, at 91.
[40] *United States* v. *Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon C.J. concurring in part, dissenting in part).

ruling on the definition of the "insanity" defense. The matter was too fluid, too susceptible of change, too much oriented to the individual case for a Supreme Court pronouncement to do anything other than misdirect the development of the law in this area. The Supreme Court in his absence has continued to heed his advice, consciously or not. I would strongly recommend that the Congress do so as well and strike § 522, as well as all of Subchapter C, Chapter 3 of S. 1, from the bill. There is a continuous debate among the proponents of codification and their opponents over the proper extent and particularity of codification attempts. This debate has raged from the days of the first Field codes in the early 10th Century.[41] This debate concerns itself with more than a power struggle between judiciary and legislature; but rather also focuses on the extent to which the legislature should attempt to freeze or alter the direction of development in the law. I think the Congress would be well advised to not attempt any intervention at present in the development of the "insanity" defense. I say this as one judge who is on record as opposed to certain aspects of the present development.

If the Congress is intent on codification of the defense, two courses of action are consistent with the institutional framework I have mentioned. While polar opposites, each claims the slogan "abolish the insanity defense." The first of these courses of action would entail an elimination altogether of the law's inquiry into the existence of a free choice to do wrong. If the defendant did not operate under a mistake of fact, *i.e.* he realized the thing in his hand was a gun and not a toothbrush, he should be convicted. This course of action is, as I have noted, one possible view of § 522. If this is the intent of Congress, I would suggest the following additional explanation be added to clarify such an intent: "Evidence of a mental disease or defect shall be admissible for the purpose of demonstrating that a person was unaware of the factual circumstances of his conduct or of the existence of a risk, and for no other purposes." This additional language should be placed in § 301 and § 522, as well as §§ 521, 23 should be eliminated. Perhaps further language could be added to the sentencing provisions of S. 1 to support the view that evidence of mental disease or defect may be considered for sentencing purposes.

This course of action certainly eliminates most of the institutional concerns I have voiced. However, elimination of the inquiry into free will prior to the imposition of moral blame and in the abstract raises significant constitutional questions upon which it would be inappropriate for me to comment. Regardless of constitutional objections, one might seriously question whether such a harsh rule is consistent with any possible consensus in the nation on the nature of criminal responsibility. Perhaps if we considered our reaction to the criminal conviction of a member of our family who suffers from a severe mental disability, we would take a different view of the morality of elimination of inquiry into free will. As long as we think only of "those other people", and we all know who they are, our moral perception will be distorted.

The other course of action would involve a total reformulation of the concept of criminal intent. Sections 301–02 as presently written follow the common law presumption of criminal intent from knowledge of factual circumstances. However, §§ 521–23 by adding to the concept of intent "mistakes of law", "mental disease or defect" and "intoxication", appear to suggest that the common law presumption be pried open to permit an inquiry into the free choice to do wrong regardless of the circumstances. The language of §§ 301-02 strongly suggests that the ultimate arbiter of the existence of a free choice to do wrong is the jury, since all the issues are stated in "factual" terms. Of course, the terms "mental disease or defect", "mistake of law", "intoxication" are retained to guide the jury's attention to the particular impairment of free will alleged in an individual case. But presumably the intent inquiry would not be exclusively controlled by those terms, but would include any impairment, narcotics addiction for example,[42] relevant to the existence of the free choice to do wrong. If this is the proper

[41] P. Miller, The Life of the Mind in America 289–95 (1965).
[42] *See United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973); Fingarette, *Addiction and Criminal Responsibility*, 84 *Yale L.J.* 413 (1975).

interpretation of § 522, then it comes very close to the "abolition" of the insanity defense proposed by Joseph Goldstein.[43] This interpretation, to the extent it touches upon "mental disease or defect", is also close to the proposal I advocated in my *Brawner* dissent.

In order to clarify its intention to adopt this interpretation, if there is indeed such an intention, Congress should explicitly state that the jury is to ascertain the extent of the impairment of will and measure it against contemporary community standards of blameworthiness. It should further state that Subchapter C is non-exclusive. Finally, it should, regardless of its intention on this matter amend § 521, concerning mistakes of law and fact, to deal only with mistakes of law. Mistakes of fact are handled by the existing language in §§ 301–02. Congress should also consider whether the terms "mental disease or defect" invite too much expert dominance and hence a substitute such as that devised in my *Brawner* dissent inserted in its place.

Proper consideration of either of these two forms of "abolishing" the insanity defense must proceed with an awareness of the practical consequences of a verdict of not guilty by reason of insanity. Both proposals to "abolish" the insanity defenses are premised in major part on the effect of these practical effect on the substantive standard of responsibility. S. 1 provides that persons acquitted by reason of insanity are to be committed to a treatment facility for diagnosis. After a period of time, the committing judge must hold a hearing at which the government must prove by preponderance of the evidence that the acquitted person is suffering from a mental disease or defect and is therefore dangerous to the person or property of others at the time of the hearing.[44] Many persons assume with cause that commitment pursuant to a statute of this sort is virtually automatic following acquittal by reason of insanity. Some advocates of abolition of the "insanity" defense conclude from this that the only purpose of the "insanity" defense is to determine the proper disposition of the accused, *i.e.* whether the person should be incarcerated in a prison or a hospital. That determination, it is suggested, is really a sentencing decision presently made by the jury[45] with extraordinary expense and trouble.[46]

This "practical" argument for abolition of the "insanity" defense is not convincing. First, as discussed previously, the central purpose of concepts of criminal responsibility is to assess blame. The dispositional decision operates entirely apart from concepts of responsibility; if the disposition decision did attempt to assess blame, questions would be raised whether the right to a jury trial had been abrogated. Some assert that the blame-imposition function of the "insanity" defense is not meaningful, not worth caring about. I do not agree. A criminal conviction carries a stigma quite apart from the fact of imprisonment.[47] And its imposition or non-imposition is part of the moral ritual of the criminal trial, a ritual that serves to reinforce our basic standards of decency and to teach us about the causes of the human wreckage we witness in court. We need this process for our education and moral well-being, as well as for the rights of the defendant.

But more than this, I do not concur in the view that conviction of a crime and sentencing to a hospital are equivalent to the dangerousness determination under a commitment statute. The commitment procedure looks to

[43] *See* Goldstein, *The Brawner Rule—Why? or No More Nonsense on Non Sense in the Criminal Law, Please!*, 1973 *Wash. U. L.Q.* 120.

[44] S. 1, 94th Cong., 1st Sess. § 3613 (1975).

[45] Under the so-called *Lyles* instruction, juries in the District of Columbia are told that an acquitted defendant is subject to a commitment by reason of his dangerousness. *See Lyles* v. *United States*, 254 F.2d 725, 728 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958) *reaffirmed United States* v. *Brawner*, 471 F.2d 969, 996 (D.C. Cir. 1972). S. 1, 94th Cong., 1st Sess. §§ 3614–15 (1975) seems to permit an overt "insanity defense" to sentencing to a prison!

[46] This allegation of undue expense or trouble in presentation and adjudication of the insanity defense is really of little importance. The evidence indicates in the District of Columbia with both local and federal jurisdiction prior to the Court Reform Act that insanity acquittals ran about 2% of all cases terminated. And many of these acquittals were largely uncontested trials equivalent to a plea of guilty. (These trials are necessary since the trial court must raise a defense of "insanity" *sua sponte* if it is substantial and if the defendant does not raise it, *see United States* v. *Robertson*, 507 F.2d 1148 (D.C. Cir. 1974); *Whalem* v. *United States*, 346 F.2d 812 (D.C. Cir.), *cert denied*, 382 U.S. 862 (1965).) This data is collected in United States v. Brawner, 471 F.2d 969, 989 (D.C. Cir. 1972); Brief of *amicus* William H. Dempsey, Jr. at 32–34, *id.*; Brief of *amicus* David Chambers.

[47] *See Menard v. Mitchell*, 430 F.2d 486, 490–91 (D.C. Cir. 1970).

the defendant's present and future dangerousness and releases him when he is no longer dangerous. The "insanity" defense looks to the defendant's mental condition at the time of the offense. The dangerousness commitment is not based simply on the prior commission of a criminal act whereas a criminal conviction and sentence are (and also the sentencing process is based at least to some extent on the principle that punishment should be proportionate to the offense). It is clear that the dangerousness commitment is really not equivalent to conviction and a hospital sentence.[48]

It would appear that the dangerousness commitment procedures would satisfy any considerations of social order associated the propensity of the individual offender to commit further anti-social acts. There is, however, one theoretical gap between the coverage of the insanity defense and the coverage of the commitment statutes. This lies in the differing burdens of proof. Under present practice in the federal courts,[49] the government must prove beyond a reasonable doubt that the accused was not "insane" at the time of the crime. Under the dangerousness commitment statute, the government must prove by a preponderance of the evidence that the defendant meets the standards for commitment. This raises the theoretical possibility that a person will be acquitted because of a reasonable doubt about his sanity but not committed because of his dangerousness because the government failed to sustain its burden of proof.[50] In practice there is no substance to this contention. The figures indicate that virtually all acquitted defendants are found dangerous and are released only because of changes in their medical condition.[51] Furthermore, the burden of proof requirement is mostly hortatory, a warning of the seriousness of the action, and beyond that serves to enforce the requirement that the government present sufficient evidence to establish a *prima facie* case. Any slippage between an acquittal by reason of insanity and the dangerousness commitment is almost certainly a result of the fact that not all persons "insane" at the time of the crime meet the standards of dangerousness for purposes of commitment. This point, of course, is not premised on differing burdens of proof.

Consideration of the burden of proof in regard to the "insanity" defense does point to some "practical" aspects of the defense which deserve consideration if the Congress contemplates codification. In practice, the success of an "insanity" defense largely depends on the quality of the defendant's expert testimony and the quality of the defendant's attorney. Even if the trial judge appoints an expert witness for an indigent defendant,[52] the quality of that expert's testimony and the quality of the pre-trial mental examination will largely determine whether the defense will be taken seriously. Furthermore, testimony that the defendant did suffer from a mental disease or defect may be easily trivialized by the prosecution through "know nothing" comments on psychiatric tests and procedures and through challenges to the extent of the expert's preparation (although no greater preparation is permitted under present time and money limitations). Testimony of government experts that the defendant did not suffer from a mental disease or defect are not subject to such trivialization and only expert defense counsel can probe the weaknesses of preparation and investigation that lie behind some such conclusions. For the indigent defendant, then, the burden of proof is in fact very much on him. "I fear that it can fairly be said of *Brawner*, just as it should be said of *Durham*, that while the generals are designing an inspiring new insignia for the standard, the battle is being lost in the trenches."[53] If the Congress is desirous of codification, it should consider amendments to S. 1 to ensure that all indigent defendants be provided with the resources to make assertion of the "insanity" defense realistically possible.

[48] Of course, there are some judges who would impose lower burdens of proof on commitment of an offender acquitted by reason of insanity. *See United States* v. *Brown*, 478 F.2d 606 (D.C. Cir. 1973); *see also Dixon* v. *Jacobs*, 427 F.2d 589, 601 (D.C. Cir. 1970) (Leventhal, J. concurring). This view truly undercuts the status of the "insanity" issue as a true defense.

[49] *Davis* v. *United States*, 160 U.S. 469, 484 (1895).

[50] *See Overholser* v. *O'Bierne*, 302 F.2d 852, 854, 859–61 (D.C. Cir. 1961).

[51] *See United States* v. (*LaVance*) *Greene*, 489 F.2d 1145, 1172–73 n.73 (D.C. Cir. 1973), *cert. denied*, 95 S.Ct. 239 (1975) (Bazelon C.J. dissenting from the denial of rehearing *en banc*).

[52] 18 U.S.C. § 3006A(e) (1970); *United States* v. *Chavis*, 476 F.2d 1137, 1141 (D.C. Cir. 1973).

[53] *United States* v. *Brawner*, 471 F.2d 969, 1013 (D.C. Cir. 1972) (Bazelon C.J. concurring in part, dissenting in part).

Else its bold new insignia will have no more real effect than that of *Durham* and *Brawner*.

There is one further problem of the interface between the dangerousness commitment procedure and the "insanity" defense. At present, S. 1 as well as most dangerousness statutes is tied to the medical model of mental impairment. The proposal I have advanced to reformulate the criminal responsibility defense to eliminate reliance on the "medical model" raises the possibility that an individual may have a mental impairment not covered by the "medical model" and be acquitted, but could not be committed because his mental impairment is not a predicate for commitment. This possibility raises two unattractive alternatives. Either we can close our eyes to mental impairments not recognized by behavioral scientists and impose responsibility without inquiry into free will or we can reformulate the standards of commitment to include those who are dangerous but largely untreatable.[54] I have no answer to this dilemma but I direct your attention to it, if serious consideration is given to my proposal.

Reliance on the dangerous commitment procedure to safeguard certain concerns of social order, either under the "medical model" of mental impairment or an expanded view of mental impairment, highlights certain difficulties with those procedures. Most important, present predictions of dangerousness are highly inaccurate and tend to reflect social and cultural biases of the predictor.[55] Furthermore, there is a tendency to err on the side of over-prediction of dangerousness, particularly in regard to persons who have committed prior criminal acts; this suggests the possibility that a finding of dangerousness coupled with an indeterminate sentence will put an offender in prison for a period longer than the maximum sentence of a crime he may have committed on the basis of an inaccurate prediction of dangerousness. The alternatives to this are no less palatable: complete freedom for the offender or criminal conviction of an individual who did not really choose to do wrong.

I have no solution to these difficulties. Understanding of the issues themselves is too limited, it proceeds on a level of generality that makes easy solutions impossible. We are in that terrible period known as "meanwhile" and it appears we will be there for some time. I caution the Subcommittee against any actions which may retard or shortcircuit present attempts to ventilate those issues of which I have been speaking, and to confront the largely insoluble dilemmas they present. With a moral consciousness and an awareness of public demands, we may over time reach accommodations, temporary though they may be, which will reflect our wisest and most persistent traditions.

HOPKINS, SUTTER, MULROY, DAVIS & CROMARTIE,
Chicago, Ill., April 7, 1975.

PAUL C. SUMMIT, Esq.,
Chief Counsel, Subcommittee on Criminal Laws and Procedures, Committee of the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR PAUL: It gives me great pleasure to send you officially the comments of the Antitrust Section of the American Bar Association on S.1.

Sincerely,

MARK CRANE.

Enclosure.

HOPKINS, SUTTER, MULROY, DAVIS & CROMARTIE,
Chicago, Ill., April 7, 1975.

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
COMMITTEE OF THE JUDICIARY,
U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

GENTLEMEN: We hereby submit the comments of the Antitrust Section of the American Bar Association on the Criminal Justice Reform Act of 1975,

[54] *See United States* v. *Alexander & Murdock*, 471 F.2d 923, 960–65 (D.C. Cir.), *cert. denied*, 409 U.S. 1044 (1973) (Bazelon C.J. dissenting on this point).

[55] *See, e.g.*, Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 *J. Legal Ed.* 24 (1970); *Developments in the Law—Civil Commitment*, 87 *Harv. L. Rev.* 1190, 1240–44 (1974) and authorities cited.

introduced as S.1 on January 15, 1975. The views presented are those of the Antitrust Section and do not represent the views of the American Bar Association until approved by its House of Delegates or Board of Governors.

At the outset, we would like to thank the Committee and its Staff for the opportunity on May 3, 1973 to present our views concerning S. 1 and S. 1400 introduced in the 93rd Congress (herein called "the prior bills"). We are pleased that the present version of S. 1 incorporates most of the changes we suggested, and we, of course, reaffirm our support of those changes.

This leaves only three provisions on which we wish to comment with respect to the present bill.

I. SOLICITATION TO COMMIT ANTITRUST OFFENSES

Although Section 1004(b) makes a vast improvement in the attempt, conspiracy and solicitation provisions of the prior bills, it still permits a person to be convicted of soliciting antitrust offenses (other than attempts to monopolize and conspiracies to restrain trade or to monopolize). In our testimony on the prior bills, we observed:

"Whatever the merits may be of punishing solicitation to commit treason, murder, or drug pushing, it is both unnecessary and unwise to make it a crime to solicit someone to violate the antitrust laws, when the solicitation results in neither an attempt nor a conspiracy. In antitrust cases, courts agonize at length over whether business conduct constitutes an antitrust offense. The length of antitrust trials and volume of antitrust records is too well known to need documentation, and it is not uncommon for important antitrust opinions to review and analyze the facts for 100 pages.

"If problems of this complexity are presented by completed transactions, they become even more difficult when a transaction is inchoate. In the case of both attempts and conspiracies, some concrete action is required which may give the court some idea whether the contemplated business conduct, if completed, would restrain trade. Criminal solicitation leaves out the requirement of action, thereby moving the restraint into the realm of conjecture.

"Even in the area of per se offenses—such as price fixing and group boycotts—it can be difficult to tell whether the conduct involved constitutes a proscribed activity. For example, courts have struggled mightily—and inconclusively—over whether consciously parallel conduct evidences an agreement to fix prices or boycott distributors. Compare *Interstate Circuit Inc.* v. *United States* 306 U.S. 208 (1939) and *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948) with *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954) and *United States* v. *National Malleable and Steel Castings Co.*, 1957 Trade Cas. ¶68,890 (N.D. Ohio 1957), aff'd per curiam, 358 U.S. 38 (1959). What point is there in expending this type of judicial effort in situations where the proposed price fixing scheme or group boycott never got further than one competitor asking another and getting rebuffed? If the proposal gets into the action stage, it falls within the definition of attempts or conspiracies and can be dealt with under those sections." (Hearings 5603–4)

We still believe that our position has merit and urge that the solicitation provisions be inapplicable to all antitrust offenses.

II. CORPORATE PROBATION

Section 2001(c) provides that a corporation may be placed on probation. In our testimony on the prior bills, we opposed the remedy of corporate probation because it was tantamount to entering an injunction and appointing a receiver (the probation officer) as part of the sentencing process. (hearings 5606–8). In the course of our testimony, we said (at 5607):

"* * * [A] sentence is generally imposed at the end of a criminal trial without the full adversary, evidentiary hearing that is customarily held before an injunction is entered in antitrust cases. The Supreme Court has repeatedly emphasized the need for a full exploration of the facts in framing an antitrust decree. In 1945 it is said in *Associated Press* v. *United States*, 326 U.S. 1, 22 a Sherman Act case: 'The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils,

is a matter which rests largely in the discretion of the court. (Quotation omitted.) A full exploration of facts is usually necessary in order to properly draw such a decree.'

"In 1972, it repeated this concept in *United States* v. *Ford Motor Co.*, 405 U.S. 562, after noting that the 'District Court * * * held nine days of hearings on the remedy' (405 U.S. at 571): 'The thorough and thoughtful way the District Court considered all aspects of this case, including the nature of the relief, is commendable. The drafting of such a decree involves predications and assumptions concerning future economic and business events. Both public and private interests are involved; * * *' (405 U.S. at 578)

Because of the complexity of these questions, extensive evidentiary hearings on relief are held as a matter of course in antitrust cases."

It is still our view that injunctions should be entered and receivers appointed only after a full evidentiary hearing. We see nothing to be gained by making this hearing a part of a criminal proceeding. The government can as easily bring a subsequent civil case for injunctive relief in which it will have the benefits of collateral estoppel on questions of violation. This civil injunction suit will be no more burdensome than a full trial on the terms of probation at the end of the criminal case, and will avoid such difficult procedural questions as whether the government must prove the need for the injunction and receiver beyond a reasonable doubt instead of simply by a preponderance of the evidence. We urge the Committee to eliminate corporate probation as a remedy.

If, however, the Committee decides to retain corporate probation as a remedy, we oppose the application of Section 2103(a) in its present form to corporations. This section reads as follows:

"MANDATORY CONDITION.—The court shall provide, as an explicit condition of a sentence of probation, that the defendant not commit another federal, state, or local crime during the term of probation."

While this condition is reasonable when applied to individuals, it presents serious problems when applied to large corporations which act through thousands of individuals located in many different States. A corporation placed on probation for an antitrust offense could violate that probation, for example, because if it violated the pollution control laws of a State, even though the person responsible for complying with the anti-pollution laws did not even know of the terms—or even the existence—of the antitrust probation.

In short, when an individual commits a crime during a period of probation, it is fair to assume that he committed the crime knowing that it was a violation of his probation. This assumption simply does not apply to the activities of large corporations where no one person can keep abreast of all of the things which are being done. We urge the Committee, if it decides to retain the remedy of corporate probation, to modify Section 2103(a) to make it discretionary rather than mandatory in the case of corporations. This would permit its application in the case of the closely-held corporations, where it might be appropriate, without requiring that it be applied in all cases.

III. FINES MEASURED BY TWICE THE GAIN OR LOSS

Sections 2001(c) and 2201(c) provide that corporate and individual antitrust offenders can be required to pay a fine equal to double the gain they received from the offense or double the loss they caused the victim. Whatever the merits of such a fine in simpler factual context (e.g., burglary or embezzlement), we believe that its application to antitrust offenses is unwise for two reasons.

Our first reason was set forth in our testimony on the prior bills (Hearings 5604-5) but bears repetition here. Antitrust offenses are distinguished from other crimes in that present law permits the victims to obtain treble damages from the offenders. (15 U.S.C. § 15) This remedy has been invoked frequently, and the Supreme Court has described it as "one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318, (1965).

As long as the treble damage remedy remains (and there is no reason to expect it to be changed) the enactment of S. 1 in its present form would single out antitrust offenders and subject them—alone among all criminals—to paying *five-fold* the amount of the gain they received or the loss they caused. We do not approve of antitrust violations. We have no objection to "double-damage" fines by themselves. But we do not believe that antitrust offenses should be singled out for a five-fold penalty, especially in view of the increase last December in maximum fines for antitrust violations from $50,000 to $100,000 for individuals and $1,000,000 for corporations. Act of December 21, 1974, Public Law 93-528.

Our second reason for urging this action upon the Committee is one which we did not advance in our testimony on the prior bills, although it is similar to the reasoning we advanced for opposing corporate probation. We see problems in determining the gain or loss resulting from an antitrust offense as part of the sentencing process at the end of a criminal trial.

Antitrust offenses are distinguished from many other crimes by their complexity. It would be a simple matter for a judge to determine the gain or loss resulting from a theft or embezzlement. It is quite another thing for a judge to establish the gain the defendant derived from an antitrust offense (that is, how much the defendant's *profit* was increased by the illegal conduct), or how much loss the victim incurred as a result of the antitrust violation (that is, how much *more profit* the victim would have made but for the defendant's conduct).

These questions are exactly the same questions litigated in the damage portion of civil antitrust cases, where they often take weeks to try. Can they be adequately tried at the end of a criminal case as part of the sentencing procedure? We think not, since sentencing is usually accomplished on the basis of facts contained in reports not in the record, facts which have been developed without the procedures associated with the determination of damages at a civil trial.

If it were decided to hold a full scale hearing to determine the "gain" or "loss" at the end of the criminal antitrust trial, severe procedural problems would be presented. What standard of proof would be used—are damages to be proved beyond a reasonable doubt or simply by a preponderance of the evidence under the rather liberal standard allowed in civil antitrust cases? Are the victims entitled to representation at the sentencing hearing, since it is their damages that are being litigated? If so, what is their role, and will the fine imposed conclusively determine the basis of the recovery in the later treble damage case? Even if they are not represented, does the determination of gain or loss at the sentencing hearing constitute collateral estoppel against the defendant in the subsequent damage action even though the victims are free to try to prove still higher damages? Such a result would seem possible, perhaps likely, in view of the courts' movement away from "mutuality" as a prerequisite for collateral estoppel.

These considerations argue strongly in favor of trying the damage questions at a subsequent civil trial and not as part of the sentencing procedure. The victims would have the benefit of the finding of violation in the prior criminal case, which is, by statute, *prima facie* evidence of violation in subsequent damage cases. 15 U.S.C. § 15(a). As a practical matter such cases nearly always follow antitrust convictions, so there is small possibility that the treble damage remedy would not be applied.

Thus, not only is it unfair to subject antitrust offenders (and only antitrust offenders) to a five-fold penalty but doing so creates many procedural problems not present in simpler factual contexts. For these reasons, we urge the Committee to make Section 2201(c) of S. 1, which provides for the double damage fine, inapplicable to antitrust offenses.

We respectfully request the opportunity to be heard on the matters set forth in this letter at any public hearings which may be scheduled on S. 1.

Respectfully,

MARK CRANE,
Antitrust Section of the American Bar Association.

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN,
Washington, D.C., April 25, 1975.

Hon. JOHN MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedure, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: With this letter we are forwarding a statement in opposition to the provisions of S. 1, dealing with criminal jurisdiction on Indian reservations, submitted on behalf of the Association on American Indian Affairs and a number of named tribes.

We would appreciate your having the enclosed statement made a part of the formal hearing record on the pending legislation. We would also be happy to discuss the subject matter of our statement informally with members of your staff at any time.

Respectfully submitted,

ARTHUR LAZARUS, JR.

STATEMENT OF ARTHUR LAZARUS, JR.

The following comments are submitted in opposition to certain provisions affecting Indian tribes in S. 1, the "Criminal Justice Reform Act of 1975". This statement is filed on behalf of the Association on American Indian Affairs, Inc. and the following named tribes: The Seneca Nation of Indians of New York, the Miccosukee Tribe of Indians of Florida, the Nez Perce Tribe of Idaho, the Navajo Tribe of Arizona and New Mexico, and the Hualapai Tribe and the Salt River Pima-Maricopa Community of Arizona.

In order to appreciate fully the drastic implications of the Indian provisions in S. 1, a brief review of the unique legal status of Indian tribes is necessary. Over a century ago Chief Justice Marshall, speaking for the Supreme Court, affirmed the proposition that "* * * the several Indian nations * * * [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Worcester* v. *Georgia*, 6 Pet. 515, 557, 8 L. Ed. 483, 499 (1932). *Accord*, *Williams* v. *Lee*, 385 U.S. 217, 218–19, 3 L. Ed. 2d 251, 253 (1959). The Supreme Court's conclusion in the *Worcester* case recently has been restated forcefully in *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 36 L. Ed. 2d 129 (1973):

"It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty predates that of our own Government * * * 'They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *Id.* at 172–73, 36 L. Ed. 2d at 136.

The Indian provisions in the present Title 18 of the United States Code have been drafted in light of the extensive powers of self-government which historically have been exercised by Indian tribes. Section 1153 restricts the scope of federal criminal jurisdiction on Indian reservations to thirteen "major crimes"—"* * * namely, murder, manslaughter, rape, [statutory rape], assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny * * *" 18 U.S.C.A. § 1153 (1975 Supp.). Furthermore, courts have held without exception that the jurisdiction conferred on federal courts by Section 1153 is exclusive, and state courts are prohibited from exercising concurrent jurisdiction over the same offenses. The limited nature of the jurisdictional grant in Section 1153 has allowed the courts established by Indian tribes to exercise extensive criminal jurisdiction on Indian reservations.

These same considerations are manifest in Section 1152, which provides that "[e]xcept as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District

of Columbia, shall extend to Indian country."[1] 18 U.S.C.A. § 1152 (1966). The general laws referred to in Section 1152 include, in addition to federal statutes applicable to federal enclaves, the Assimilative Crimes Act, which authorizes federal courts to apply state law as the measure of a federal crime if the act committed in Indian country does not represent a criminal offense under federal law, but has been so classified under a state statute. *See generally* 18 U.S.C.A. § 13 (1969).

Section 1152, however, contains several important exceptions which sharply limit its impact on Indians and Indian tribes. The federal laws referred to in Section 1152 are not applied in the case of "* * * offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C.A. § 1152 (1966). This exception clause has limited the application of federal enclave laws and the Assimilative Crimes Act to cases in which an Indian commits a criminal act against a non-Indian or a non-Indian commits such an act against an Indian. Thus, the tribal courts retain jurisdiction over a number of lesser offenses when only Indians are involved.

S. 1 would effect a wholesale expansion of federal jurisdiction over criminal offenses committed on Indian reservations by deleting in their entirety Sections 1152 and 1153. Indian reservations no longer would be treated as discrete jurisdictional entities, but, instead, would be included, along with all other federally held lands and unorganized federal territories and possessions, in a category entitled "Special Jurisdiction of the United States". Section 203 of the proposed Criminal Code provides that "[a]n offense is committed within the special jurisdiction of the United States if it is committed within the special territorial jurisdiction * * * of the United States", and the term "special territorial jurisdiction" is defined by Section 203(a) to include "Indian country".

S. 1 lists no less than forty-six acts or omissions which, if committed or omitted in areas of special jurisdiction, would constitute a criminal offense over which federal courts are to have jurisdiction. The extent of federal jurisdiction thus is increased vastly beyond the thirteen offenses which at the present time are enumerated in Section 1153.

Furthermore, in contrast to Section 1153, provisions in S. 1 indicate that the jurisdiction of federal courts over offenses committed in Indian country may not be exclusive. Section 205(a) of the proposed Criminal Code declares that "[e]xcept as otherwise expressly provided, the existence of federal jurisdiction over an offense does not, in itself, preclude * * * a state or local government from exercising its jurisdiction to enforce its laws applicable to the conduct involved. * * *" Thus, Indian reservations would be subject under S. 1 to substantially increased federal criminal jurisdiction, and, possibly, to state jurisdiction which heretofore has been prohibited explicitly by federal law.

The proposed Criminal Code's complete failure to recognize the unique legal status accorded Indian tribes and their courts is evidenced further by S. 1's treatment of Sections 13 and 1152 of the present Title 18. Section 13, which is the Assimilative Crimes Act, is continued in force by Section 1863(a) of the proposed Criminal Code, which provides that "[a] person is guilty of an offense if, in a place within the special jurisdiction of the United States * * * he engages in conduct * * * that constitutes an offense under the law then in force in the state or locality in which such place is located * * * [and] that does not otherwise constitute an offense under a federal statute applicable in such place * * *." In addition, S. 1 would delete Section 1152.

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[1] The term "Indian country" is defined in Section 1151 as follows:
"Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C.A. § 1151 (1966).

The proposed Criminal Code's deletion of Section 1152 and continuation in force of Section 13 would result in yet a further incursion on the criminal jurisdiction of tribal courts. The exception clauses contained in the deleted Section 1152 excluded from the effect of the Assimilative Crimes Act cases which involved only Indians. In effect, therefore, S. 1 would extend the Assimilative Crimes Act beyond cases involving non-Indians to criminal offenses involving only Indians.

S. 1 admittedly contains provisions which indicate that, at least as a theoretical matter, nothing in the legislation should be construed as ousting tribal courts of the jurisdiction which they now exercise over criminal offenses committed on Indian reservations. Section 205(a) provides that "[e]xcept as otherwise expressly provided, the existence of federal jurisdiction over an offense does not, in itself, preclude * * * an Indian tribe, band, community, group, or pueblo from exercising its jurisdiction in Indian country to enforce its laws applicable to the conduct involved. * * *" Despite this rather abbreviated and vague disclaimer, the tremendously expanded scope of federal and possibly state jurisdiction could well have a significant adverse impact upon the continued vitality and utility of tribal courts which at the present time exercise considerable jurisdiction over criminal offenses committed on Indian reservations.

The proposed Criminal Code's approach to federal jurisdiction over Indian reservations appears to have been prompted by two problems of Constitutional dimension which have arisen in connection with the administration of Section 1153. *See generally* Committee Print of Report of Senate Committee on the Judiciary on the "Criminal Justice Reform and Codification Act of 1974" (1974). First, several federal courts held that an Indian charged with an offense under the Major Crimes Act was not entitled to an instruction on a lesser included offense. *See, e.g., United States* v. *Davis*, 429 F.2d 552, 554 (8 Cir. 1970); *Kills Crow* v. *United States*, 451 F.2d 323, 325 (8 Cir. 1971), *cert. denied*, 405 U.S. 999 (1972). Second, Section 1153's adoption of state penal provisions and definitions of offenses for specified crimes frequently had resulted in the imposition of harsher penalties and a lower quantum of proof on Indian defendants than would be imposed upon a non-Indian defendant committing the same offense. Both these problems raised the question whether Section 1153 discriminated in an unconstitutional manner against Indian defendants.

Neither issue, however, warrants the proposed Criminal Code's sweeping and indiscriminate approach to federal criminal jurisdiction over Indian reservations. The first question—whether an Indian defendant charged under Section 1153 is entitled to an instruction on a lesser included offense—has been resolved recently by the Supreme Court in the favor of Indian defendants:

"* * * [T]he [Major Crimes] Act expressly provides that Indians charged under its provisions 'shall be tried in the same courts, *and in the same manner*, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.' * * * In the face of that explicit statutory direction, we can hardly conclude that Congress intended to disqualify Indians from those benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense." [Original emphasis.] *Keeble* v. *United States*, 412 U.S. 205, 212, 36 L. Ed. 2d 844, 850 (1973). *Accord, Felicia* v. *United States*, 495 F.2d 353, 354–55 (8 Cir. 1974). Thus, Indian defendants charged under Section 1153 plainly are now entitled to an instruction on a lesser included offense, and, consequently, this issue no longer can serve as a basis for deleting the Major Crimes Act from the Criminal Code.

Furthermore, the second problem—whether the imposition of state penal provisions and definitions of offenses on Indian defendants is constitutional—can be solved by a legislative technique far more subtle than making Indian reservations just another federal enclave and emasculating tribal courts in the process. Whatever Constitutional deficiencies exist in provisions in Section 1153 relating to sentencing and burden of proof can be remedied easily by amending the offending sections of the Major Crimes Act. Thus, the second issue also in no way justifies the radical approach to federal jurisdiction over Indian reservations which is employed in S. 1.

Although the proposed Criminal Code's treatment of jurisdiction over Indian reservations is the most objectionable feature of the bill, a number of additional shortcomings in S. 1 should be noted. Section 685(b) of the proposed Criminal Code, which authorizes and describes the extent of state jurisdiction over offenses committed by or against Indians in Indian country, and is identical to Section 1162 of the present Title 18, contains a number of inaccuracies. Its description of Indian country over which states are authorized to exercise jurisdiction does not include states which assumed jurisdiction subsequent to the passage of Section 1162, or those which since its enactment have retroceded jurisdiction to the United States.

More important, Section 685(b) fails to eliminate a number of the ambiguities which have made the precise legal implications of Section 1162 almost impossible to determine. Indian tribes have expended considerable sums of time and money litigating the question whether the state jurisdiction referred to in Section 1162 is exclusive or concurrent with the jurisdiction of Indian tribes. *See, e.g., Oliphant* v. *Schile*, No. 511–73C2 (W.D. Wash.). Furthermore, the cases are legion in which Indian tribes have been forced to resort to legal action in an attempt to determine whether, or under what circumstances, the state's jurisdiction shall include the power to tax. *See, e.g., Bryan* v. *Itasca County*, No. 44947 (S. Ct. Minn.); *Confederated Salish and Kootenai Tribes* v. *Moe*, Civil No. 2145 (D.C. Mont.); *United States* v. *Washington*, Civil No. 3909 (E.D. Wash.); *Confederated Tribes of the Colville Indian Reservation* v. *Washington*, Civil No. 3868 (E.D. Wash.).

Nor does Section 1162 indicate whether states may assume piecemeal jurisdiction over selected subject matter or geographical areas within Indian country. At the present time the State of Washington, for example, has enacted laws which authorize the imposition of its jurisdiction on all Indian reservations in eight selected subject matter areas. *See Rev. Code Wash.* § 37.12.

Finally, S. 1 would delete the provisions in the present Title 18 which govern the use of liquor in Indian country. Specifically, Sections 1154 through 1156 prohibit the introduction, possession or dispensation of liquor in Indian country, while Section 1161 provides that the prohibitions of Sections 1154 through 1156 shall not apply within the Indian country when "* * * such act or transaction is in conformity both with the laws of the State * * * and with an ordinance duly adopted by the tribe * * * ." 18 U.S.C.A. § 1161 (1966). Sections 1154 through 1156 would not be recodified under S. 1, and, as a consequence, an Indian tribe's legal basis for preventing the sale of liquor on its reservation would be eliminated.

In conclusion, the provisions in S. 1 relating to federal criminal jurisdiction over Indian reservations completely belie the unique status which historically has been accorded Indian tribes by the Supreme Court and the Congress. The present version of the proposed Criminal Code should be amended to reflect the firmly established federal policy that the United States always has restricted its criminal jurisdiction on Indian reservations in recognition of the extensive powers of self-government which Indian tribes exercise.

STATEMENT BY ALAN R. PARKER ON BEHALF OF THE FRIENDS COMMITTEE ON NATIONAL LEGISLATION

My name is Alan R. Parker. I am Vice President of the American Indian Lawyers Association, an unincorporated association of licensed attorneys of Native American descent who are working in areas directly related to the legal rights of Indian tribes. However, I file this statement as a private person speaking on behalf of the Friends Committee on National Legislation.

The Friends Committee on National Legislation is widely representatives of Friends throughout the United States, having members drawn from 22 of the 28 Friends' Yearly Meetings in the country, but it does not purport to speak for all Friends, who cherish their rights to individual opinions. Friends have had a long-satnding concern in the area of criminal justice and social equality, and have also had a history of involvement in the rights of Native Americans. That concern is currently expressed in a special programs which relates directly and exclusively wth Native American legislative issues.

Under existing federal law, the jurisdictional relationships between federal, state and tribal governments regarding prosecution of criminal offenses taking

place within the boundaries of Indian reservations are carefully defined. The overall effect of the law has been to protect the right of self-government on the part of judicial and law enforcement authorities within Indian country. (See 18 U.S.C. Sections 13, 1151, 1152, 1153 and 1162.)

The bill, S. 1, amended, will, if enacted, disrupt this jurisdictional scheme and result in a virtually total preemption of the tribal government's jurisdiction within the boundaries of a reservation. That is, where existing jurisdictional law preserves the exclusive authority of tribal governments over certain criminal offense and classes of offenders within the reservation, S. 1 would vastly expand the nature and scope of federal and state law at the expense of tribal law. (See proposed U.S.C. Sections 203, 205, 685, 1861 and 1863.) Briefly, Section 203(a) would abolish the distinction between Indian country and other types of federal enclaves for purposes of delineating the reach of federal law, Section 685(b) expands the scope of state jurisdiction over offenses in Indian country while Sections 1861 and 1863 would expand the number of enclave laws and retain provision for assimilation of state law within federal enclaves where there may be a vacuum on federal law. This is in contrast to existing federal law which recognizes the special jurisdictional status of Indian reservations and provides for the application of federal and state law only where the interest of the tribe in asserting tribal authority cannot be supported.

This total disregard for the rights of tribal self-government evident in the proposed S. 1, amended, has apparently been motivated by an understandable desire to achieve uniformity in federal criminal law as it applies to federal enclaves or "areas of special federal criminal law as it applies to federal enclaves or "areas of special federal jurisdiction." Analysis of the commentary accompanying various drafts of this legislation reveals that the authors have failed to appreciate the special status that Indian reservations have enjoyed by virtue of their unique right of self-government. Simply put, an Indian reservation, in addition to being an area of special jurisdiction, encompasses at the same time a distinct political community. Recognition of this special status has long been an integral part of federal Indian policy. (See *Worchester* v. *Georgia*, 6 Pet. 515, 1832; *Williams* v. *Lee*, 358 U.S. 217, 1959; and *McClanahan* v. *Arizona*, 441 U.S. 164, 1973.) By comparison, other federal enclaves such as national parks or military reservations do not encompass self-governing jurisdictional entities distinct from federal and state governments.

In short, even the objectives of achieving a desirable uniformity in the federal enclave laws ought not to override the right of self-government enjoyed by the Indian tribes which predates the founding of this Republic. It would be a relatively simple matter to retain this special jurisdictional status without disturbing the overall objectives of the bill as it applies to all other federal enclaves. The appropriate provisions of the law could simply be retained in Title 18 or transferred to Title 25 of the Code. Whichever approach is chosen surely ought to be taken *only* after soliciting the input of Indian tribes and organizations. This effort at reform of the federal criminal law could also address itself to the theory problems associated with Public Law 82-280 as those problems are now being addressed by the Senate Subcommittee on Indian Affairs. Recently the two major national Indian organizations have articulated a position regarding what they feel are serious shortcomings in Public Law 83-280 and certainly legislative activity on this point ought to be coordinated with the efforts of the Senate Judiciary Committee.

STATEMENT OF MARVIN J. SONOSKY

I submit this statement on behalf of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, the Standing Rock Sioux Tribe of North Dakota and South Dakota, and the Shoshone Indian Tribe of the Wind River Indian Reservation, Wyoming.

I have reviewed the portions of the bill affecting Indians (Section 203(a)(3), p. 45; Section 205(a), p. 48; and Sections 681-693, pp. 571-575). One cannot be certain that every possible point is covered, but I submit for your consideration some of the questions that occur to me.

1. *Section 205(a), p. 48.* The opening sentence specifies that "Except as otherwise expressly provided, the existence of federal jurisdiction over an offense does not, in itself, preclude: '(1) a state or local government from exercising its jurisdiction to enforce its laws applicable to the conduct involved; * * *."

The law is established that state law does not extend to Indians in Indian country. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164; *Williams* v. *Lee*, 358 U.S. 217; *Worcester* v. *Georgia*, 6 Pet, 515. I find nothing in S. 1 that "otherwise expressly provides" that state law shall *not* extend to Indian tribes or Indians in Indian country. As a matter of caution such an express provison should be added to the proposed legislation. Otherwise, litigation is invited.

2. *Section 1863, p. 181.* On the same point discussed in Item 1 above, attention is directed to Section 1863, p. 181, which would vest the state with jurisdiction over any person, including Indians in Indian country (Secton 203(a)(3)), who violate state law. If the intent is to preserve the right of a reservation Indian to be free from state law, the section must be modified.

3. *Section 685A, p. 573—Application of Indian liquor laws.* Present federal law prohibits the introduction of intoxicants into Indian country (18 U.S.C. 1154(a)). Parenthetically, I note that for this purpose "Indian country" does not include fee-patented land in nonIndian communities or rights-of-way through reservations. (18 U.S.C. 1154(c).) The prohibition can be lifted if the act or transaction is in "conformity" both with state law and with an ordinance adopted by the tribe. (18 U.S.C. 1161.) In effect, the statute gives the tribe local option. *Unted States* v. *Mazurie*, 42 L.ed.2d 706 (January 21, 1975).

If I read S. 1 correctly, it repeals all of the Federal Indian liquor statues, 18 U.S.C. 1154, 1156, 3113, 3488, and 3618. This would remove the federal prohibition against the introduction of liquor into Indian country. If this is so, the tribal right to control liquor in Indian country is concluded. Absent the federal prohibition, what purpose is served by Section 685A authorizing a tribe to adopt ordinances "concerning dispensing, possession and use of liquor in Indian country * * * consistent" with state law.

Further, Section 685A employs the bare word "liquor" instead of "intoxicating liquor", "malt spiritous or vinous liquor including beer, ale and wine"—phraseology that has a long history in the case law. Also, Section 685A introduces a new phrase "consistent with" instead of "in conformity with" that has been in 18 U.S.C. 1161 since 1953. The latter phrase has been administratively construed. 78 I.D. 36 (1971).

The Federal Indian liquor laws have a history extending back about 150 years. The subject is not simple. With all due respect, I submit the matter requires further study before legislation can be drafted that will codify existing law and weed out the non-essentials. Section 685A as drafted constitutes a wholesale change in the substantive law. I urge that such far-reaching changes not be undertaken wthout further study and further input from the Indian tribes on the precise point.

4. *Section 693, p. 574.* I should like to suggest an additional amendment to Section 202(10) of the Act of November 11, 1968, 25 U.S.C. 1302(10). Section 202(10) is now interpreted to require a jury trial, when requested, in every case in tribal court. Probably over 90% of the tribal court cases are very minor misdemeanors, punishable by 30-60 days or less. The cost of jury trials is prohibitive for most tribes. Justice is defeated when one accused of a minor offense requests a jury trial. The tribes simply cannot meet the demand. I suggest that subsection (10) be amended to read as follows:

(10) [No tribe shall] deny to any person accused of an offense punishable by imprisonment *for more than six months*, the right, upon request, to a trial by jury of not less than six persons. [New language underscored.]

The proposed amendment accords with the definition of a petty offense in 18 U.S.C. 1(3) and the views of the Supreme Court. See *Annotation*, 26 L.ed.2d 916.

WILKINSON, CRAGUN & BARKER,
Washington D.C., April 25, 1975.

Senator JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, Washington, D.C.

DEAR SENATOR MCCLELLAN: As counsel for the Araphahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, the Quinault Tribe of the Quinault Reservation, Washington, and the National Congress of American Indians, we submit the attached statement on S. 1 (a bill to codify, revise and reform title 18 of the

United States Code). We respectfully request that this statement be included as part of the legislative record which is being compiled by your Subcommittee on this important bill.

We appreciate the opportunity to present the views of the above named Indian tribes and organizations on those provisions of S. 1 which will have a direct impact on Indian affairs in this country.

Sincerely,

By JERRY C. STRAUS.

Enclosure.

STATEMENT OF JERRY C. STRAUS

Mr. Chairman: My name is Jerry C. Straus; I am a member of the law firm of Wilkinson, Cragun & Barker. I am submitting this statement concerning S. 1 on behalf of the National Congress of American Indians, the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, the Quinault Tribe of the Quinault Reservation, Washington, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

We support the basic aims of S. 1 in recodifying Title 18 of the United States Code, in revising the Federal Rules of Criminal Procedure, and in creating a more logical system for the graduation of federal offenses generally. However, only those sections of S. 1 amending Title 25 of the United States Code, and those sections transferring former sections of Title 18 into Title 25, regarding federal offenses committed on Indian lands, are of direct concern to us.

We strongly feel that some changes to conforming amendment section 687 of the bill (pp. 573–74) are warranted, in order to assure Indian tribes a badly needed remedy against those who trespass upon Indian lands. As presently worded, conforming amendment section 687 of S. 1 merely transfer 18 U.S.C. § 1165 into Title 25 of the Code, with minor changes, and provides criminal sanctions only for "hunting, trapping, or fishing" upon Indian lands. No protection against simple trespass is afforded by the transfer effected in conforming amendment section 687, and we believe that enactment of section 687 in its present form would perpetuate a serious oversight presently existing in the Federal Criminal Code.

Significant difficulties exist in the enforcement of 18 U.S.C. § 1165, as it remains necessary to apprehend intruders in the actual conduct of the narrowly defined activities of hunting, fishing, trapping, or removing game on Indian lands in order to render the statute applicable. Specifically, the present wording of 18 U.S.C. § 1165, and the substantially similar language embodied in conforming amendment section 687, pose unreasonably difficult problems of enforcement and proof. Convictions for violations of Indian lands by non-Indians are often unobtainable because of the absence of federal officials at the scene of the offense at the time the offense is committed, or because of the inability to prove subsequently the necessary criminal intent to remove game from lands reserved for Indian use. (With respect to the criminal intent burden under 18 U.S.C. § 1165, *see United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973).)

The practical inability to prevent recurring and minor unauthorized uses of Indian land by non-Indians is a highly emotional issue and a continuing source of considerable dissatisfaction among various tribal councils, and consideration of S. 1 by this Committee at this time offers an excellent opportunity to correct the situation with a minimum of legislative effort.

To resolve these continuing problems of trespass and unauthorized activities upon Indian land, we propose that simple changes be included in the present language of conforming amendment section 687, creating an unambiguous violation of federal law for simple trespass upon Indian lands.

Such changes in language would eliminate the unmanageable burdens of proof inherent in the present statute, while doing no violence to the present regulation of hunting, fishing, and trapping on Indian lands, and would go a long way toward the ultimate elimination of a particularly bothersome situation for residents of our Nation's Indian reservations.

To resolve these continuing problems of trespass and unauthorized activities upon Indian lands, we request that the following or similar language be substituted for conforming amendment section 687 of S.1:

"SEC. 687 Trespass Upon Indian Land—

"(1) Whoever, without lawful authority or permission from authorized federal officials or from the tribal or individual Indian owner knowingly goes upon any land that belongs to any Indian or Indian tribe, band or group and either is held by the United States in trust or is subject to a restriction against alienation imposed by the United States, for any purpose, including hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be guilty of a Class B misdemeanor; and all game, fish and peltries in his possession shall be forfeited.

"(2) This section shall create a federal offense for the act of unauthorized simple trespass upon Indian lands."

We would also like to comment upon section 203(a)(3) (pp. 45–45) of the pending bill which, in effect, proposes a wholesale extension of federal jurisdiction over offenses committed in Indian country. In our earlier statements and comments submitted to this subcommittee during the 93d Congress, we objected to this provision as it was then embodied in S. 1400, and we were greatly disappointed to find that it was included in the revised committee print of October 15, 1974. Needless to say, we continue in our opposition to this provision. We fear that this section will extend jurisdiction by implication over those offenses committed on Indian lands which are particularly local in character and are presently handled in tribal courts. The provision in section 205(a)(2), which states that federal jurisdiction does not preempt an Indian tribe's exercise of jurisdiction in Indian country to enforce its laws applicable to the conduct involved, is not sufficient, in our opinion, to prevent the certain and substantial derogation of the successful operation of local self-government in our Indian communities.

Moreover, the implementation of the proposed extension of federal criminal jurisdiction would aggravate the present inability of federal prosecutors to enforce effectively the laws regarding offenses by non-Indians on Indian lands. We continue to doubt the adequacy of present federal resources to assume successfully any additional criminal enforcement responsibilities on Indian lands. More importantly, however, the effective denial of the exercise of inherent tribal jurisdiction over such matters constitutes a violation of recognized tribal sovereignty, and an interference with the exercise of tribal self-government. These important attributes of tribal existence are jealously guarded by Indian tribes throughout our country, and have found strong support in past and present opinions of the United States Supreme Court. *See United States* v. *Mazurie*, 43 U.S.L.W. 4174 (U.S., January 21, 1975; *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); *Willams* v. *Lee*, 358 U.S. 217 (1959); *Worcester* v. *Georgia*, 31 U.S. 515 (1832). We strongly urge your Committee to take full account of the important principle of Indian tribal sovereignty before final enactment of this legislation.

HANSON, O'BRIEN, BIRNEY, STICKLE AND BUTLER,
Washington, D.C., January 14, 1975.

PAUL C. SUMMITT, Esquire,
Chief Counsel, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, Washington, D.C.

DEAR MR. SUMMITT: In furtherance of your recent communication to me under date of December 19 and your discussions with Mr. Fenrich, my associate, I am pleased to be able to include here five pages of suggested language which we believe should be considered as and when S. 1 is taken up by the Subcommittee in detail. I recognize fully your time strictures and the fact that it is your hope that S. 1 will be introduced today. I am sure, however, that we both recognize that the likelihood of it being passed in the form it is introduced today is not in the spectrum of normal legislative procedure.

I would also suggest that if there are to be any further hearings concerning this subject in the Senate that ANPA would like to have the opportunity to appear.

I would also suggest that there is considerable doubt in the minds of many as to whether or not there is a substantial requirement for legislation in this field. If, however, the Subcommittee, the full committee, and the Senate proceed, we would respectfully ask that further consideration be given to the suggestions we enclose herewith.

I look forward to hearing from you concerning these matters.

Sincerely yours,

ARTHUR B. HANSON,
General Counsel, American Newspaper Publishers Association.

Enclosure.

ANPA RECOMMENDED CHANGES TO S. 1

1. § 1128(g)—*"national defense information"*

a. Objection: Scope of the term is too broad, particularly 1128(g)(7) and 1128(g)(10) which encompass a potentially unlimited range of information which could be concealed from the public without national security justification. Additionally, information in the public domain, from whatever source, should not be included.

b. Recommendation: Insert the word "military" as the first word in § 1128(g)(6) and (7) and insert the word "military" between "the" and "security" in § 1128(g)(10). Delete "pursuant to authority of Congress or by lawful act of a public servant" from the introductory language.

2. § 121. *Espionage.*

a. Objection: Failure to differentiate between specific intent to injure the United States or aid foreign power and intent to aid the United States by release of information to the public which might have short term prejudicial effects but long term benefits, i.e., Pentagon Papers.

b. Recommendation: Two categories of offenses. (1) Change present § 1121 to read: "A person is guilty of an offense if, *intending* that national defense information *will* be used to the prejudice of the safety of interest of the United States * * *" (2) Create a new offense, with a substantially reduced penalty, structured the same as § 1121(a) with the addition of the following:

"(b) Affirmative Defenses: It is an affirmative defense to a prosecution under this section that:

(1) The information was obtained, collected or communicated with the intent to inform the United States public for the ultimate benefit of the public; and

(2) The communication of such informaton can or could reasonably be expected to result in ultimate benefits to the United States which would outweigh any prejudice to the safety or interest of the United States resulting from the communication of such information to a foreign power."

3. § 1122. *Disclosing National Defense Information.*

a. Objection: Same as § 1121.

b. Recommendation: Same as § 1121.

4. § 1123. *Mishandling National Defense Information.*

b. Recommendation: Change § 1123(a) (1) and (2) to read: "being in authorized (unauthorized) possession or control of national defense information and knowing that such information may be used to the prejudice of the safety or interest of the United States, he:"

Establish the affirmative defense recommended for §§ 1121, 22.

5. § 1124. *Disclosing Classified Information.*

a. Objection: No requirement that the information relate ot the national defense and no element of intent to injure the United States or aid a foreign power. Additionally, a person should have a *judicial* remedy to declassify information without being subject to possible conviction.

b. Recommendation Add to § 1124(d).

"(3) the information was communicated with the intent to inform the United States public for the ultimate benefit of the public and the communication of such information could reasonably be expected to result in ultimate benefits to the United States which would outweigh any prejudice to the safety or interest of the United States resulting from the communication of such information to a foreign power."

Insert language authorizing federal district courts to render declaratory judgments, subsequent to the exhaustion of administrative remedies, regarding the lawful classification of the information.

THEFT AND RELATED OFFENSES

6. § 111—*"property" and "property of another"*

a. Objection: Definitions should explicitly exclude the intellectual information contained in tangible property (i.e., documents). Copying tangible property or verbally communicating the information contained in tangible property should not constitute a theft.

b. Recommendation: Add to definition of "property" and "property of another."

"* * * but does not include the information contained in tangible personal property as opposed to the property itself."

7. § 1731. *Theft.*

a. Objection: Should not apply to a case where someone copies a tangible object (i.e., document) or views the object and then records or transmits the information contained in the object without taking the object to the deprivation of the owner.

b. Recommendation: The recommended changes in the definition of "property" would solve this objection.

8. § 1732. *Trafficking in Stolen Property.* § 1733. *Receiving Stolen Property.*

a. Objection: To the extent that the definition of "property" applies to the information contained in tangible objects, the press could be prosecuted under § 1732 and § 1733 for receiving and publishing copies of government documents or verbal leaks from government employees. Additionally, the elements of intent and knowledge contained in the present statute 18 U.S.C. § 641 have been eliminated.

b. Recommendation: Proper definition of "property" will solve first objection. Change § 1732(a) to read:

"(a) Offense: a person is guilty of an offense if the traffic in property of another knowing that such property has been stolen."

Change § 1733(a) to read:

"(a) Offense: a person is guilty of an offense if he buys, receives, possesses, or obtains control of property of another with the intent to convert it to his use or gain, knowing it to have been stolen."

9. § 1358. *Retaliating Against a Public Servant.*

a. Objection: No requirement of intent to injure. This offense would restrict freedom of press from publishing editorials which criticize public officials for their actions.

b. Recommendation: Change introductory phrase to read:

"(a) Offense: a person is guilty of an offense if he *intentionally*:

10. § 1523. *Intercepting Correspondence.*

b. Recommendation: Add to subsection (a)(2)—"provided that, nothing shall prohibit a news media organization from receiving or publishing private correspondence which has not been intercepted by or opened by such organization."

UNIVERSITY OF WISCONSIN-MADISON,
LAW SCHOOL,
Madison, Wis., January 29, 1975.

Hon. ROMAN L. HRUSKA,
U.S. Senator,
Washington, D.C.

DEAR SENATOR: This is a reply to your letter of January 20 in which you ask for my reactions to the incorporation of the criminal rules in S. 1. We did meet with members of the Senate Judiciary Committee and representatives of the Department of Justice. It is the opinion of Judge Lumbard, Wayne LaFave, and myself that it is appropriate to incorporate the Rules of Criminal Procedure in S. 1, and it is also our opinion that S. 1 well formulates these rules. Indeed, I think your staff is to be commended for the way in which they have accomplished the task. They have not only accurately incorporated the rules, but have in a number of instances substantially improved the clarity of the rules.

As you know, the rules in S. 1 are in the form approved by the Supreme Court and transmitted to the Congress. These are now pending in Congressman Hungate's House Judiciary Subcommittee. The present effective date is August 1, 1975. Should the Congress make changes in the rules approved by the Supreme Court, it will, of course, be necessary to make corresponding changes in S. 1.

Best regards,

FRANK J. REMINGTON, *Professor of Law.*

JANUARY 20, 1975.

Prof. FRANK J. REMINGTON,
University of Wisconsin Law School,
Madison, Wis.

DEAR PROFESSOR REMINGTON: As Reporter of the Advisory Committee on Criminal Rules of the Judicial Conference, you are aware that last year Con-

gress delayed the effective date of the proposed amendments to the Federal Rules of Criminal Procedure in order to allow sufficient time for study by the Congress. The amendments will take effect on August 1 unless Congress acts otherwise.

Because the Federal Rules of Criminal Procedure are codified in title 18, S. 1, the Criminal Justice Reform Act of 1975, introduced on January 15, incorporates these Rules as part of the revision of title 18. The thrust of the proposed amendments to the Rules is also embodied in the bill because these amendments, or variants thereof, will take effect before the provisions of S. 1 become effective. (The effective date of S. 1 is delayed for one year following enactment.)

Douglas Marvin of the Senate Judiciary Committee has informed me that he, along with Paul Summitt, Chief Counsel of the Senate Subcommittee on Criminal Laws and Ronald Gainer of the Department of Justice, met with you, Judge Lumbard and Professor Lafave on the incorporation of the Federal Rules of Criminal Procedure. It is my understanding that, as members of the Advisory Committee on Criminal Rules of the Judiciary Conference, you were of the opinion that incorporation of the Rules of Criminal Procedure in S. 1 was appropriate and that S. 1 well formulates these rules.

Because the scratch of the pen is often of more worth than a verbal recital, I would appreciate it if you could take the time to respond on the accuracy of my understanding.

With kind regards,

Sincerely,

ROMAN L. HRUSKA,
U.S. Senator, Nebraska.

MAY 14, 1975.

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: The following are the views of the Department of Justice concerning the amendment of one aspect of the present Juvenile Delinquency Act.

The present "Juvenile Justice and Delinquency Prevention Act of 1974" (Public Law No. 93-415, September 7, 1974) contains a provsion which could cause an undue burden on federal prosecutors and the judiciary under certain circumstances. This cause for concern stems from the possible application of the certification provision found in Section 5032 of Title 18 U.S.C. to juvenile delinquents charged with petty offenses, the penalty for which does not exceed 6 months imprisonment, a $500 fine or both. The great majority of petty offenses committed by juveniles occur in our nation's parks, forests and military enclaves and consist primarily of minor traffic violations or disorderly acts which are ordinarily disposed of through collateral forfeiture.

Under the present act, a certification procedure has been established whereby the United States, before it can assume jurisdiction in a juvenile case, must first conduct an investigation after which it must be able to certify to the United States district court that the juvenile court or other appropriate court of a State (1) does not have or refuses to assume jurisdiction over the juvenile offender or, (2) does not have available programs and services adequate for the needs of juveniles. It is readily apparent that if the requirement for such a procedure is applied to the handling of juvenile petty offenders on our various federal enclaves the effect would be quite burdensome and law enforcement on federal reservations would be seriously impaired.

Therefore it is recommended that the 1974 Juvenile Act be amended in the new criminal code so that the necessity for such a procedure will not be required in the handling of juveniles who have committed petty offenses on federal enclaves. We strongly urge that the amendment also provide for the handling of such offenders by the United States Magistrates.

Sincerely,

JOHN C. KEENEY,
Acting Assistant Attorney General.

[From South Dakota Law Review, Vol. 20, Winter 1975]

THE INDIAN CIVIL RIGHTS ACT OF 1968 AND THE PURSUIT OF RESPONSIBLE TRIBAL SELF-GOVERNMENT

(by Joseph de Raismes*)

This article, along with its companion in this issue, examines the Indian Civil Rights Act of 1968. The author urges that the Act be interpreted broadly thereby granting free access to the federal courts to insure protection of Indian civil rights.

INTRODUCTION

According to Gerald Wilkinson, Executive Director of the National Indian Youth Council, it is axiomatic that "every Indian is opposed to the Indian Civil Rights Act . . . until he has been screwed by his tribal council." [1] Indeed, it has become an article of faith among advocates of Indian self-determination that the guarantees provided by the Indian Civil Rights Act of 1968, title 25 United States Code sections 1301-1303, strike at the heart of tribal sovereignty and threaten the basis of tribal self-government by allowing review of tribal action in the federal courts according to criteria borrowed from the Bill of Rights and couched in the familiar language of American constitutional jurisprudence.[2]

Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights, 3 COLUM. SURVEY HUMAN RIGHTS L. 49 (1970) [hereinafter cited as COLUM. SURVEY HUMAN RIGHTS L. Note]; Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969) [hereinafter cited as HARV. L. REV. Note]; Note, *Equitable and Declaratory Relief Under the Indian Civil Rights Act*, 48 N.D.L. REV. (1972); Note, *Indians—Criminal Procedure: Habeas Corpus as an Enforcement Procedure Under the Indian Civil Rights Act of 1968*, 46 WASH. L. REV. 541 (1971).

The Indian Civil Rights Act has been decried as an imposition of Anglo-Saxon values on a conquered people without their consent, and some commentators have implied that Congress did not adequately consult with Indian people and their tribes prior to the enactment of the legislation.[3] Since Senator Ervin's Subcommttee on Constitutional Rights held extensive hearings over a period of seven years, Congress cannot be faulted for a lack of effort in consulting Indian people. An extensive legislative history was in fact compiled.[4] However, it is safe to state that Congress did not sufficiently consider the actual effect of the provisions of the Indian Civil Rights Act on tribal self-government or the customs and values of the different Indian nations. The Act left many important questions unanswered, particularly the deference, if any, to be paid to tribal cultures and governmental structures and the remedies to be afforded for violations of the Indian Civil Rights Act. As a result of these deficiencies, and as a consequence of growing assertions of the transcendent importance of tribal sovereignty with the demise of the "termination" policy of the 1950's,[5] the

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*A.B., Yale, 1967; J.D., Harvard, 1970. Member of the Bar of Colorado, Counsel for the Mountain States Region of the American Civil Liberties Union and Staff Counsel to the A.C.L.U. Indian Rights Committee. The opinions expressed in this article are attributable only to the author and not to the A.C.L.U. or the A.C.L.U. Indian Rights Committee.

[1] Statement of Gerald Wilkinson, *quoting* Chairman of the Mescalero Apache Tribe, Minutes of the A.C.L.U. Indian Rights Comm. Meeting 21 (Aug. 9, 19, 1974).

[2] *See, e.g.*, AMERICAN INDIAN TRIAL LAWYERS ASSOCIATION, THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER (1974) [hereinafter cited as THE INDIAN CIVIL RIGHTS ACTS, FIVE YEARS LATER]; Bean, *The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers*, 49 N.D.L. REV. 303 (1973); Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1969); Warren, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255 (1972); Note, *Federal Law and Indian Tribal*

[3] *E.g.*, THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER, *supra* note 2, at 49, 76.

[4] *See* Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557 (1972) [hereinafter cited as Burnett].

[5] The termination policy was expressed by Congress in the preamble to a joint resolution: [I]t is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the U.S., and to grant them all the rights and prerogatives pertaining to American Citizenship. H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953).

The policy was implemented by terminating certain tribes through special legislation and by allowing states to assume criminal and civil jurisdiction over reservatons within their boundaries. See F. COHEN, FEDERAL INDIAN LAW 262 (1971). The Indian Civil Rights Act of 1968 was passed as a compromise, to accomplish the protection of individual rights championed by the termination policy while reasserting the sovereignty of the Indian tribes and repudiating the specific instruments of the termination policy.

Indian Civil Rights Act has been the subject of extensive controversy and varying judicial construction.

In the view of this author a government which fails to establish and maintain its legitimacy will ultimately forfeit its viability. Unfortunately, tribal justice systems have often failed to provide equal justice. Accordingly, I would submit that the rule of law and some impartial review of tribal actions are critical to the continued defense of the sovereignty of American Indian tribes. The Indian Civil Rights Act, in establishing criteria of legality, and review of tribal action by a federal tribunal, can go far toward legitimating tribal government in the eyes of both Indian people and their white neighbors. Revision of the Indian Civil Rights Act may be in order, but the fundamental rights of Indian people can no longer be ignored.

The ultimate battle is for jurisdiction over non-Indians in Indian country, for true sovereignty over the tribal land base and control over federal programs. In my view, the Indian Civil Rights Act, despite its flaws, is an important aid in securing those goals, as well as the ultimate goal of responsible and effective tribal self-government.

After a sketch of Indian civil rights prior to the passage of the Indian Civil Rights Act of 1968, this article will consider the background of tribal government, the abuses which Indian civil rights must be viewed. In particular, I will attempt to sketch what I see as the contours of the obligation which lies before the federal courts and the advocates of tribal self-government. That obligation is to define a "flexible" means of interpretation which will allow for the continued defense of tribal sovereignty or tribal cultural autonomy, while permitting the vigorous advocacy and defense of the fundamental human rights of Indian people.What is needed is a standard, and I propose that the standard enunciated by the Supreme Court in the case of *Wiconsin v. Yoder*,[6] under the free-exercise clause of the first amendment, be applied to protect "central cultural values" from an overzealous enforcement of the Indian Civil Rights Act. The case law development since 1968 will be discussed against that backdrop, concentrating on election, membership, jurisdictional and remedial problems. Finally, I will discuss some of the problems which I see in the Act, and I will propose revisions of the statute to enhance responsible tribal self- government.

INDIAN CIVIL RIGHTS PRIOR TO THE INDIAN CIVIL RIGHTS ACT OF 1968

In the landmark case of *Worcester v. Georgia*,[7] Mr. Chief Justice Marshall, in rejecting state jurisdiction over a crime allegedly committed by a white missionary on the Cherokee reservation, laid down the enduring dictum that Indian tribes are to be "considered as distinct, independent political communites . . ."[8] retaining powers of self-government, subject only to supervening federal authority.[9] Since *Worcester*, the federal courts have in fact been the primary protectors of tribal sovereignty. As stated in a recent note:

"The right of tribal self-government is probably the most basic concept in all of Indian law. . . . Indeed, the courts have played such a large role in asserting and reaffirming this principle that, although the right is an inherent part of original sovereignty, the doctrine itself may be said to be judicial.[10]

The doctrine of tribal sovereignty enunciated in *Worcester* was reaffirmed in the case of *Ex Parte Crow Dog*.[11] The Supreme Court in *Crow Dog* held that the alleged murder of one Sioux by another on the reservation was not within the criminal jurisdiction of any court of the United States, state or federal, and that only the tribe could punish the offense. The furor caused by the tribe's refusal to prosecute the accused led in turn to the passage of the Major Crimes Act of 1885,[12] which gave the federal courts original jurisdiction over cases involving the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny when committed in "Indian Country" by one Indian against another. To this list, robbery, incest and assault with a deadly weapon were later added.[13]

In upholding the constitutionality of the Major Crimes Act in *United States v. Kagama*,[14] the Supreme Court once again reaffirmed the principle that unless Congress dictates otherwise, Indian tribes may legislate and administer their own criminal and civil laws without outside interference. The Court again recognized the Indians' "semi-independent position . . . not as possessed of the full attributes of sovereignty, but as separate people, with the power of regulating their internal and social relations. . . ."[15]

The federal preemption of tribal criminal jurisdicton over major crimes was paralleled by the end of treaty making between the federal government and the tribes in 1871,[16] and the devastating General Allotment (Dawes) Act of 1887,[17] which parcelled out Indian lands, destroying the tribal land base. The latter had the immediate effect of reducing tribal control of internal affairs almost to a nullity. The assimilationist cast of federal Indian legislation endured until the Indian Reorganization (Wheeler-Howard) Act of 1934,[18] which ended the allotment policy and had as one of its additional purposes the reorganization of tribal government. According to Senator Wheeler the Act sought "to stabilize the tribal organization of Indian tribes by vesting such organizations with real, though limited authority, and by prescribing conditions which must be met by such tribal organizations."[19]

Yet even during the darkest hours of Congress' assimilationist policy, the federal courts remained faithful to the doctrine of tribal sovereignty enunciated in *Worcester* and refused to allow incursions into tribal sovereignty without an explicit declaration by Congress of federal polcy. This deference was particularly marked in the area of Indian-civil rights, that is, the rights of individual Indians against their tribal governments. From the landmark case of *Talton v. Mayes*,[20] the federal courts consistently refused to extend the protections of the Bill of Rights to the relationship between individual Indian people and their tribes. To be sure, the federal preemption of criminal jurisdiction over the major crimes had made the Constitution applicable to the most serious cases involving the application of governmental authority to individual Indian people, albeit at the cost of heavy federal involvement in the tribal legal systems. However, the federal courts continued to defend the exclusive tribal civil and misdemeanor jurisdicton. Congress did make the standing of Indian peole to claim the protection of constitutional guarantees clear in the Indian Citizenship Act of 1924,[21] but the Act has been of little significance.[22]

The *Talton* holding, which concerned a tribal five-man grand jury asserted to be unconstitutional under the sixth amendment, precluded the assertion of any remedial right conferred by the Constitution against a tribal government, absent specific federal legislation. As has been noted:

"Left open by the holding, and never decided by the Supreme Court, was whether a tribal government, again absent any federal action, may deny its members a fundamental right—an inviolable and personal liberty—under the Constitution. . . . The lower federal courts, through, in a series of decisions withholding basic Bill of Rights protections, eventually filled that gap.[23]

The so-called constitutional immunity doctrine which tribal governments

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[6] 406 U.S. 205 (1972).
[7] 31 U.S. (6 Pet.) 515 (1832).
[8] *Id.* at 559.
[9] *Id.* at 561.
[10] Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).
[11] 109 U.S. 556 (1883).
[12] Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385, *as amended*, 18 U.S.C. §§ 1153, 3242 (1970).
[13] Act of March 4, 1909, ch. 321, §§ 328–30, 35 Stat. 1151; Act of March 3, 1911, ch. 231, § 296, 36 Stat. 1167; Act of June 28, 1932, ch. 284, 47 Stat. 337, 18 U.S.C. §§ 1153, 3242 (1970). The crimes of carnal knowledge of a female under sixteen and assault with intent to rape were added in 1966. Act of Nov. 2, 1966, Pub. L. No. 89–707, 80 Stat. 1101, 18 U.S.C. §§ 1153, 3242 (1970). In 1968, assault resulting in serious bodily injury was added. Act of April 11, 1968, Pub. L. No. 284, § 501, 82 Stat. 80, 18 U.S.C. § 1153 (1970). These crimes, plus infringement of a few federal laws applicable to both Indians and non-Indians, *e.g.*, 18 U.S.C. §§ 438, 1154–65, 1953 (1970); 25 U.S.C. §§ 179, 202 (1970), constitute the only acts of Indians against each other on Indian land that are federal crimes. All other such offenses are solely within tribal jurisdiction.
[14] 118 U.S. 375 (1886).
[15] *Id.* at 381.
[16] Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, 25 U.S.C. § 71 (1970).
[17] Ch. 119, 24 Stat. 388, *as amended*, 25 U.S.C. §§ 331–58 (1970).
[18] Act of June 18, 1934, ch. 576, §§ 1–18, 48 Stat. 984, *as amended*, 25 U.S.C. §§ 461–79 (1970).
[19] SEN. REP. No. 1080, 73d Cong., 2d Sess. (1934).
[20] 163 U.S. 376 (1896).
[21] Ch. 233, 43 Stat. 253.
[22] Johnson, *Sovereignty, Citizenship and the American Indians*, 15 ARIZ. L. REV. 973 (1973).
[23] Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. REV. 337, 341 (1969) [hereinafter cited as Lazarus].

enjoyed had both its good and bad aspects. It permitted tribes to retain their own legal systems and concepts of justice while avoiding non-Indian interference with traditional cultural norms. On the other hand, it permitted tribal governments to wield unchecked authority over all aspects of tribal life. This problem was exacerbated after the Indian Reorganization Act of 1934, when many tribal governments adopted tribal constitutions patterned after those of the state and federal governments; consequently, their remaining traditional forms of checks and balances were largely eliminated.

Evidence of the growing dissatisfaction with tribal government and with the unavailability of means of redress with tribal institutions can be seen in the number of lawsuits filed in federal courts seeking judicial review. For example, reservation Indians have alleged that their tribal governments have arbitrarily banished them from the reservation,[24] restricted their religious freedoms[25] conducted tribal elections in violtion of their own election rules,[26] prevented them from holding office,[27] misused tribal lands and land sale proceeds,[28] failed to ensure justice in tribal courts,[29] and failed to provide decent conditions in tribal jails.[30] Since no federal right was violated under the *Talton* doctrine, complaints filed prior to the Indian Civil Rights Act of 1968 were routinely dismissed by the courts for lack of jurisdiction.[31]

Exceptions to the constitutional immunity doctrine appeared in the years immediately preceding the enactment of the Indian Civil Rights Act of 1968. It became apparent that at least some courts would no longer adhere to the rule of absolute immunity and that *Talton* could be viewed as precluding remedial guarantees only and not as precludng application of fundamental substantive provisions of the Bill of Rights.

The Ninth Circuit was the first court to break ranks with the cases of *Colliflower v. Garland*,[32] and *Settler v. Yakima Tribal Court*.[33] In *Colliflower* and *Settler*, the Ninth Circuit assumed jurisdiction over disputes between individual Indians and their tribes pursuant to the Constitution and the federal habeas corpus statute. The court rationalized that, despite the theory that for some purposes an Indian tribe is an independent sovereignty, it would be "pure fiction to say that the Indian courts are not in part, at least, arms of the federal government."[34]

Colliflower concerned a tribal criminal prosecution for trespass and *Settler* concerned a prosecution for a violation of a tribal fishing regulation. The Ninth Circuit concluded that neither type of regulation concerned affairs so "internal" as to preclude a challenge to the jurisdiction of the tribal court. Nor should he be precluded from challenging the fairness of a hearing in the tribal court under the United States Constitution. Thus, although the court was anxious to emphasize that it did not follow from its decisions that all tribal courts must comply with every constitutional restriction applicable to federal or state courts, the court did extend certain of the protections afforded by the due process clause of the fifth amendment to tribal court procedure. In other words, the court began the process of "selective incorporation" of provisions of the United States Constitution into the relationship between individual Indians and their tribal governments.

Some commentators have sought to limit the *Colliflower* precedent to its facts, and it is true, as Attorney General Robert Kennedy concluded, that *Colliflower* "virtually stands alone in upholding the competence of a federal court to inquire into the legality of an order of an Indian court." [35] But the case

[24] *E.g.*, Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957); Fast Horse (Grey Eagle) v. Fort Hall Tribal Council, Case No. 4-73-74 (D. Idaho 1972).
[25] *E.g.*, Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.N.M. 1954).
[26] *E.g.*, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973); Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971).
[27] *E.g.*, Luxon v. Rosebud Sioux Tribe, 455 F.2d 698 (8th Cir. 1972), *on remand* Civ. No. 71-46 (D.S.D. March 15, 1972).
[28] *E.g.*, McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973).
[29] *E.g.*, Dicke v. Cheyenne-Arapaho Tribes, Inc., 304 F.2d 113 (10th Cir. 1962); Lake v. Peabody Coal Co., Civ. No. 72-209 (D. Ariz. Sept. 26, 1973).
[30] *E.g.*, Prairie Band of the Pottawatomie Tribe v. Puckkee, 321 F.2d 767 (10th Cir. 1963); Crooked Foot v. United States, Civ. No. 73-3031 (D.S.D. Sept. 5, 1973).
[31] *E.g.*, Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
[32] 342 F.2d 369 (9th Cir. 1965).
[33] 419 F.2d 486 (9th Cir. 1969).
[34] 342 F.2d at 379.
[35] *Hearings on H.R.* 15419, 15122, *S.* 1843 *Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 90th Cong., 2d Sess. 16 (1968).

deserves more careful consideraton than it has received, since the passage of the Indian Civil Rights Act of 1968 has essentially adopted its holding into federal law.

Mrs. Colliflower was sentenced by the Fort Belknap Court of Indian Offenses to five days in jail for failing to remove her cattle from land leased by another person. Claiming denial of rights to trial, counsel and confrotaton of witnesses, she appealed to the Ninth Circuit, which upheld jurisdiction under the federal habeas corpus statute. The *Colliflower* opinion discusses in detail its finding that the federal executive department created and imposed the tribal courts upon the Indian community, and still retains "partial control" over them.[36] The court stressed the federal origin of the Fort Belknap tribal court, the federal role in the development and supervision of the court, the court salaries and contracts which remain subject to federal approval and appropriation,[37] and the Fort Belknap Code of Indian Tribal Offenses, which was "taken almost verbatim from the regulatons of the Bureau of Indian Affairs." [38]

The *Colliflower* court acknowledged the doctrine of tribal sovereignty and recognized that *Oliver v. Udal*,[39] had held that adoption by a tribe of the federal "law and order" code makes the code tribal law, not federal law. Indeed, the tribe's lack of desire or resources to refine the B.I.A. code or fit the letter of the law better to their circumstances and their customary law certainly cannot be held to justify further federal intrusion. But the alien system of the tribal courts, applying the B.I.A.'s "law and order" code, has, in fact, often been in conflict with the remnants of traditional tribal cultural norms and justice systems. This would appear to be the thrust of the Ninth Circuit's reasoning.

The *Colliflower* court also bowed to the principle that the Indian Citizenship Act of 1924 had not affected the jurisdiction or status of the tribal courts, citing *inter alia*, *Iron Crow v. Oglala Sioux Tribe*,[40] a case which had upheld the *Talton* doctrine. On the other hand, the troublesome case of *In re Sah Quah*,[41] was cited for the application of the thirteenth amendment to Eskimos, although no tribal judgement was at issue in that case.

Talton v. Mayes [42] was distinguished, not on the grounds of the procedural or remedial character of the grand jury issue, but on the grounds that the Supreme Court in fact decided *Talton* on the merits. *Colliflower* quoted somewhat ambiguous language of *Talton* to the effect that "the Indian tribes are subject to the dominant authority Congress, and . . . their powers of local self-government are also operated upon and restrained by the general provisions of the Constitution of the United States." [43]

Thus, based upon the particular facts of the history and status of the Fort Belknap tribal court, the Ninth Circuit found habeas corpus jurisdiction and remanded to the district court, stating cryptically that

> these courts function in part as a federal agency, consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court. We confine our decision to the courts of the Fort Belknap reservation. The history of other Indian courts may call for a different ruling, a question which is not before us.[44]

The commentators have generally disagreed with the *Colliflower* court. They suggest that despite the unique statutory status of the B.I.A.'s Courts of Indian Offenses "there [is] little qualitative difference between the functions of such courts and those of tribal courts." [45]

To be sure, the *Colliflower* case left much unsettled. In particular, it failed to determine which substantive constitutional restrictions should be applied to tribal courts pursuant to federal habeas corpus jurisdiction. *Colliflower* suggested that the fourteenth amendment, directed at the states, might not apply to tribal courts and that certain other constitutional restrictions applicable of the "sovereignty that the tribe retains and exercises through its Tribal Coun-

[36] 342 F.2d at 379.
[37] *Id.* at 373.
[38] *Id.* at 374.
[39] 306 F.2d 819 (D.D.C. 1962).
[40] 231 F.2d 89 (8th Cir. 1956).
[41] 31 F. 327 (D. Alas. 1886).
[42] 163 U.S. 376 (1896).
[43] 342 F.2d at 378, *quoting* Talton v. Mayes, 163 U.S. 376 (1896).
[44] *Id.* at 379.
[45] Burnett, *supra* note 4, at 591 n.200. *See also* Lazarus, *supra* note 19, at 343; Colum. Survey Human Rights L. Note, *supra* note 2, at 73. *But see* Harv. L. Rev. Note, *supra* note 2, at 1350.

cil and Tribal Courts . . . ." [46] The court cited the Insular cases in this regard, including *Territory of Hawaii v. Mankichi*,[47] which applied a constitutional standard of fundamental fairness. However, the district court had no difficulty in concluding, on remand, that there had been a total lack of due process and that Mrs. Colliflower was entitled to be released under any standard.[48]

Although the Ninth Circuit purported not to comment on the validity of Mrs. Colliflower's claims, the record was cited as supporting them,[49] and it is certainly true that: "What emerges from a close reading of *Colliflower* . . . is not a cohesive new theory of constitutional law, but rather a distinct impression that the Court of Appeals found a gross injustice to have been perpetrated and simply decided to stop it." [50]

In the *Settler* case, the Ninth Circuit followed its decision in *Colliflower* but added a standard for review of tribal court action. The standard was designed to avoid federal court interference with tribal self-government except in extreme cases. The court reasoned that intervention has always been possible when the procedures of the tribal court are "so summary and arbitrary as to shock the conscience of the federal court," [51] thus presumably making the federal courts' consciences the test of their jurisdiction over tribal actions.

It is important to note that the Ninth Circuit has remained *alone* among the federal courts in its acceptance of jurisdiction to review actions of tribal institutions under the Bill of Rights. The Eighth Circuit upheld the broad *Talton* doctrine in refusing jurisdiction in *Iron Crow v. Oglala Sioux Tribe*.[52] However, it deviated somewhat in *Barta v. Oglala Sioux Tribe*,[53] and affirmed the jurisdiction found by the district court [54] in a tax collection action brought by the tribe against a nonmember. Both the district and circuit courts found jurisdiction under the Indian Reorganization Act of 1934 and the tribe's organization under federal law. However, the circuit court then upheld the tribe's right to assess a discriminatory tax on nontribal members, despite the due process protections of the fifth amendment and the equal protection clause of the fourteenth amendment. Thus, despite the court's jurisdictional holding, the Eighth Circuit continued to deny the applicability of federal constitutional provisions to tribal actions.

The Tenth Circuit was guided by similar principles in the cases of *Martinez v. Southern Ute Tribe*,[55] and *Native American Church v. Navajo Tribal Council*.[56] In *Native American Church*, as in *Barta*, the Tenth Circuit acknowledged jurisdiction, even though the Navajo tribe was not organized under the Indian Reorganization Act. The court directly faced the religious freedom argument raised by the Navajo's prohibition of peyote on the reservation and held that the Bill of Rights did not apply to the tribe.

The Ninth Circuit in *Colliflower* distinguished all of the cases from other circuits on varying grounds. *Iron Crow* was distinguished as holding only that the tribal court had jurisdiction over the adultery case at issue.[57] Further, since *Martinez*, *Native American Church* and *Barta* did not address the propriety of federal habeas corpus review of tribal court decisions, the *Colliflower* court did not consider them binding on that question. In other words, the *Colliflower* precedent rejected the *Talton* doctrine only insofar as it asserted federal habeas corpus jurisdiction to review the disposition of cases within the criminal jurisdiction of the tribal courts.

While the federal courts generally continued to decline to apply constitutional guarantees, the state courts began in the 1960's to reflect the erosion of the *Talton* doctrine. Thus, the plaintiff in the *Martinez* case was successful in seeking a remedy in the Colorado state courts. In *Martinez v. Southern Ute Tribe*,[58] the Colorado Supreme Court, noting that the plaintiff had been denied a hearing in tribal and federal courts, reasoned that under these conditions to deprive the plaintiff of a state remedy would be to deny her any remedy whatsoever thus depriving her of equal protection of the laws. The court therefore agreed to hear the case, which had resulted in the plaintiff's exclusion from the reservation. Similarly, the Idaho Supreme Court, in *Boyer v. Shoshone-Bannock Indian Tribes*,[59] recognized the otherwise unprotected position of an Indian tribal council member in a suit brought in a state court to enjoin tribal officials from preventing him from holding his elected office. Once again, the ground for the decision was that the plaintiff must have an opportunity to confront the tribe in some court. If both the federal and tribal courts continued to decline jurisdiction, the state court was compelled to assume jurisdiction and decide the case.[60]

[46] 342 F.2d at 379.
[47] 190 U.S. 197 (1903).
[48] Colliflower v. Garland, Civ. No. 2414 (D. Mont. Aug. 19, 1965), *cited in* Lazarus, *supra* note 19, at 344 n.29.
[49] 342 F.2d at 379.
[50] Lazarus, *supra* note 19, at 344.
[51] 419 F.2d at 489.
[52] 231 F.2d 89 (8th Cir. 1956).
[53] 259 F.2d 553 (8th Cir. 1958).
[54] Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (D.S.D. 1956).
[55] 249 F.2d 915 (10th Cir. 1957).
[56] 272 F.2d 131 (10th Cir. 1959).
[57] 342 F.2d at 378.
[58] 150 Col. 504, 374 P.2d 691 (1962).

This, then, was the posture of Indian civil rights prior to the Indian Civil Rights Act of 1968. The tribal sovereignty doctrine enunciated in *Worcester* was alive and well. *Williams v. Lee* [61] had affirmed the exclusive jurisdiction of the Navajo tribal court over civil suits brought by outsiders against tribal members, in continuing recognition of the prerogatives of tribal self-government. The doctrine of "constitutional immunity" enunciated in the *Talton* case was becoming more difficult to sustain, however, and the Ninth Circuit and the Colorado and Idaho Supreme Courts had begun to reflect dissatisfaction with the lack of review of tribal actions as the complaints from individual Indians became more numerous and more adamant. The Tenth Circuit's denial of constitutional protection to the peyote church in *Native American Church* stimulated both the judicial revolution of *Colliflower* and its limited progeny and the Congressional inquiry which led to the formulation of the Indian Civil Rights Act of 1968.

THE ABUSES OF TRIBAL SELF-GOVERNMENT AND THE GENESIS OF THE INDIAN CIVIL RIGHTS ACT OF 1968

Until the passage of the Indian Reorganization Act of 1934, the system and quality of tribal government varied with the tribe. Prior to their military defeat by the white man, all tribes had centuries-old methods for governing themselves, some by hereditary religious or clan leaders. For some tribes, self-government entirely broke down after their defeat and their eviction from their ancestral lands. For others, the federal government took over many governmental functions or reorganized tribal government according to its own needs and priorities. However, in 1934, the federal government imposed on most tribes a uniform system of elective tribal councils, styled according to the traditional Anglo-American model. Today there are approximately 250 Indian tribes with identifiable governments; 95 of these have constitutions written in conformity with the Indian Reorganization Act.[62] Most of the remainder exercise a form of self-government organized along similar lines.

But the conflict between traditional and elective leaders continues on many reservations. Council members are supposed to be elected democratically by the people, but in practice the elective systems have been so alien to large numbers of Indians that majorities on many reservations have consistently refused to vote in tribal elections and continue even today to view the councils as institutions of the white man rather than of their own people. It is not infrequent to find the percentage voting in a tribal election varying between 10 and 25 percent of the qualified electorate.

The gap thus created between the tribal governments and the Indians who do not accept them was severe in the past—indeed it has been an inhibiting factor in Indian development for a long time. However, the move to foster Indian self-determination, together with both the greatly increased funds which have been appropriated for Indians in recent years and the increasing development of Indian country, have worsened the situation by increasing the power and financial resources of the tribal councils and officers. In effect, many small political and economic Indian "establishments" have been created on the reservations. This system, encouraged by the Bureau of Indian Affairs, has all too often resulted in accelerating the growth of corrupt little tyrannies, with little accountability either to the individual Indian people of their presumed constituencies or to the culture and traditions of the tribes. These new ruling factions, together with their friends and relatives, acting in collusion with B.I.A.

[59] 92 Idaho 247, 441 P.2d 167 (1968).
[60] *Id.* at 262, 441 P.2d at 172.
[61] 358 U.S. at 217 (1959).
[62] Kerr, *Constitutional Rights, Tribal Justice and the American Indian*, 18 J. Pub. L. 311, 316 (1969).

officials and the white interests desiring to exploit the reservation resources, have come to serve almost as willing arms of the federal government on many reservations.

The B.I.A. is the key. The Indian Reorganization Act of 1934 had as its "prime objective . . . which was crucial to any effective establishment of self-government . . . [the] elimination of the 'absolutist' discretion previously exercised by the Interior Department and the Office of Indian Affairs," [63] Yet the Indian Reorganization Act, according to Commissioner Collier, its architect, sought to *maintain* federal "guardianship" while shifting to tribal self-government and Indian "administration" and "control" over Indian affairs.[64] This could, in fact, only be accomplished by retaining broad federal powers to review and even to veto tribal actions, mitigated by the Indian preference provisions which were designed to make the B.I.A. more responsive to Indian concerns.[65] Even under the Act as passed

"[t]he Secretary was empowered to review many actions of the tribal governments and still retains close control over tribal government. The rationale for this federal control was that at the time of the adoption of the tribal constitutions and charters under the I.R.A., most Indians had had little experience in managing their own affairs." [66]

The problem is that the relationship thus formed between the B.I.A. and the new tribal governments, together with the bureaucratic attitude of the B.I.A., may actually have *increased* federal control over tribal actions.[67] Indeed, it is generally conceded that the Indian Reorganization Act has failed "to fulfill the promise of shifting to Indians the control of Indian affairs." [68]

The B.I.A. oversees most tribal actions [69] and administers all federal Indian programs.[70] B.I.A. approval is required before tribal government may enter into contracts [71] or expend tribal funds.[72] Even more important, every constitution adopted under the Indian Reorganization Act contains a provision allowing the Secretary of the Interior to veto nearly any ordinance passed by a tribal council for "any cause." [73] Further, B.I.A. approval is a prerequisite to adopting or amending the tribal constitutions.[74] Much of this pervasive federal control is not specifically mandated by statute but is achieved by the B.I.A.'s practice of formulating model codes and resolutions for passage by the tribes.[75] In summary:

"To most Indians, federal supervision, then, has meant economic exploitation and paternalism, both of which have been accompanied by efforts to trample upon or ignore the traditional Indian culture. It appears that neither Indians nor the federal government can choose between the dilemma of preservation of tribal lands and cultures or assimilation of the Indian into American society.

"In addition to this, traditonal tribal politics has been consensual politics. Delay in tribal action has often been the result and consequently 'tribal policy' often means the *status quo* . . . . Federal paternalism and lack of leadership and factionalism within the tribes have produced Indian governments which endorse the *status quo*, practice nepotism, and perpetuate personal political organizations rather than reform or policy oriented governments . . . . Federal legislation and usage, at any rate, have proclaimed self-government but have treated the Indians as though they were generally incapable of it." [76]

[63] MICH. L. REV. Note, *supra* note 10, at 966.
[64] *See Hearings Before House Committee on Indian Affairs*, 73d Cong., 2d Sess. 20 (1934).
[65] *See* S. 2755, 73d Cong., Title I, §§ 3–5, 9 (1934).
[66] MICH. L. REV. Note, *supra* note 10, at 968–69.
[67] *Id.* at 976–77.
[68] *Id.*
[69] *See, e.g.*, 25 U.S.C. § 373 (1970) (approval of wills); 25 U.S.C. § 483 (1970) (approval of alienation of land).
[70] The B.I.A. administers, *e.g.*, its own welfare and guidance system, a relocation and employment agency, a vocational training program, a revolving loan fund and a system of Indian schools.
[71] 25 U.S.C. § 81 (1970).
[72] 25 U.S.C. §§ 13, 145 (1970).
[73] COLUM. SURVEY HUMAN RIGHTS L. Note, *supra* note 2, at 54–55.
[74] 25 U.S.C. § 476 (1970). *See also* HARV. L. REV. Note, *supra* note 2, at 1350 n.33.
[75] *Subcommittee on Constitutional Rts. of the Senate Committee on the Judiciary, Summary Report of Hearing and Investigations on Constitutional Rts. of American Indians*, 88th Cong., 2d Sess. (1964). HARV. L. REV. Note, *supra* note 2, at 1350. *See generally* COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPONSIBILITIES OF THE AMERICAN INDIAN, THE INDIAN, AMERICA'S UNFINISHED BUSINESS (W. Brophy & S. Aberle eds. 1966).
[76] Kerr, *supra* note 62, at 316–17.

Abuses of Tribal Self-Government

Having sketched the contours of tribal self-government under the Indian Reorganization Act of 1934, we must now examine the failures of tribal self-government which led to the enactment of the Indian Civil Rights Act of 1968. We begin by acknowledging the participation of the federal government in these abuses and the existence of many examples of similar abuses in the white man's governments: federal, state and local. Indian people, who are often the subject of such abuses, are certainly keenly conscious of the white man's hypocrisy in this regard.

Be that as it may, in 1961, in response to numerous requests and particularly in reaction against the Tenth Circuit's decision in the *Native American Church* case,[77] Senator Ervin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary commenced hearings on the rights of reservation Indians.[78] The hearings were held around the country, and many Indian people testified to various abuses of tribal self-government. In 1966, the hearings ended, and a Summary Report was prepared, which details the findings of the Subcommittee.[79] The hearings are summarized in an extensive analysis of the legislative history of the Act, by Donald L. Burnett, Jr.[80]

The hearings shocked the Senators on the Subcommitee. Senator Hruska reported on the floor of the senate that

"[a]s the hearings developed and as the evidence and testimony were taken, I believe all of us who were students of the law were jarred and shocked by the conditions as far as [rights] for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian right." [81]

In a similar vein, Senator Ervin, Chairperson of the Subcommittee, stated:

"When the Subcommittee on Constitution Rights began its study of this problem, most of its members were astounded to learn that under decisions of the courts, reservation Indians do not possess the same constitutional rights which are conferred upon all other Americans by the Bill of Rights of the Constitution." [82]

The hearings focused on abuses of tribal self-government. As Donald Burnett summarized: "Native testimony mixed self-interest and tribal loyalty, bitterness about White mistreatment and cautious acceptance of Anglo-American precepts. From this mixture emerged a broad picture of constitutional neglect . . . ." [83] Allegations included harrassment and incarceration of political dissidents, arbitrary denial of tribal enrollment, election fraud, arbitrary banishment from tribal land, restriction of religious freedom and inadequacy, partiality and pervasive corruption of the tribal courts. Apparently, the privilege against self-incrimination was rarely granted, jury trials were equally rare, and tribal judges sometimes simply refused pleas of not guilty, dispensing with any need for a trial. Appellate procedures were similarly attenuated, and fraught with conflicts of interest and political influence.[84]

Many of these denials or abridgements of individual rights were due to the "paucity of resources which most tribes could allocate to law enforcement." [85] However, infringements by tribal councils were often political in nature. The Navajo Tribe's prohibition of peyote, despite the large representation of the Native American Church on the reservation, is an example.

The Ervin Subcommittee reacted especially strongly to the documented abuses of the tribal courts. The tribal justice systems had emerged from systems which had been collective and consensual in nature and which had emphasized restitution and reintegration into the tribal group, with rules enforced by public opinion and religious sanctions. However, the new tribal courts were found to

[77] Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1950).
[78] S. REP. No. 841, 90th Cong., 1st Sess. (1967); *Hearings on Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. pt. 1 (1962); 87th Cong., 1st Sess. pt. 2 (1963); 87th Cong., 2d Sess. pt. 3 (1963); 88th Cong., 1st Sess. pt. 4 (1964); *Hearings on Constitutional Rights of the American Indian, S. 961–68 & S.J. Res. 40, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965).
[79] See materials cited note 75 *supra*.
[80] Burnett, *supra* note 4, at 577–82.
[81] Cong. Rec. S. 35473 (daily ed., Dec. 7, 1967).
[82] *Id.* at 35472.
[83] Burnett, *supra* note 4, at 577.
[84] *See generally* materials cited at note 78 *supra*.
[85] Burnett, *supra* note 4, at 581.

frequently disregard fundamental individual rights.[86] And the thin veneer of Anglo-Saxon procedure instituted by the B.I.A. in the Courts of Indian Offenses which preceded the tribal courts was found not to have permeated the tribal justice systems. The increased power of the tribal courts under the Indian Reorganization Act had destroyed their traditional nature, and had severely disreputed the tribal justice systems.

The very establishment of the tribal courts had the effect of instituting personal authority and undermining the checks and balances of tribal life, which were formerly based on a requirement of group consent in an egalitarian social structure. Death or banishment had been occasionally invoked as sanctions to enforce group harmony, but these punishments had been conspicuous for their rarity. Thus, from the beginning, the new tribal court systems, with their emphasis on personal authority, abstract rules, coercive law enforcement, and the use of the legal sanctions of fines and incarceration to control behavior, have been out of step with traditional Indian concepts of justice. Anomalous in the tribal setting, some tribal courts have become political instrumentalities of the tribal councils. Judges have consistently lacked training and detachment; family ties and political affiliations have continued to exert a strong influence in tribal courts, even as their power has grown.

Perhaps the best study documenting the problems of a typical tribal court is "Tribal Injustice: The Red Lake Court of Indian Offenses" by William J. Lawrence.[87] Lawrence is not always sufficiently charitable toward the tribal officials. These officials, for the most part, seem to me to be men of good will, trapped in the blighted tribal court system, rather than authoritarian oppressors, dedicated to subverting the system or tyrannizing their people. But Lawrence does document the inadequacies of the system in detail: inadequate salaries, inadequate education and training, the spoils system, lack of judicial independence from either the tribal council or the B.I.A., administrative chaos, lack of transcripts or precedent, an inadequate appeals system, total disregard for the most rudimentary components of the due process of law, lack of means to enforce court judgments, lack of judicial impartiality, inadequate physical facilities and apathy. From his study of the Red Lake tribal court, Lawrence was forced to conclude that

"[i]t has become a fact of reservation life today that Indians have now replaced non-Indians as the prime exploiters of their own people . . . . [T]heir affairs and resources are plagued by corrupt, irresponsible and self-interested officials." [88]

Having documented the abuses of the tribal justice systems, the Ervin Subcommittee was determined to act to guarantee fundamental rights to Indian people. The only remaining question was what action the federal government should take.

The Indian Response

Senator Ervin and his Subcommittee were convinced of the need for reform of tribal self-government according to the moral values and legal criteria of the United States Constitution. Accordingly, in 1965, Senator Ervin introduced Senate Bills 961-968 and Senate Joint Resolution 40, which were

"Addressed primarily to bringing the Constitution to the reservations, integrating tribal systems into the overall legal system of the Country, and protecting the principle of the consent of the governed.

"S. 961 provided that any tribe exercising its powers of self-government would be subject to the same limitations and restraints as imposed upon the federal government. Senator Ervin's only concession to the special nature of Indian tribes was a recognition of their ethnic character; S. 961 would not have subjected them to the "equal protection" requirement of the Fourteenth Amendment, which applied only to the states." [89]

The reaction during the hearings was mixed. The Subcommittee conducted hearings in nine states and received testimony from 79 witnesses, including representatives of at least 36 Indian tribes and several national Indian organizations.[90] Senator Ervin indicated that groups like the A.C.L.U. had supported the legislation, as had the National Congress of American Indians, the Association of the Bar of the City of New York, the Department of the Interior, the Indian Rights Organization, the National Council of Churches of Christ, and, according to Senator Ervin, "Indian Tribes throughout the United States." [91] But the testimony was not unanimous. According to Burnett:

"The Hopi claimed to be unaffected, since their constitution was already "in accordance with the U.S. Constitution." Most tribes, however, echoed the sentiments of the Mescalero Apaches who were sympathetic to the purposes of the bill, but deemed it "premature" because the tribes were not psychologically or financially prepared for it. At the other extreme were the Pueblos, who were determined to maintain their closed, traditional societies." [92]

Other commentators have also disagreed with Senator Ervin. Thus, M. Smith noted that the "weight of testimony was opposed to the Act," [93] and James Kerr relates that the general reaction of Indians to the Act was one of "apathy and in some cases opposition." [94] He indicates that there was "little support among Indian organizations for the legislation," which was opposed by the National Congress of American Indians and the National Indian Youth Council [95] despite Senator Ervin's assertion.

Senator Ervin apparently took account of some of the criticism, and he introduced a new bill, S. 1843, in the next Congress, as a replacement for S. 961. It followed a suggested draft offered by the Department of the Interior, which had agreed with some of the Indian critics of the legislation, that "the blunt insertion of all constitutional guarantees into tribal systems would produce disorder and confusion." [96] Senate Bill 1843, which became the Indian Civil Rights Act of 1968, specifically omitted the constitutional prohibition against establishment of religion in deference to the semitheocratic tribes. Also omitted were the right to a jury in all criminal prosecutions, and the full right to a jury in all criminal prosecutions, and the full right to assistance of counsel, as well as the fifteenth amendment injunction against racial discrimination. Federal habeas corpus was substituted for trial de novo in the federal courts as the only remedy expressly granted by the statute. For the full text of the Act, see the Appendix to these articles.

According to Lazarus,[97] there was less Indian opposition to the Act, as revised, than had been expressed in the earlier hearings. Indeed, aside from the testimony of individual Indian people, endorsements of S. 1843 by a number of tribes do appear in the Congressional Record.[98] Even Kerr, concluded that "a majority of the tribal leaders who have studied the new law approve of it . . . ." [99]

The summary given by Burnett is most convincing, however:

"Most of the tribes testifying . . . were sympathetic to the purposes of the legislation and amenable to the eventual merger of Indian and non-Indian systems of justice. They were cautious, however, about taking large steps beyond their psychological preparedness or financial capability." [1]

Indian Civil Rights and the Confrontation at Wounded Knee: A Warning

The Indian peoples' antagonism to their tribal governments have split many reservations. I first became familiar with the frustrations of the Oglala Sioux during the Wounded Knee confrontation and from my participation in the case of *Oglala Sioux Civil Rights Organization v. Wilson*.[2] A number of tribal members had unsuccessfully attempted to oust their tribal chairman, Richard Wilson, charging him with corruption, nepotism and with being a puppet of white interests. This frustration was a major contributing cause to the outburst at Wounded Knee. Similarly, I have witnessed the poignant conflict arising out of the attempt of the traditional "longhouse" government of the Iroquois (Six Nations) Confederacy to regain the authority which it has lost to the elective govrenments of the scattered reservations of the Northeast. Cheyennes, Hopis and Navajos have had serious internal divisions over the

[86] *Id.* at 477–578; Kerr, *supra* note 45, at 320–23.
[87] 48 N.D.L. Rev. 639 (1972) [hereinafter cited as Lawrence].
[88] *Id.* at 652–53.
[89] Burnett, *supra* note 4, at 588–89.
[90] *Hearings on S. 961–968 and S.J. Res. 40 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965).

[91] S. Ervin, Interference with Civil Rights, S. Rep. No. 721, 90th Cong., 1st Sess. 29–33 (1967).
[92] *Supra* note 4, at 589.
[93] Smith, *Tribal Sovereignty and the Indian Bill of Rights*, 3 Civ. Rts. Dig. 9, 15 n.45 (1970).
[94] Kerr, *supra* note 62, at 333.
[95] *Id.*
[96] Burnett, *supra* note 4, at 557.
[97] Lazarus, *supra* note 19, at 348 n.47.
[98] 113 Cong. Rec. S.18157 (daily ed. Dec. 7, 1967).
[99] Kerr, *supra* note 62, at 333.
[1] Burnett, *supra* note 4, at 601.
[2] Civ. No. 73-5036 (D.S.D.).

secretive leasing activities of their leaders, and numerous other groups, including the Cherokees, the Pawnees and other tribes in Oklahoma, and Indians in Minnesota, Nebraska, and throughout the Dakotas, have been in conflict with their governments.

The result of these and of a number of allied developments has been the growth of opposition, often sparked by activists, traditionalists and Indian landowners, against the reservation "establishments." Members of the "establishment" are termed derisively "uncle tomahawks" or "apples," because they are viewed as tools of the white interests and betrayers of their own people. These are disputes which can and should be channelled into the legal system. In fact, redress in federal court may well be the only effective mans now available to reform tribal governments. This, then, is the ultimate basis for my support of the Indian Civil Rights Act.

The issues raised in the *Oglala Sioux case*[3] go to the very heart of the intra-tribal conflict which ultimately resulted in the seige of Wounded Knee. They are the critical issues of tribal government. Surely, the existence of an "auxiliary police force," allegedly harrassing political supporters of the American Indian Movement on the Oglala reservation, would have been ample grounds for intervention of the federal judiciary. The Wounded Knee confrontation might even have been prevented by timely action. Intervention in such a situation can only serve to redeeem the legitimacy of tribal political institutions when they are threatened by an usurpation of power or by civil war. For if we deny legal redress, we must accept the legitimacy of revolt; the right of revolution was certainly a legitimate part of the Indians' former legal systems, and the Declaration of Independence asserts it to be a fundamental right of all people. That, for me, is the real dilemma posed by Wounded Knee.

Thus, it is a great mistake to view the Wounded Knee confrontation as "irrelevant" to the plight of the Oglala people: a "media event" staged by the American Indian Movement in order to dramatize its demands to the federal government.[4] Wounded Knee was an expression of genuine grievances against the tribal, state and federal governments.[5] Absent some accountability of Indian tribal institutions, it is my conviction that Wounded Knee is a harbinger of what is to come.

THE NEED FOR A FLEXIBLE INTERPRETATION OF THE INDIAN CIVIL RIGHTS ACT OF 1968

Previous Commentary on the Indian Civil Rights Act

Many commentators have severely criticised the Indian Civil Rights Act of 1968 as an unjustified abrogation of tribal sovereignty. The point is repeatedly made that Indian tribal sovereignty should not be destroyed by federal fiat and without the tribal consent which was the hallmark of the federal Indian policy announced in the Indian Reorganization Act of 1934. The feasability and the advisability of the Indian Civil Rights Act are questioned, and some commentators have advocated outright repeal.[6]

Most of the writers, however, have advocated a "flexible" application of the Act by the courts. Unfortunately, only a few have approached the difficult question of precisely what exceptions should be allowed to the Indian Civil Rights Act, specifying areas in which federal intervention may be inappropriate.[7]

Those few writers who have discussed the problem urge deference where culture, including such "anachronisms" as the Pueblos' theocracy, is seen as essential if the traditions, the spirituality, and the sovereignty of the Indian people are to survive. The interpretation of the "due process" and "equal protection" clauses of the Indian Civil Rights Act[8] are viewed as critical matters of judgment for the federal courts, involving the adaptation of those constitutional clauses to the tribal milieu and particularly to the tribal justice systems.

[3] *Id.*
[4] *See, e.g.*, Shultz, *Bamboozle Me Not at Wounded Knee*, HARPERS MONTHLY 46 (1973).
[5] *See, e.g.*, V. DELORIA, GOD IS RED (1973). *See also* 5 AKWESASNE NOTES, NOS. 2, 3, Special Issues April, June (1973); *Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Internal and Insular Affairs on the Causes and Aftermath of the Wounded Knee Takeover, June 16–17, 1973*, 93d Cong., 1st Sess. (1973).
[6] COLUM. SURVEY HUMAN RIGHTS L. Note, *supra* note 2.
[7] Pechota & Cross, The 1968 Indian Bill of Rights: An Interpretation, Survey of Indian Law (priv. pub. 1971); Reiblich, COLUM. SURVEY HUMAN RIGHTS L. Note, HARV. L. REV. Note, all *supra* note 2; Kerr, *supra* note 62.
[8] 25 U.S.C. § 1302(8) (1970)

Membership and similar "internal" decisions of the tribe are viewed as inappropriate areas for federal court action. Elections are another area in which restraint has been urged. The exclusion power of the tribes is generally supported as a necessary adjunct to their right to a separate and culturally distinctive way of life. The informal nature of the tribal courts is approved and deference to the tribal justice system is urged. The right to retained professional legal counsel in tribal criminal cases[9] also comes under considerable attack.

The 1969 *Harvard Law Review* Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments"[10] is the most extensive and satisfactory exploration to date of the problems of the application of the Indian Civil Rights Act to tribal governments. After urging that Indian people should not be excluded from constitutional protection, and that reform of tribal institutions is definitely required,[11] the Note goes on to suggest that the Indian Civil Rights Act be "flexibly" interpreted. The Note concludes that "a more appropriate definition of due process for the tribes would require fairness as defined by their different culture. Standards of due process should be evolved which synthesize tribal culture and Anglo-American personal freedoms."[12]

In practice, of course, the "synthesis" turns out to be a dilution of the Indian Civil Rights Act. Thus, the Note suggests that the constitutional provisions of the Act be interpreted by analogy to the category of the Insular cases, as suggested in *Colliflower*.[13] Only "basic constitutional guarantees," and a "more universal definition of due process, that of fundamental fairness" would apply to tribal government.[14]

The Note makes the argument that the extensive verbatim copying of constitutional language should not be interpreted as manifesting a Congressional intent to apply to tribal governments the same substantive standards that the federal courts have evolved in applying the language to state and federal governments. This argument is unconvincing, to say the least. As is conceded in the Note, the contrary view is strengthened by statements in the legislative history to the effect that tribal governments were bound to respect the "same constitutional rights" as the stae and federal governments.[15] In my view, there is little doubt that Congress meant to apply evolving constitutional guarantees directly to tribal governments, with the specific exceptions made in the final version of the Indian Civil Rights Act. The real question is whether or not the courts should assert the countervailing interests of tribal sovereignty and cultural integrity, and if so, on what basis and to what extent.

The Note argues that the traditional election procedures of the Pueblos of New Mexico should not be held to be in violation of the due process guarantees of the Indian Civil Rights Act. As the Note observes: "The legislative record recognizes theocracy as a legitimate tribal cultural value to be preserved."[16] This result was reached without such a principled basis in the Tenth Circuit case of *Groundhog v. Keeler*,[17] which held that the Indian Civil Rights Act did not mandate democracy in tribal governments.

The Note also argues that ethnic qualifications for voting, including blood quantum restrictions, should be viewed with considerable tolerance unless they violate fundamental fairness.

"An approach taking into account the avowedly exclusive nature of the tribe is consistent with congressional purpose: outsiders have no recognized right to share in the community, and the tribe may apply its own cultural standards to determine who the outsiders are. But once the individual has been defined as being within the cultural group, or has been allowed to develop a substantial stake in it—especially insofar as he is ethnically related to the tribe—his official status ought not to be affected by blood distinctions."[18]

Except for an articulation of the rights of marriage, this seems a fair standard.

Focusing next on the question of free speech and free exercise of religion, the Note observes that Indian tribes were "homogeneous communities which

[9] 25 U.S.C. § 1302(6) (1970).
[10] 82 HARV. L. REV. 1343 (1969).
[11] *Id.* at 1351.
[12] *Id.*
[13] 342 F.2d 369 (9th Cir. 1965).
[14] HARV. L. REV. Note, *supra* note 2, at 1353.
[15] *Id.* at 1355.
[16] *Id.* at 1361.
[17] 442 F.2d 674 (10th Cir. 1971).
[18] HARV. L. REV. Note, *supra* note 2.

have traditionally suppressed open internal conflict or partisanship," leading to the conclusion that "full protection for free speech would undermine a cultural value." [19] Nonetheless, the Note is quite emphatic in asserting that "although free speech might cause some disruption in the tribe, it would seem that to protect the priority of interests thought important by Congress requires that tribal members be privileged in their political speech." [20]

The note bases its conclusion on the practical observations that

"[t]he disruption that might be caused to the tribe by free speech would be greatest when the dissatisfaction of members with tribal life was greatest, exactly the situation in which tribal culture should receive least protection. Additionally, protection of free speech is an apposite principle for courts to enforce because it tends to foster tribal practices consistent with the members' desires and thus enables the court to give greater deference to the determinations of the tribal government when its actions are attacked as unfair.[21]

However, the Note attempts to limit the protection of the Indian Civil Rights Act to tribal members. Although conceding that the language of the statute extends protection to all persons, the Note nonetheless approves of the exclusion of nonmembers from reservations because of political agitation. The Note's defense of this conclusion on the ground that "[c]ultural autonomy is antagonistic to political pressure from the outside," [22] is singularly unconvincing. Some protection of the "outside agitator" on Indian reservations is essential particulary in a period when it appears that militant Indian movements will be pan-tribal in scope if they are to be successful at all, and when Indian people have become increasingly mobile. If nothing else, the events at Wounded Knee and the allegations of the *Oglala Sioux* case [23] must have shown the necessity for the invocation of the Indian Civil Rights Act in similar situations. The alternative is more confrontations, more lawlessness, and ultimately less tribal autonomy.

Full enforcement of the free exercise clause is imperative, and, as the Note recognizes, includes the extension of that protection to organizations such as the Native American Church. Thus, even though the tribes are allowed to establish religions, there must be a requirement of religious tolerance. Otherwise, Congress' deference to Indian theocracy may have created a monster.

The Note's discussion of procedural due process is unfortunately not particularly cogent, in that it again hinges protection on tribal membership. On this basis, the Note appears to question the result in *Dodge v. Nakai*,[24] the first major case under the Indian Civil Rights Act. In that case a nonmember OEO attorney was successful in overturning a tribal exclusion order. Consistent with its defense of the exclusion of nonmembers even for purely political reasons, the Note would allow the tribal council to exclude nonmembers with only a minimum hearing requirement.

I cannot agree that the member-nonmember distinction should determine the scope of the protection to be afforded by the free speech and due process provisions of the Indian Civil Rights Act. Firstly, and perhaps most importantly, this is an era of increasing Indian militancy, which will see increasing participation by non-tribal members in tribal political processes. Secondly, we are increasingly seeing intermarriages between tribes. The definition of tribal membership accepted by the Note would allow one spouse's tribe to exclude the other spouse from all political processes, or expel him or her from the reservation, even though he or she might have spent most of his or her life on that reservation. Likewise, their children could be excluded from tribal privileges, making the burden of marriage outside the tribe onerous or perhaps even prohibitive. Conceding that full participation in tribal political processes, including the right to vote, must remain within the tribe's authority, I would reject any further limitation on the political rights of nonmembers.

The desire for the power to exclude outsiders without judicial supervision stems ultimately from the historical limitation of tribal jurisdiction which has left the tribes defenseless against outsiders. Yet what is needed is not less supervision of exclusion, but rather the dvelopmnt of the tribal courts and processes to the point where their jurisdiction can be successfully enlarged or

[19] *Id.*
[20] *Id.*
[21] *Id.* at 1363–64.
[22] *Id.* at 1364.
[23] Oglala Sioux Civil Rts. Org. v. Wilson, Civ. No. 73-5036 (D.S.D.).
[24] 293 F. Supp. 17 & 26 (D. Ariz. 1968).

fully asserted, through, for example, the "long-arm" statutes now in effect on the Oglala, Blackfeet, Gila River and Salt River reservations.[25]

I reject the use of the member-nonmember dicotomy for exclusion purposes even though I recognize the necessity that tribes have some control over nonmembers coming to their reservation. It is my firm belief that uniform laws uniformly enforced can beter accomplish control over nonmembers so long as deference is paid to the tribes' need for cultural autonomy. This unfortunately would result in increased federal court scrutiny of tribal membership criteria since the courts would have to determine membership for exclusion purposes. Control of these membership criteria is, however, the key to the survival of tribal groups. For my part, the preservation of this membership power seems far more important than the preservation of the power to exclude "outside agitators." Thus, while the tribes may have to yield on the issue of exclusion of nonmembers, they should retain the ultimate control over the setting of criteria for tribal membership.

What the *Harvard Law Review* Note fails to supply is a doctrinal basis for not applying the guarantees of the Indian Civil Rights Act in a particular situation and a test to determine its applicability. Thus, although the Note seems to me have suggested the proper parameters, the rubric of tribal sovereignty is not helpful or persuasive. A key to the interpretation of the Indian Civil Rights Act therefore seems still to be required.

The Yoder Analogue

The most striking analogue to the kind of process required in interpreting the Indian Civil Rights Act is found in the case of *Wisconsin v. Yoder*.[26] In *Yoder* the Supreme Court restricted the reach of the Wisconsin compulsory education law when it was found to conflict with the "central cultural values" of a discrete society and subculture, the Amish. Concededly, *Yoder* dealt with explicitly religious objections to compulsory education. But the courts could apply the same test in interpreting and applying the Indian Civil Rights Act in light of those cultural values found to be "essential" to the tribal cultural milieu.

In *Yoder*, the Court held that the free exercise clause of the first amendment, made applicable to the states by the fourteenth amendment, necessitated a balancing process when the religious beliefs of the Amish were found to conflict with the state's interest in compulsory education. The Court in *Yoder* was careful to emphasize that only a form of state regulation which would gravely endanger, if not destroy, the free exercise of the Amish religious beliefs could be abrogated by the first amendment. The opinion, written by Mr. Chief Justice Burger, discussed in detail the beliefs of the Amish, and specifically found that the Amish objection to formal education beyond the eighth grade was "firmly grounded in . . . central religious concepts." [27]

Summarizing its holding, the Court concluded that:

"Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious belief, the interrelationship of their belief with their mode of life, the vital role which belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one which probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on this State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting the exemption to the Amish." [28]

From the above quotation, it is apparent that the Court in *Yoder* was artic-

[25] The Indian Civil Rights, Five Years Later, *supra* note 2, at 25, 29, 31.
[26] 406 U.S. 205 (1972).
[27] *Id.* at 210.
[28] *Id.* at 235–36.

ulating a relatively narrow exemption from the compulsory education statute. Those advocates of tribal sovereignty who desire broad exemptions from the provisions of the Indian Civil Rights Act would undoubtedly be unhappy with the limited *Yoder* standard. In particular, the insistence of the Court in *Yoder* in grounding its decision on the free exercise clause rather than on principles of community sovereignty acts to limit the scope of the decision.

Of course, the Amish community does not enjoy the same long-standing recognition of sovereign status accorded to Indian tribes, nor is there any treaty or other obligation between either the United States or the State of Wisconsin and the Amish people. Thus, the Indian's right to a separate mode of life is more firmly established than that of the Amish. Also, for the Indian, religion and culture are either interdependent or equivalent; so, even more than the Amish, Indians must be entitled to a "separate" way of life. *Yoder* must protect Indian "central cultural values" from abridgement under the Indian Civil Rights Act.

It is submitted that the action of the United States Congress in enacting the Indian Civil Rights Act abrogated whatever absolute tribal sovereign immunity from suit which might have preceded the enactment, although some question remains as to immunity from damages. Accordingly, if some vestage, of tribal sovereignty is to be preserved, a consistent principle must be found to defend that tribal sovereignty. The concept of sovereign immunity from suit will not suffice; it protects to much, too indiscriminately. It is in the light of the inadequacy of the older concept of tribal sovereign immunity that I propose a newer concept, based on the principle that the "central cultural values" of tribal life are entitled to protection under the free exercise clause of the first amendment, and that rights protected by the free exercise clause must override certain provisions of the Indian Civil Rights Act of 1968.

Yoder is a starting point. It should be clear by direct analogy that the Southwestern Pueblos cannot be faulted for allowing young male members to disobey compulsory school attendance laws during their period of apprenticeship in the ceremonial clans. Similarly, I would urge substantial deference to the process of appointment of the theocratic leadership of the Pueblo tribes even though that appointment process is essentially undemocratic. This deference should, perhaps, also be extended to their decisions. Where the leadership is less "traditional," however, as in the case of the plains Indians, the argument to extend special deference is weaker. On the other hand, a court should not be reluctant to enter into a dispute involving even a theocratic government, when it is clear that the actions of that government threaten the very basis of tribal existence. Further, some provisions of the Act must probably remain inviolate, such as the right to freedom of speech.

The case of *Groundhog v. Keeler*,[29] stands for the proposition that neither the United States Constitution nor the Indian Civil Rights Act require election of tribal officials. Accordingly, the most basic fear articulated by the Pueblos in the legislative hearings concerning the Act has apparently been obviated by the construction given to the Act by the federal courts. This is the kind of "flexible" interpretation which a *Yoder* approach could provide, and on a more compelling basis than the unsatisfactory defense of tribal sovereignty as exemplified by the opinion in *Groundhog*.

The *Yoder* approach has several advantages over the tribal sovereignty concept. It balances the free exercise rights of the tribe against the fundamental rights of individual Indian people. This approach is clearly superior to an approach which attempts to balance the rights of the people against the "sovereignty" of the tribe or to defer to the tribe's sovereignty in "intra-tribal" disputes. Under the *Yoder* test, both rights can be evaluated, and the facts can dictate the result, rather than the result being dictated by the arbitrary and outworn concept of sovereignty, borrow from Anglo-Saxon jurisprudence. The notion that "the King can do no wrong" has no place in tribal justice systems. Thus, tribal sovereignty as a concept has no force in evaluating the legitimate scope of the Indian Civil Rights Act.

The primary objection which will be raised is that *Yoder* contemplates a rather high burden of proof to make out the tribes' free exercise claims. To some extent, the historical status of the tribes will given them an advantage over the Amish, since the Indians' right to a separate way of life is well established as a part of our jurisprudence. Moreover, I would generally favor a liberalization of the criteria necessary to present a free exercise case under

[29] 442 F.2d 674 (10th Cir. 1971).

Yoder. However, technical matters concerning the burden of proof are not the critical issue. The issue presented is how to "weigh individual rights and tribal values to determine operative standards for each situation."[30] The *Yoder* analogue makes this balancing process easier in that it specifies that the tribal values or central cultural values at stake must be delineated in the context of a particular tribe and a particular culture by inquiring into any tribal free exercise claim. *Yoder* thus gives the courts a procedure, and, to some extent, a standard, upon which to begin the difficult process of interpretation which the Indian Civil Rights Act requires.

The Judicial Response

Perhaps the most comprehensive and sensitive discussion of the issues presented by the Indian Civil Rights Act which has appeared in judicial opinions to date is that of *McCarty v. Steele*.[31] In that case, Judge Anderson articulated a flexible interpretation of the Indian Civil Rights Act similar to that urged by many commentators and similar to that which would obtain under the *Yoder* analogue:

"[T]he record suggests some concern at least that those guarantees incorporated by the Indian Civil Rights Act not be unduly disruptive of tribal culture. Some such guarantees of fairness might be adapted to the Indians through the application of general rules of fairness rather than strict rules of procedure. It would thus appear that the Indian Civil Rights Act is properly considered in the context of federal concern for Indian self-government and cultural autonomy: its guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy.

"Thus, for instance, usual standards of equal protection and due process may be modified where their imposition otherwise would threaten basic tribal interest. Where, as here, plaintiffs seek compliance with existing tribal procedures, applications of flexible equal protection and due process safeguards of the Indian Civil Rights Act appears appropriate."[32]

Judge Anderson is not the only federal judge to recognize the necessity for such a "flexible" interpretation. But the question remains: How well have the courts responded to the challenge of applying the Indian Civil Rights Act? In my opinion, they have generally not responded well.

As the federal courts began to receive cases predicated on the Indian Civil Rights Act, they quickly saw the thrust of the Act in abrogating the judicial doctrine of tribal constitutional imuunity which had for so long allowed them to "wash their hands" of intratribal disputes under the *Talton* ruling. The judicial reaction to the abrogation threat varied, depending primarily, I suspect, on the situation of the tribe at issue and the willingness of the federal judge in each case to intervene in intra-tribal disputes.

The Eighth Circuit and the Tenth Circuit were conspicuous in affirming the rights of tribal sovereignty. In *Daly v. Crow Creek Sioux Tribe*,[33] the plaintiffs requested the federal court to require that the tribe allow tribal members living off of the reservation to vote in tribal elections and permit persons of one-quarter blood to hold office. The court denied relief, stating in part:

"Indians, in designing their own apportionment plan and election rules, are entitled to set those requirements they find appropriate so long as they are uniformly applied.

"[T]he tribe has a sufficient cultural interest in setting a higher blood quantity requirement to hold office than for mere membership in the tribe if it so desires.

"[W]hether or not the tribe should take into account members of the tribe who do not reside on the reservation . . . is a purely internal decision which must be made by the tribe itself."[34]

The Eighth Circuit has also indicated that the federal courts will abstain from entertaining any complaint under the Indian Civil Rights Act unless the plaintiff can first show exhaustion of all reasonably available means to obtain relief from the tribe itself. Under this rationale, the court declined to hear a condemnation dispute between a tribal member and the tribe, because the plaintiff had failed to seek an appeal in the Superior Tribal Court from the disputed Junior Tribal Court judgment.[35]

[30] HARV. L. REV. Note, *supra* note 2, at 1369.
[31] 353 F. Supp. 629 (D. Utah 1973).
[32] *Id.* at 633–34.
[33] 483 F.2d 700 (10th Cir. 1971).
[34] *Id.* at 705, 706, 707.
[35] O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973).

The Tenth Circuit has signalled a similar wish to retain to some extent the immunity doctrine. In *Groundhog v. Keeler*,[36] case involving a challenge to the Congressional enactment permitting the B.I.A. to appoint the principal chief of the Cherokees, the court specifically urged in *dictum* that "in some respects the equal protection requirement of the Fourteenth Amendment should not be embraced in the Indian Bill of Rights." [37]

In other cases, however, the circuit courts have not been so reluctant to exercise jurisdiction. The Eighth Circuit has upheld general civil rights jurisdiction pursuant to 28 U.S.C. § 1343(4) in addition to the remedy of habeas corpus provided by the Indian Civil Rights Act itself and has entertained jurisdiction over a tribal election dispute in *Luxon v. Rosebud Sioux Tribe*.[38] The Ninth Circuit affirmed section 1343(4) jurisdiction in *Johnson v. Lower Elwha Tribal Community*.[39] On the other hand, the Tenth Circuit managed to avoid the jurisdictional issue in *Sattery v. Arapaho Tribal Council*,[40] by affirming the decision of the district court.[41] The circuit court rejected the district court's rationale that the Indian Civil Rights Act failed to provide an express grant of jurisdiction to review intra-tribal matters. However the circuit court upheld the district court's findings that the complaints themselves, relating to the administration of the tribal enrollment ordinance, failed to state facts which showed a denial of due process or equal protection. Thus, the Tenth Circuit, in a generally opaque opinion, replicated the Eighth Circuit's more reasoned deference to tribal enrollment practices in *Daly*, while intimating that its earlier decision in the *Martinez v. Southern Ute Tribe* [42] was probably no longer good law.

The response of the lower federal courts to the Indian Civil Rights Act has also been cautious, but many courts have provided relief. Election disputes have been the most frequent. In addition to the Eighth Circuit's holding in *Luxon*, the Utah and Nebraska district courts have provided relief in *McCurdy v. Steele* [43] and *Solomon v. LaRose*,[44] both of which involved attempts to frustrate elections by ignoring the tribal election code, similar to the issue raised in *Boyer v. Shoshone-Bannock Indian Tribes*.[45]

On the other hand, the plaintiffs in *Means v. Wilson*[46] were denied relief, even though the plaintiffs alleged multiple violations of the tribal election code. The district court first indicated that its interpretation of the Eighth Circuit's opinion in *Luxon* was that intra-tribal controversies could not be entertained under title 28 United States Code section 1343(4), since "an action involving an internal controversy among Indians over tribal government is a subject not within the jurisdiction of a federal court under *Luxon*." [47]

The court went on to hold that the plaintiffs had failed to exhaust tribal remedies, even though the plaintiffs had filed a detailed protest with the tribal Election Board, the only remedy provided by Oglala law, and the Board had refused to act. This writer would argue that the abstention doctrine of *O'Neal* only applies after the tribal court has assumed jurisdiction, particulary since the Oglala Sioux Tribe asserts its sovereign immunity from suit. Further, it seems quite proper to urge that the federal courts take jurisdiction when there is a strong inference of bias. The course of the dispute between Russell Means and Richard Wilson certainly supports such an inference. The alternative is to deny relief altogether in most election disputes. For an example of the treatment of election complaints in tribal court, the outcome of the case of *Boyer v. Shoshone-Bannock Indian Tribes* is instructive. After the Idaho State Supreme Court opinion was handed down,[48] the Fort Hall Court took jurisdiction. Six years after the Fort Hall Court took jurisdiction and a full decade after the disputed election, the tribal court issue its final judgment dismissing the amended complaint on the ground of tribal immunity from suit.[49]

[36] 442 F.2d 764 (10th Cir. 1971).
[37] *Id.* at 682.
[38] 455 F.2d 698 (8th Cir. 1972).
[39] 484 F.2d 200 (9th Cir. 1973).
[40] 453 F.2d 278 (10th Cir. 1971).
[41] Pinnow & Shoshone Tribal Council, 314 F. Supp. 1157 (D. Wyo. 1970).
[42] 249 F.2d 915 (10th Cir. 1957).
[43] 353 F. Supp. 620 (D. Utah 1973).
[44] 355 F. Supp. 715 (D. Neb. 1971).
[45] 92 Idaho 257, 441 P.2d 167 (1968). *See also* White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973); Wounded Head v. Tribal Council, Civ. No. 73-5096 (D.S.D. April 19, 1974); United States v. San Carlos Apache Tribe, Civ. No. 74-52 TUC (D. Ariz. April 12, 1974); Armstrong v. Howard, No. 6-72-CIV-31 (D. Minn. Jan. 22, 1974); St. Mark's v. Canaan, Civ. No. 2928 (D. Mont. Oct. 23, 1970).
[46] Civ. No. 74-5010 (D.S.D. Sept. 20, 1974).
[47] *Id.* at slip opinion 13.
[48] Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257, 441 P.2d 167 (1968).
[49] Boyer v. Shoshone Bannock Indian Tribes (Ft. Hall Ind. Ct. Sept. 10, 1974).

The third reason supporting the dismissal of the complaint in *Means v. Wilson* was the court's announced holding that the complaint fails to state a claim upon which relief can be granted, because: "This court should not set aside a tribal election under the Indian Civil Rights Act in circumstances in which a non-Indian local election under the Fourteenth Amendment would not be set aside." [50] The basis for the court's ruling was the Eighth Circuit's holding in *Pettengill v. Putnam County*,[51] that criminality, fraud, or discrimination must be shown to justify federal intervention in irregularities in the administration of local elections. Of course, *Pettengill* was based on a judgment of comity, to avoid federal "tinkering with the state's election machinery," [52] a doubtful rationale when the allegation is that the machinery has broken down, as in the *Means* case. The court's holding is even more questionable, in light of the allegations of violations of federal criminal and civil conspiracy laws and interference with free speech and due process rights under title 25 United States Code section 1302(1), (8) contained in the *Means v. Wilson* complaint.

The problem with the holding is clear, in that it amounts to a severe judicial limitation of what appears to be one of the most important provisions of the Indian Civil Rights Act, according to the number of cases filed, *i.e.*, the application of standards of fairness to tribal elections. Under the court's holding, the federal courts will not require the tribes to follow their own election rules.[53] Thus, the *Luxon*, *McCurdy* and *Solomon* courts would have been powerless to act under the *Means* holding.

The greatest weakness in the opinion is that it fails to take account of the tribal situation. This author feels that the effect of the political struggle between Means and Wilson should have been considered. Not to do so was to fail to respond to the real dictates of the situation.

In summary, the *Means v. Wilson* decision would seem to imply that election disputes are not proper cases for federal court review under the Indian Civil Rights Act. This case illustrates well the failure of the federal courts to act under the Indian Civil Rights Act. I would submit that no cultural value would be abridged by a new election on the Pine Ridge Reservation and that the decision fails to reinforce the cultural and political integrity of the tribe. These are the considerations we must ponder in order to make sense of the Indian Civil Rights Act.

In contrast to *Means v. Wilson*, the federal courts generally have intervened in election cases, as discussed above with respect to the *Luxon*, *McCurdy* and *Solomon* cases. They have however recognized tribal determinations of eligibility, as in the *Daly* case. In more difficult cases, concerning reapportionment, the courts have affirmed the one-man, one-vote principle under the Indian Civil Rights Act in *White Eagle v. One Feather*,[54] and in *St. Marks v. Canaan*.[55] The *White Eagle* opinion carefully considered the cultural issues at stake, but determined that the voting procedures of the tribe are not entitled to special deference, since they are derived from Anglo-Saxon models. This analysis is well taken. Thus, the Eighth Circuit concluded:

> We have no problem of forcing an alien culture, with strange procedures, on this tribe. What the plaintiffs seek is merely a fair compliance with the tribe's own voting procedures in accordance with the principles *Baker v. Carr* and subsequent cases.[56]

The other recent election cases [57] have generally denied relief and include a specific finding that the twenty-sixth amendment (18-year old vote) does not apply to Indian tribes through the Indian Civil Rights Act in *Wounded Head v. Tribal Council*.[58] This seems to be correct, although the opinion is not very detailed. The only recent case in which relief was secured was through a consent decree filed in *United States v. San Carlos Apache Tribe*,[59] after the federal government had acted to enjoin the tribal election because of procedural defects.

Other than election disputes, enrollment disputes have perhaps been the most frequent cases brought under the Indian Civil Rights Act. Although the old

[50] Means v. Wilson, Civ. No. 74-5010 at 23 (D.S.D. Sept. 20, 1974).
[51] 472 F.2d 121 (8th Cir. 1973).
[52] *Id.* at 122.
[53] Brief for United States as Amicus Curiae, Means v. Wilson, Civ. No. 74-5010 (D.S.D. Sept. 20, 1974).
[54] 478 F.2d 1311 (8th Cir. 1973).
[55] Civ. No. 2928 (D. Mont. Oct. 23, 1970).
[56] 478 F.2d at 1314.
[57] Cases cited note 144 *supra*.
[58] Civ. No. 73-5096 (D.S.D. April 19, 1974).
[59] Civ. No. 74-52 TUC (D. Ariz. April 12, 1974).

Martinez[60] rule of absolute immunity has been abrogated by the Indian Civil Rights Act, the consensus of the courts has been to defer to tribal determinations of membership criteria, as long as the enrollment ordinance is fairly and impartially administered. The leading cases are the Ninth Circuit's decisions in *Laramie v. Nicholson*,[61] *Thompson v. Tonasket*,[62] and the South Dakota District Court's decision in *Yellow Bird v. Oglala Sioux Tribe*.[63] The Ninth Circuit in *Laramie* and *Thompson* reversed the district court's denial of jurisdiction, based on *Johnson v. Lower Elwha Tribal Community*[64] and on the fact that both cases asserted discriminatory administration of the enrollment ordinance at issue. *Yellow Bird*, on the other hand, was dismissed because the plaintiffs alleged only that the enrollment criteria were arbitrary and capricious.[65]

The only other reported membership challenge now in litigation is being pressed by the Department of Justice in *Martinez v. Santa Clara Pueblo*.[66] The case challenges the right of the Pueblo to exclude from membership and from public housing the children of Pueblo women and non-Pueblo men, while admitting children of a Pueblo man who is married to a Navajo woman.[67] Masquerading as a simple sex discrimination case, this case seems to be to be highly ill-advised, and one can only hope that the court will be receptive to the Pueblo's interest in determining membership criteria. This is clearly one area where courts should fear to tread, since the cultural values at stake are high indeed.

JURISDICTION AND REMEDIES

Aside from the legitimate attempt to insulate tribal governments by specifying areas where federal court intervention may be inappropriate, by whatever standard, there has been a simultaneous effort to reduce the jurisdictional and remedial resources available under the Act. I believe very strongly that any limitation on the scope of the Indian Civil Rights Act should be achieved by means of a principled discussion of the areas of tribal sovereignty which are so critical to the integrity of "central cultural values" of the tribe as to be protected by the first amendment. Unfortunately, the published opinions have rarely reached such a plane, although a number of more technical issues have been addressed. Thus, aside from the absolute bar to federal court intervention suggested by the doctrine of tribal sovereign immunity and its derivative, abstention from interference with intra-tribal disputes, it has been urged: (1) that jurisdiction under the Indian Civil Rights Act should be limited to the habeas corpus power explicitly conferred by the Act; (2) that tribal sovereign immunity should apply to liability for damages if not to liability for equitable relief; and (3) that considerations of comity between the federal courts and tribal governments should require exhaustion of tribal remedies, including tribal court remedies, prior to entertaining suits in the federal courts. Each issue will be addressed in turn.

Jurisdiction

The first of these contentions, the technical argument that the Indian Civil Rights Act does not confer jurisdiction beyond the narrow grant of habeas corpus jurisdiction specifically included in the Act, has been rejected by the great majority of the courts which have considered the issue. The Indian Civil Rights Act is clearly an "act of congress providing for the protection of civil rights," and the federal courts therefore have upheld jurisdiction under title 28 United States code section 1343(4), the general civil rights jurisdictional provision.[68]

As has been seen, the Indian Civil Rights Act was designed to create "a body of substantive rights, patterned in part on the federal Bill of Rights, to extricate the individual Indian from the legal no man's land," which had been created by the line of decisions holding that a controversy between an Indian and his tribal government was an internal controversy not subject to the jurisdiction of the federal courts.[69] Accordingly, the courts have held that Congress has created certain rights in the Indian Civil Rights Act and given corresponding jurisdiction of actions to secure those rights. In such a context, the federal courts have the power to fashion remedies appropriate to the protection of the rights established by the Act. As was held by Judge Bratton in *Loncassion v. Leekity*:

"Violations of constitutional rights, however, do not always take the form of incarceration, and if enforcement of the Act were limited to habeas corpus proceedings, some provisions of the Act would be unenforceable and thus meaningless. Because it cannot be presumed that Congress would pass an Act containing provisions which could not be enforced, the existence of the habeas corpus provision in the Act cannot be said to limit federal court jurisdiction to those proceedings."[70]

The most comprehensive treatment of the jurisdictional issues under the Indian Civil Rights Act is found in the recent article by Barbara A. Larson Webb and John R. Webb.[71] This article supports the courts in finding jurisdiction under section 1343(4) and also under section 1331, the federal question jurisdiction statute, so long as the requirement of "substantiality" is met. Thus, the courts appear to have overcome the jurisdictional hurdle, contradicting the conclusion earlier expressed by commentators such as Lazarus, that the Indian Civil Rights Act may indeed have "provided a right without an effective remedy."[72] The Webb article concludes from the legislative history that although the specific issue of remedies was not addressed by Congress, "the importance of the rights, and the historical record of an established probability of the federal judiciary refusing to apply any constitutional prohibitions against the tribes, suggests that Congress intended this Act as a reversal of that policy. The limited remedy of habeas corpus would not meet that goal."[73]

Some commentators, including Mr. Ziontz in his compaunion article, have been critical of any extension of federal jurisdiction under the Act,[74] while others have supported broad jurisdictional authority as an essential tool in the flexible interpretation of the guarantees provided by the Act.[75] At least one Note[76] has criticized the habeas corpus remedy as overly disruptive of the autonomy of the tribal justice system and has suggested the use of more flexible remedies. It seems to be well recognized that Congress neglected any serious consideration of the remedial issue, leaving the question for the courts.

There is no evidence that Congress meant to limit rights under the Indian Civil Rights Act to situations involving alleged criminality, and it is clear that Congress did intend that the rights conferred by section 1302 be as enforceable by Indans as they already are by the rest of the citizenry, under the fourteenth amendment and the Civil Rights Act of 1871. The plain language of the Act, the legislative history previously cited and the historical context from which the Act emerged are all proof of this fact. Thus, for the federal courts to refuse jurisdiction except under the habeas corpus provisions of the Act would work a serious limitation on the scope of the rights provided by the Indian Civil Rights Act, without any basis in principle or precedent. Fortunately, the courts have avoided such a judicial repeal of the Act, and the jurisdictional issue appears to be settled at this time.

Sovereign Immunity

The courts have generally recognized that the sovereign immunity the tribes, their officers and employees enjoyed prior to the enactment of the Indian Civil Rights Act has been abrogated insofar as is necessary for the federal courts to enforce the rights guaranteed by the Act.[77]

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[60] Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957).
[61] 487 F.2d 315 (9th Cir. 1973).
[62] 487 F.2d 316 (9th Cir. 1973), *cert. denied*, 95 S. Ct. 132 (1974).
[63] Civ. No. 74-5009 (D.S.D. Aug. 8, 1974).
[64] 484 F. 2d 200 (9th Cir. 1973).
[65] Civ. No. 74-5009 (D.S.D. Aug. 8, 1974).
[66] Civ. No. 9717 (D.N.M. 1974).
[67] *Id.*
[68] Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698 (8th Cir. 1972); McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); Dodge v. Nakai, 298 F. Supp. 17 & 26 (D. Ariz. 1968).

[69] *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896); Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971); Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971).
[70] 334 F. Supp. at 372-73.
[71] Webb & Webb, *Equitable and Declaratory Relief Under the Indian Civil Rights Act*, 48 N.D.L. Rev. 695 (1972).
[72] Lazarus, *supra* note 91, at 350.
[73] Webb & Webb, *supra* note 4, at 679.
[74] *See also* Burnett, *supra* note 4 at, at 618.
[75] *E.g.*, Harv. L. Rev. Note, *supra* note 2, at 1371-73.
[76] N.D.L. Rev. Note, *supra* note 2.
[77] Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698 (8th Cir. 1972); McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973); Seneca Const. Rts. Org. v. George, 348 F. Supp. 48 (W.D.N.Y. 1972); Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971); Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969); Dodge v. Nakai, 298 F. Supp. 17 & 26 (D. Ariz. 1968).

In the leading case of *Loncassion v. Leekity*,[78] a boy shot by Zuni policemen sued the Pueblo of Zuni for damages for subjecting him to unreasonable and excessive force and for negligently hiring and training the policeman. The Pueblo sought dismissal on grounds of sovereign immunity. The district court replied:

"Congress having exercised its power to subject tribes to suit by passing the Indian Civil Rights Act, a tribe cannot claim immunity from suit under the Act. The Act does not, in so many words, provide that a tribe may be sued under its provisions nor does it explicitly waive sovereign immunity as a defense. However, since enforcement of the provisions of the Act could only occur through suits in courts of law, the Act must be held to imply that suits may be brought under its provisions. To hold otherwise would render the Act an unenforceable admonition." [79]

One variant of the sovereign immunity defense urged by many tribal lawyers is to concede the equitable jurisdiction of the federal courts pursuant to section 1343(4) while continuing to deny that the tribes may be subject to liability for damages absent specific Congressional authorization. At the outset, it should be admitted that this argument has some force, and it should be kept in mind that the federal courts have generally been reluctant to abrogate state immunity from damages under the eleventh amendment, making a rule of tribal immunity from damages consistent with our overall constitutional scheme.[80] Moreover, Indian tribes are generally not wealthy, and protection of the tribal financial base may be critical to their survival as independent sovereignties.

On the other hand, a denial of relief by way of damages will effectively insulate the tribe from liability for certain kinds of violations of individual rights under the Indian Civil Rghts Act. It may be argued that lability of tribal officers will provide adequate compensation for any such violations. But, assuming that the Act is construed to permit such actions, liability of tribal officers will surely be subject to some form of qualified privilege.[81] One may legitimately wonder whether a further propogation of the doctrine of *Ex Parte Young*,[82] which makes individual liability of government officers the primary means for recovery of damages occasioned by abuses of state sovereignty, is really advisable in this area.

If the Indian Civil Rights Act is to be limited, it should be limited in a principled way, depending on the amount of interference with "central cultural values," not by an arbtrary limitation, depending upon the type of relief available or sought. The eleventh amendment does not apply to tribes, and the concept of sovereign immunity from suit for damages, a policy which "runs counter to prevailing notions of reason and justice,[83] should not be expanded into new ground when its *raison d'etre* has itself been repudiated.

Loncassion v. Leckity has demonstrated that the federal courts are willing to imply a remedy in damages for violations of the Indian Civil Rights Act. In *Loncassion*, the Pueblo and a tribal policeman were both held to be liable for damages. To deny the plaiatiff relief by way of damages would have been to deny him any remedy at all for the defendants' illegal conduct. The courts' supervision of the amount of the damages is the ultimate bulwark to prevent harm to tribal sovereignty from overzealous enforcement of the Act, and the danger to tribal resources can be easily minimized. Senate Bill 1343, proposed by the executive branch, contemplates insurance coverage coupled with waiver of tribal sovereign immunity up to the amount of the policy for all contractual tribal activities.[84]

The sovereign immunity issue is by no means free from doubt. The tribes' historical immunity goes beyond the *Talton* deference to tribal self-government in "internal affairs" or "intra-tribal" controversies, and constitutes a general bar to suit against the tribes in the absence of express Congressional action abrogating the immunity.[85] Further, some commentators have argued that the

[78] 334 F. Supp. 370 (D.N.M. 1971).
[79] *Id.* at 373.
[80] *See, e.g.*, Edelman v. Jordan, 94 S. Ct. 1347 (1974); Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).
[81] *Cf.* Scheuer v. Rhodes, 94 S. Ct. 1683 (1974).
[82] 209 U.S. 123 (1908).
[83] Larson v. Domestic & Foreign Corporation, 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting).
[84] Letter of August 1, 1973, Solicitor Frizell to Senator Jackson.
[85] *E.g.*, Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967).

Indian Civil Rights Act "does not constitute Congressional consent to suits against the tribes." [86]

However, the consequences of upholding tribal sovereign immunity from suit under the Indian Civil Rights Act are potentially as serious as a total denial of jurisdiction. Thus, although the one established exception to the doctrine of sovereign immunity is the allowance of suits against individuals actng outside of the scope of their authority on the principle of *Ex Parte Young*,[87] the Indian Civil Rights Act specifically applies only to tribal action and not to actions of individuals.[88] Despite the implication of *Loncassion v. Leekity*,[89] a good argument can therefore be made, and seems to be accepted in the recent decision in *Means v. Wilson*,[90] that the Indian Civil Rights Act does not reach individual action absent a showing that the defendants acted within the scope of their tribal offices.[91] On that basis, the combination of tribal sovereign immunity and lack of jurisdiction over individuals would totally preclude relief under the Act, or, at the very least, would totally preclude relief in damages. This would in turn sharply reduce the effectiveness of the Act and the scope of the protection provided and would make the vindication of rights against political repression, such as the rights involved in the *Oglala Sioux* case,[92] impossible.

As far as the specific argument of executive privilege from liability for damages based on some standard such as "good faith discretionary acts" is concerned, personal immunity or privilege must be qualified so as to afford substantial protection under the Indian Civil Rights Act. On the one hand, tribal officials must not be deterred in their duties by fear of liability for damages; on the other hand, tribal officials must be deterred by the substantive provisions of the Indian Civil Rights Act. Liability should certainly depend upon some finding of fault, but the articulation of a qualified executive privilege should be left as narrow as possible, and dependent upon affirmative findings by the federal courts.

Some commentators have argued that even though habeas corpus relief may not be sufficient to enforce the provisions of the Indian Civil Rights Act, the damage remedy should be denied because of its threat to Indians' limited tribal and individual resources. Some tribes have complained of oppression simply from the necessity of defending such suits.[93] However, it must be noted that it is the tribes who have not adhered to elementary standards of fairness in tribal court proceedings in the past [94] that have been among the first to invoke their sovereign prerogatives.[95] And if expense is the real objection, federal funding should be made available to relieve the problem.

Access to equitable and declaratory relief against tribes, but not damages, would be more acceptable to most advocates of tribal sovereignty, and has been suggested in a recent article.[96] Of course, the remedial distinction is irrelevant to the issue of subject matter jurisdiction, and the doctrine of tribal immunity from suit is jurisdictional in nature. Since jurisdiction under title 28 United States Code section 1343(4) expressly includes a grant of authority over actions "to recover damages," it is difficult to see how such a remedial distinction could be sustained, except by judicial restraint in appropriate cases. But remedies should indeed be carefully tailored to fit each case brought under the Indian Civil Rights Act.

Sovereign immunity, which has bedeviled the federal courts when invoked by the states under the eleventh amendment, has hindered the enforcement of the provisions of the fourteenth amendment, especially under the present Supreme Court.[97] But despite the long-standing quarrel, the courts have never squarely faced the issue of whether or not the fourteenth amendment necessarily abridges the provisions of the eleventh to the extent required for its

[86] Webb & Webb, *supra* note 170, at 706. *See also* Lazarus, *supra* note 23, at 349–50.
[87] 209 U.S. 123 (1908). *See also* Barr v. Mateo, 360 U.S. 564 (1959); Webb & Webb, *supra* note 170.
[88] Unlike the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, which apply to individual action, albeit "under color of state law."
[89] 334 F. Supp. 370 (D.N.M. 1971).
[90] Civ. No. 74–5010 (D.S.D. Sept. 20, 1974).
[91] *Id.* at slip opinion 27.
[92] Oglala Sioux Civil Rts. Org. v. Wilson, Civ. No. 73–5036 (D.S.D.).
[93] THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER, *supra* note 2, at 55.
[94] Lawrence, *supra* note 87.
[95] THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER, *supra* note 2, at 57–60.
[96] Webb & Webb, *supra* note 170.
[97] *See* Edelman v. Jordan, 94 S. Ct. 1347 (1974).

full enforcement. Thus, the issue which the courts must face in deciding whether or not the Indian Civil Rights Act waives tribal sovereign immunity is precisely the question which has been avoided for so long with respect to the fourteenth and eleventh amendments. Since the Indian Civil Rights Act does not share the individualized focus of the fourteenth amendment, but directly focuses on the tribes' exercise of the powers of self-government, the issue is whether the courts will seek to enforce the Act or whether they will seek to frustrate the Act through new doctrines of tribal immunity from damages. Because tribal resources are so limited, the courts must be circumspect in granting damages, but the courts must retain that power. Federally funded insurance for contractual activities is a start, but a more comprehensive insurance is required, and it is the obligation of the federal government, which waived the tribes' sovereign immunity, to pay the price of civil rights for Indian people.

Abstention and Exhaustion

The abstention doctrine and the exhaustion of tribal remedies requirement also present perplexing problems within the context of the Indian Civil Rights Act. These problems are vividly illustrated by the recent division of the Eighth Circuit in *O'Neal v. Cheyenne River Sioux Tribal Council.*[98] *O'Neal* concerned an action brought in federal court by Indian plaintiffs against several officials of the Cheyenne River Sioux Tribe subsequent to a Junior Tribal Court order that property of the plaintiffs be seized on behalf of the tribe. Under these circumstances, the Eighth Circuit held that the plaintiffs should have first applied to the Superior Tribal Court for relief before applying to the federal courts. The circuit court affirmed the district court's dismissal of the suit for failing to exhaust all available tribal remedies declaring that these remedies need not be pursued when bringing conventional civil rights suits, because

"Congress wished to protect and preserve individual rights of the Indian peoples, with the realization that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments. From this perspective an exhaustion requirement is consistent with the statute."[99]

Nonetheless, the Eighth Circuit made it clear that

"[E]xhaustion is not an inflexible requirement. A balancing process is evident; that is, weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights."[1]

It seems to me that, even conceding the general policy of federal judicial deference to the decision-making prerogatives of the tribal courts, the courts should be loath to grant deference to the decisions of tribal courts when actions of tribal officials are concerned and delay risks substantial injustice. That is why the abstention in *Means v. Wilson*[2] is so disturbing. Further, a federal court should never dismiss a case for failure to exhaust tribal judicial remedies; rather, it should abstain, retain jurisdiction and remand the case to tribal court.[3] The lack of any real separation of powers between the Indian tribal judiciary and tribal administration makes the availability of a trial de novo in the federal district court imperative, at least in cases involving challenges to tribal officials, such as *Means v. Wilson.*

[98] 482 F.2d 1140 (8th Cir. 1973).

[99] *Id.* at 1144.

[1] *Id.* at 1146. The Harvard Law Review Note also addressed this question, but produced an equally ambiguous response:

"The question remains whether federal courts should apply a condition of exhaustion of tribal remedies before giving federal remedies to enforce the statute. This determination should be based on the statutory purposes. One purpose was to continue the policy of strengthening tribal courts, this would support an exhaustion requirement. Yet the purpose of protecting individual rights might be defeated by such a condition in some cases, as where a delay risks serious harm with little chance of a tribal remedy. Where the balancing of these purposes is not determinative of this and similar questions, courts should refer to federal judicial policies concerning relations with other decision-making bodies, and yet articulate those policies' import in light of the unique relations between federal courts and tribal institutions . . . [thus, in the case of *Dodge v. Nakai*], the District Court suggested that an implied condition of exhaustion of tribal remedies should usually operate; this suggestion was based on congressional policy favoring Indian self government, enhancement of the Indian judiciary through responsibility, and dimunition of federal intervention. The court held, though, that no exhaustion was required in that case because, due to the presence in that case of defendants not amenable to tribal court jurisdiction, such a requirement would result in a multiplicity of law suits and a delay of any effective remedy. HARV. L. REV. Note, *supra* note 2, at 1373.

[2] Means v. Wilson, Civ. No. 74-5036 (D.S.D. Sept. 20, 1974).

[3] *See* Clark v. Land & Forestry Comm., Civ. No. 74-3021 (D.S.D. Aug. 9, 1974).

The same considerations are pertinent to the question of exhaustion of administrative remedies. At the most, as noted in *O'Neal*, the exhaustion of state administrative, rather than judicial, remedies is the most which s required in title 42 United States Code 1983 actons.[4] By analogy, it is submitted that in a majority of cases, and especially where tribal officials are challenged, exhaustion of tribal administrative remedies should be the maximum requirement prior to exercising federal jurisdiction under the Indian Civil Rights Act. Ths is particularly true where the tribe has set up an exclusive administrative procedure and claims immunity from suit in tribal court, as in *Means v. Wilson.*

Thus, the *O'Neal* case should be confined to its facts. Once a plaintiff enters the tribal court, and the tribal court takes jurisdiction, he must pursue his tribal court remedies to their final conclusion before a federal court will intervene in the tribal judicial process. This is a sound principle, worthy of general recognition. Upon the conclusion of tribal judicial proceedings, the plaintiff may then obtain relief in the federal court under the Indian Civil Rights Act, provided that he makes allegations of a denial of rights protected by the Act. If the plaintiff chooses to forego his tribal court remedies, the federal court should properly require a showing that the tribe has asserted a defense of immunity or lack of jurisdiction or that recourse to tribal judicial remedies would more probably than not be futile. In cases involving challenges to tribal officials, the federal courts should avoid the imposition of an exhaustion requirement, particularly where delay substantially prejudices the plaintiff's case.

THE PURSUIT OF RESPONSIBLE TRIBAL GOVERNMENT

The Dilemma of Cultural Imperialism

"We hold these truths to be self-evident: that all men are created equal, and that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."[5] Indeed, we hold it to be "self-evident" that all men are equally endowed with virtually all of the human rights which we have found to be indispensible to a system of ordered liberty and which we have elaborated in our Bill of Rights and our constitutional law. The rub is in the "we." The "we" is the white, Anglo-American social structure, with a peculiar historical and sociological background, a civilization which was transplanted from Europe and which conquered and colonized the North American continent. This "we" transplanted the 18th century ideals enshrined in the United States Constitution, ideals which in turn continue to govern American political life. Thus, even at the time of the Declaration of Independence, the "all men" alluded to was clearly understood to exclude Native Americans.

This is the problem—in its most stark terms—which faces anyone attempting to "sell" the Indian Civil Rights Act to the Native American population which remains in North America after the destruction and pillage of its lands, its culture, and its spirituality by the white "idealists" from across the sea. It is not only that the human rights extended by the Indian Civil Rights Act do not arise from the Indian or tribal experience and culture. It is worse because these rights arise from the white man's culture—from manifest destiny, missionary zeal and from capitalist individualism—indeed, from the very aspects of the white man's culture which have acted as the motivating force behind the exploitation of the Native American people and their homeland.

There can be no more repugnant act of cultural imperialism than the imposition of alien values on another people, as the course of our relationship with Indian people has repeatedly shown. Americans, however, are biased toward the melting pot mystique; the interaction of cultures is a major ingredient of our culture, and the assimilation of immigrant peoples into American liberalism and liberty is our dominant national myth. Even though cultural imperialism is thus to some extent inevitable, and the Indian Civil Rights Act may be viewed as balancing the impositions of the past, it nonetheless appears to be another such imposition.

But is the Act really of the same quality as past intrusions? To answer this question we must closely examine the probable effect of the Act. Has the availability of civil liberties been of importance in our society? Moreover, what should Anglo-Saxon libertarian ideals mean to tribal societies? Is there some standard of fundamental rights which goes beyond a particular culture or

[4] *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

[5] DECLARATION OF INDEPENDENCE, PREAMBLE.

a particular society? Was it not a form of cultural imperialism to fight racism in the American South, for example? If we are to pass judgment on the Indian Civil Rights Act, we must face these issues.

The Necessity of Recognizing Fundamental Rights

I believe that the cause of fundamental rights must be defended. I believe that all governments and ultimately all organizations exercising authority over individuals, must be compelled to recognize the *inherent* dignity and equality of each and every individual member of the human family—as an indispensible prerequisite to any possibility of freedom, justice and peace in the world. The disregard and contempt displayed by governing agencies toward this dignity has, as an historical matter, resulted over and over again in barbarous and inhuman acts which have outraged the collective conscience of the human family. Thus, it seems that governing bodies, disposing of the coercive power of modern sovereignty, are, by their very nature, disposed to crushing individuals in their collective lumbering toward collective goals. As "civilization" presses its way into the lives of more and more groups of the human famly, it inevitably brings wth it ths particular curse of collectivism.

The United Nations has recognized that protection of fundamental individual rights must be recognized by all nations and has adopted the Universal Declaration of Human Rights. Philosophers have had a concept of individual rights in virtually every culture and in virtually every age, and John Rawls has recently given voice to the secular conscience of humanity in his seminal book, *A Theory of Justice*, which has reinvigorated the philosophy of natural rights. And we must recognize the alternative: those persons who are inevitably denied fundamental rights, however defined, will resort to physical violence against the collectivity to resist tyranny and oppression.[6]

It will be objected that the situation of the American Indian tribes is unique and that the enforcement of fundamental rights in America has not been successful in avoiding widespread exploitation and oppression in the past. Both of these observations are true to some extent. I do not believe, however, that the uniqueness of the Native American people and the particular genius of their traditional cultures and tribal groups shoud prevent us from seeking to enforce the fundamental rights of all of the people now living together in America, nor do I believe that our failures in the struggle to enforce the same rights against Anglo-American governments should now deter us from continuing the struggle.

Sovereignty is a western concept, derived from the historical growth of the nation states of Western Europe. In the opinion of the author, it has been the cause of much suffering, in that the nation-state exists on a dynamic of exploitation and war. It is an unworthy concept, particularly when opposed to the concept of guaranteeing the fundamental human rights. Thus, I would urge that the criticism of the Indian Civil Rights Act not be predicated on a defense of "tribal sovereignty," despite its continuing significance as the basis for the legitimate treaty claims of the Native American people against the United States government.

The Indian Civil Rights Act is certainly a form of cultural imperialism, and I am sympathetic to the fact that the past erosion of tribal culture does not justify further erosion now. However, to the extent that the plight of Indian people is the fault of the federal government, tribal sovereignty must not prevent action to remedy that plight. In the final analysis, appeals to sovereignty as a basis for refusing violations of fundamental human rights by the Native American tribes in defense of their political and cultural autonomy, are misplaced and constitute a disservice to the Indian community.

Proposed Revisions of the Indian Civil Rights Act

Having emphasized my support of the Indian Civil Rights Act, it may appear peculiar to now advocate its revision, but I do believe that Congress could have done a much better job. The imminent establishment of the American Indian Policy Review Commission[7] makes the proposal of revisions in the statute particularly appropriate at this time, since the joint resolution creating the commission has as one of its duties: "a consideration of alternative methods to strengthen tribal government so that the tribes might fully represent their members and, at the same time, guarantee the fundamental rights of individual Indians."[8]

[6] UNIVERSAL DECLARATION OF HUMAN RIGHTS, PREAMBLE, U.N. DOC. No. 15-23148 (1962).
[7] H.R.J. Res., 93d Cong., 2d Sess. (1974).
[8] *Id.* § 2(6).

The most obvious revision of the Indian Civil Rights Act would be the provision of a discrete judicial forum as an alternative to the federal district courts; this idea should not be adopted, of course, unless the Indian people agree. Title IV of the Indian Reorganization Act of 1934, or originally proposed, would have established a federal Court of Indian Affairs with similar duties:

"This court would have taken over original jurisdiction from the district courts in certain matters such as crimes against the United States committed on a reservation and commercial disputes between a tribe and outsiders. Furthermore, the court would have appellate jurisdiction over the tribal courts in those cases in which it would have original jurisdiction. All mention of these special courts was eliminated from the final Act, primarily because the committee members and Indians disagreed, with each other and among themselves, whether they would be a boon or a hindrance to tribal sovereignty."[9]

Although no agreement is yet apparent, Indian legal symposia have raised the issue of such a court, an "inter-tribal Indian controlled court of appeals,"[10] to oversee the tribal courts. There is a broad realization that the essential issue under the Indian Civil Rights Act is the due process issue and the necessity of reform of the tribal courts.[11]

It is clear that there must be an impartial appellate body of some kind if the tribal courts are ever to become truly independent of political control. But, the tribal courts must also assert their independence. They must begin to strike down actions of the tribal council or tribal executive branch found to be in violation of the tribal constitution or laws. They must begin to enforce their tribal bills of rights. They must develop their professional competence, and they must be given legal and administrative resources by the federal government. This is a difficult undertaking but it is essential to the continued viability of the tribal courts.

Aside from such a dramatic reform, other, less drastic, amendments are possible and should be considered. In the event that the "traditional courts" of the Pueblos do function as dispensers of customary Pueblo law, Congress should seriously consider S. 2173, the 1969 Ervin Bill, introduced to exempt them from the Indian Civil Rights Act.

I would not, however, agree with the proposed limitation of the coverage of the Act to Indian people contained in S. 2173. To repeat, it seems to me that the real battle is for jurisdiction over non-Indians in Indian country. It is to be noted that *none* of the recent sets of demands issued by various Indian organizations, either during the Trial of Broken Treaties or the confrontation at Wounded Knee, urged the repeal of the Indian Civil Rights Act. Rather, the demands centered upon the return to a relationship based on treaties and directly supported the extention of tribal jurisdiction to non-Indians. As I see it, the Indian Civil Rights Act, or an acceptable replacement, is an essential prerequisite to the goal of responsible and effective tribal government, because it makes such comprehensive jurisdiction possible.

The repeal of the limited right to counsel provided by the Act also seems contradictory to the end of the extending jurisdiction to non-Indians, who will require effective representation in tribal courts. Further, I would oppose revisions entailing new jurisdictional limitations, abstention doctrines, or soveregn immunity defenses for the reason stated earlier—that any limitaton on the scope of Indan civil rights should be principled, not technical, in nature. Also I would rely on the federal courts, or an Indian court of appeals, to elaborate the scope of the protections provided by the Act.

CONCLUSION

In the maze of shifting attitudes toward Indian policy, the conflicting poles of assimilation and separatism have often been intermeshed. So it is today. The future envisioned by the B.I.A. is the gradual contracting of federal services to the tribes and the transfer of administrative responsibility for B.I.A. services to the tribes, while the B.I.A. maintains overall control of tribal programs. In revulsion against the specter of "termination" of the special federal responsibility toward tribal Indians, Indian people have been willing to embrace such a continuing federal "guardianship" role.

If we assume such a continuing participation by the federal government in Indian tribal affairs, we are almost compelled to accept the judgment of the

[9] MICH. L. REV. Note, *supra* note 10, at 963.
[10] THE INDIAN CIVIL RIGHTS ACT, FIVE YEARS LATER, *supra* note 2, at 56.
[11] *Id.* at 48, 103–05.

Colliflower case,[12] that the tribe, as a federal "instrumentality," should be subject to suit in federal court.[13] Too often, the veil of tribal sovereignty has given the B.I.A. an exclusive franchise to manipulate and control tribal affairs and to avoid the prospect of appeal to outside help by individual Indian people who are truly interested in self-determination, but who find that they cannot free themselves from the suffocating control of a massive federal bureaucracy. The Indian Civil Rights Act has codified the *Colliflower* case and resolved this dilemma.

It is not the fault of the Indian people that their tribal legal systems are so compromised today. It is the fault of the white man, who, in the brief period of his colonization of the North American continent, has virtually destroyed American Indian tribal customary law. Many of the oral traditions have died, and the reservation experience has been traumatic for all of the tribes. Some have resisted the white man's ways; others have not. Most have reorganized their governments to correspond to the white man's Indian Reorganization Act, and they have organized tribal justice systems in the white man's way. Now they are faced with the white man's Indian Civil Rights Act, which makes tribal institutions responsible to the federal courts.

To the extent that customary law still functions in the tribes, it can and should be preserved. However, we must recognize that for many Indian people, customary law is dead. With the continuing imposition of white civilization on the tribes and the reorganization of tribal government has come the destruction of customary political and moral authority. Many tribal governments thus do not reflect tribal law or custom, and "traditionalists" find themselves opposed to tribal governments on these reservations. Customary law and customary tribunals exist outside of the formal legal system as a part of Indian religion, but only rarely are recognized by the tribal government.

In my view, there is every reason in conscience to defer to the judgments of Indian customary law and to protect thereby the "central cultural values" of tribal Indian people. But there is no reason to defer to the judgments of nontraditional Indian governments exercising municipal powers under the charter and guardianship of the federal government. The point in need of clarification is how to tell the difference.

I have attempted to articulate a standard of judicial restraint which recognizes the need to take account of areas of sovereignty which should be protected from federal judicial interference pursuant to the Indian Civil Rights Act. It is my belief that the test should follow the *Yoder* case. Thus, where a separate ethnic community has developed its culture in a context entirely different than that of Anglo-American constitutional history, and where an important goal of that culture is preservation of traditional ways, the departures of that culture from constitutional standards should be recognized as "central cultural values" protected by the free exercise clause of the first amendment.

The *Yoder* test mandates a searching inquiry into the customary or traditional basis of challenged tribal actions. Therefore, a claim that a given institution or practice should be protected under the free exercise clause must be based on a showing of some historical continuity and some ongoing function in tribal life. If the tribe can meet the burden of showing a strong and compelling nexus between the autonomy demanded and a necessary tribal value, fundamental human rights may be compromised by the tribe. The point I am striving to make is that such a searching inquiry is quite feasible and that it is the only principled way to preserve tribal "central cultural values" while allowing inquiry into the basis of tribal actions abridging individual rights. Simplistic rubrics will not suffice. What is needed is an evaluation of the tribal justice system in each instance, pinpointing the sources of customary authority and the remaining customary rules and adjudicating persons or bodies, so that the tribe's free exercise rights can be accurately weighed against the individual's rights under the Indian Civil Rights Act.

Accordingly, it is submitted that Congress' use of constitutional language should not be taken as requiring modification of tribal governmental procedures and laws to fully comply with the same constitutional standards imposed on state and federal governments. Rather, Congress' use of constitutional language, when read in the light of the free exercise clause, mandates that the courts evolve constitutional standards appropriate to the concept of Indian

[12] 342 F.2d 369 (9th Cir. 1965).
[13] *Cf.* Marsh v. Alabama, 208 U.S. 501 (1946).

tribes as ethnically and culturally autonomous units. The fundamental rights of the Indian people should not be forfeited to the sovereignty of the tribes, but they should be balanced against the tribes' free exercise right of cultural autonomy.

What of the future? There will be more activists, and there may well be more confrontations, more Wounded Knees. More Indians will develop a pan-tribal perspective, especially in their spiritual life. Increasingly, pan-tribal political movements will come into being. Will we see the emergence of pluralistic democracy on the American political model? A return to pre-Indian Reorganization Act modes of organization? Or new, Indian-evolved, forms of government? I do not dare predict. If tribal life is to have vitality, it must develop in a legal context which provides for responsible tribal self-government. There must be accountability to standards of fairness which protect both the fundamental rights of individual Indians and the cultural integrity of the tribes. Thus despite its deficiencies, I believe that the Indian Civil Rights Act is a valuable instrument for the reform of tribal institutions. It has legitimated tribal jurisdiction, especially over non-Indians, and it is an important step in the pursuit of responsible tribal self-government.

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Creative Punishment: A Study of Effective Sentencing Alternatives

(By David F. Fisher)

I. INTRODUCTION

Criminal jurisprudence has been defined as "the problem of trying to control anti-social behavior by imposing punishment on people found guilty of violating rules of conduct called criminal statutes."[1] In the realm of criminal jurisprudence, imposition of punishment is perhaps the most weighty action taken by a judge. No other final order equals sentencing in its far-reaching effect, both on society and the individual offender. Despite sentencing's importance, however, an offender's treatment after conviction "is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system."[2]

In devising any sentencing policy it first must be noted that sentencing is not a neutral act; it is a human process occurring within a social environment of laws, facts, ideas and people. A sentencing procedure's validity depends upon the extent to which each of these factors is taken into consideration.

Traditionally, ideas of crime and punishment have been inseparable; consequences of a conviction have been described as a matter of course as "punishment."[3] Punishment may be defined as a preventive measure designed to

[1] H. Packer, The Limits of the Criminal Sanction 3 (1968) [hereinafter cited as Packer].
[2] *United States* v. *Waters*, 437 F.2d 722, 723 (D.C. Cir. 1970).
[3] H. Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 405 (1958).

protect society, reform offenders, educate the community in deterrence, and "influence development of social morals and social discipline among citizens." [4] In assessing sentencing procedures, these various purposes, upon which most sentencing provisions are founded, must be carefully scrutinized. With some variation, the traditional objectives of criminal punishment have been reprobation, retribution, deterrence and reformation.

II. PURPOSES OF PUNISHMENT

To the extent punishment is merely a penalty, it is an expression of social reprobation, a "public condemnation based upon the disturbance and excitement brought about by crime." [5] It constitutes the compensation or expiration afforded society for a material injury effected upon it by wrongdoers. The wrongdoer himself is of little consequence.[6] Society fixes the punishment's gradation to conform with its abhorrence of the particular crime without adjustment for individual circumstances. Incapacitation as a basis for punishment partially relies on this reasoning. While offenders are incarcerated, society assumes it is free of their depredations and justice is thereby effected.

Retribution embodies the theory that man is a responsible moral agent to whom rewards are due when he makes correct moral choices, as socially defined, and to whom punishment is due when he makes wrong ones.[7] Thus, retribution has been defined as "deserved punishment for evil done, or . . . merited requittal",[8] it is required atonement whether or not it reduces criminal activities. The criminal law serves as an acceptable basis within the social framework for accomplishing this atonement.[9] Retribution has been condemned as "unjustifiable vengence," [10] a "legalization of primitive and infantile reactions." [11] Once labeled an offender a person is "fair game" and society's collective emotions come forth as a conviction that its injury must be "repaid." [12]

Punishment acts as a deterrent to the extent it is used to reduce or eliminate the incidence of antisocial behavior. It is the unpleasantness of discouraging measures, i.e., death, corporal punishment, financial penalties, deprivation of liberty, and attaching social stigma which is hoped achieves this objective.[13]

It is doubtlessly accurate to say "any imaginative realization that one will be hissed off the social stage or suffer pain is bound to act as a strong deterrent." [14] However, several commentators claim this objective is highly overrated as a realistic achievement of current criminal sanctions.[15] Society cannot hope to deter "those whose lot in life is already miserable beyond the point

[4] N. WALKER, SENTENCING IN A RATIONAL SOCIETY 10 n.7 (1969) [hereinafter cited at WALKER] (quoting from Yugoslav Criminal Code of 1951, Art. 3). *See also* H. VON HENTIG, PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY 1 (2d ed. 1973).

[5] SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT 185 (2d ed. 1968) [hereinafter cited as SALEILLES].

[6] "In the eyes of criminal justice the offender is but an abstract, nameless individual, as later he becomes a mere number in the workyards of the jail or penitentiary." *Id.* at 4.

[7] *See* PACKER, *supra* note 1, at 37–38.

[8] WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1244 (college ed. 1967). Sir James Fitzjames Stephen chose to be more blunt: "[The] criminal law . . . proceeds upon the principle it is morally right to hate criminals [and society] justifies that sentiment by inflicting upon criminals punishments which express it." 2 J. STEPHENS, HISTORY OF THE CRIMINAL LAW OF ENGLAND 81–82 (1883).

[9] *See* PACKER, *supra* note 1, at 10.

[10] DeGrazia, *Crime Without Punishment: A Psychiatric Conundrum*, 52 COLUM. L. REV. 746, 750 (1952).

[11] K. MENNINGER, THE HUMAN MIND 449, 455 (3d ed. 1945).

[12] K. MENNINGER, THE CRIME OF PUNISHMENT 190 (1966); *see* SALEILLES, *supra* note 5, at 192. It becomes an indelible taint. The criminal is of another race; he is the savage come to life again; and is to be hounded without mercy; he is the extreme antisocial being, wholly refractory to the requirements of social life.

[13] *See* Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L.C. & P.S. 595, 597 (1968). There are generally two theories of deterrence: special or individual deterrence and general deterrence. Jeremy Bentham emphasized the former, contending only so much punishment need be inflicted as will effectively deter the particular offender concerned. This has been labeled Bentham's "frugality of punishment" theory. *See* WALKER, *supra* note 4, at 3–4. Sir James Fitzjames Stephen, on the other hand, has argued the primary objective of deterrence is to reflect an example for all other persons tempted to commit crime, thereby reducing the possibility they will submit to temptation. Toward this end, punishment must do more than merely deter an individual. *See* 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 92 (1883).

[14] M. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1015–16 (1940). Cohen goes on to say: "[T]o justify punishment it is not necessary to prove that it *always* prevents crime by its deterren quality. It is enough to indicate that there would be more crime if all punishment were abolished." *Id.* at 1015–16.

[15] *See* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 2–3 (1957); PACKER, *supra* note 1, at 45–46; WEIHOFEN, THE URGE TO PUNISH 149–50 (1956).

of hope . . . those whose value systems are closed to further modification, either psychologically . . . or culturally . . ." or those whose conduct is compulsory.[16] Other commentators suggest certainty of detection and punishment has a greater consequence in deterrence than the penalty's severity.[17]

The modern approach in punishment theory combines goals of community protection and criminal rehabilitation, taking the criminal's background and personality into account, rather than merely penalizing the offender for his misdeed.[18] The so-called "rehabilitative ideal" is primarily offender-oriented in that the punishment's duration is measured by what is thought necessary to beneficially change the offender's personality.[19] Theoretically this is achieved through "proper programs of education and training, medical care and assistance, according [the prisoner] basic amenities of life, and through gradual re-establishment of his ties with the community." [20]

Fundamental problems in sentencing arise from a lack of agreement as to which social purposes it should promote.[21] Realistically, it must be recognized that the desire for vengence and reprobation is strong among men.[22] Deterrence and rehabilitation are also highly regarded, necessary objectives to be achieved. Thus, no penal philosophy can focus upon a single objective; "rather will it be a somewhat dubious mixture of heterogeneous elements . . . ." [23]

III. FORMS OF PUNISHMENT

The most common means of dealing with minor offenses is the fine. Its amount generally relates to the material gravity of the offense and thus has reprobation and retribution as primary objectives.[24] Theoretically, "it quickens the sense of social responsibility" by making the offender undergo some tangible sacrifice.[25] When a judge's realistic alternatives are limited to fines or imprisonment, there is inevitable discrimination between offenders who can afford a fine and those who cannot. The United States Supreme Court has ruled that jailing an indigent for mere nonpayment of a fine is violative of equal protection.[26] However, this ruling does not cure recurrent inequality when imprisonment is a legitimate statutory alternative to a fine. Those apparently unable to "pay" for their crime financially will more readily be accorded the harsher treatment. In this respect the fine fails to accomplish desirable goals.

Imprisonment isolates from the community persons likely to commit criminal acts and serves as a disciplinary and training center helpful in beginning cetrain rehabilitative programs. It was first devised as a rehabilitative alternative to more puritanical penalties such as display in the stocks, public whippings and physical mutilation.[27] Unfortunately, the predominant theory today appears to be that incarceration should serve primarily as an incapacitative technique.[28] This ignores the obvious fact that eventually the offender

[16] PACKER, *supra* note 1, at 45; *see* S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 748–52 (2d ed. 1973) [hereinafter cited as CRIMINAL CORRECTIONS].

[17] BARNES, THE STORY OF PUNISHMENT 254 (1930); J. Andenaes, *The Preventive Effects of Punishment*, 114 U. PENN. L. REV. 949, 964–70 (1966).

[18] D. Lay, *A Judicial Mandate*, TRIAL, Nov., 1971, at 14. McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U.L. REV. 423 (1940). *See also* PACKER, *supra* note 1, at 53.

[19] PACKER, *supra* note 1, at 54.

[20] D. Lay, *A Judicial Mandate*, TRIAL, Nov., 1971, at 14.

[21] *See* J. HOGARTH, SENTENCING AS A HUMAN PROCESS 3–6 (1971).

[22] *See* HOLMES, THE COMMON LAW 41 (1881); CRIMINAL CORRECTIONS, *supra* note 16, at 745; M. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1010 (1940).

[23] Mannheim, *Some Aspects of Judicial Sentencing Policy*, 67 YALE L.J., 961, 971 (1958).

[24] WALKER, *supra* note 4, at 82–83.

[25] Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 821 (1963).

[26] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

[27] W. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U.L. REV. 450, 459–61 (1967). Nelson quotes the following passage from an address by Governor Hencock to the General Court, Massachusetts, 1793: "It may be well worthy of your attention to investigate the question whether the infamous punishments of cropping [ears] and branding, as well as that of the public whipping posts, so frequently administered in this government, are the best means to prevent the commission of crimes, or absolutely necessary to the good order of government or to the security of the people. It is an indignity to human nature, and can have but little tendency to reclaim the sufferer. Crimes have generally idleness for their source, and where offenses are not prevented by education, a sentence to hard labor will perhaps have a more salutary effect than mutilating or lacerating the human body . . . ." *Id.* at 461.

[28] S. BATES, PRISONS AND BEYOND 76 (1936).

will be released.[29] Unless imprisonment has accomplished some rehabilitation, incapacitation will have protected society only briefly.[30] Little has been done, however, to achieve rehabilitative goals—at least on the local level. For example, mandatory sentences are provided to maximize a penalty's deterrent effect and are seldom advocated for corrective reasons.[31] Thus, courts often pronounce sentences unnecessarily drastic from the corrective or precautionary view and which are often uneconomical and inhumane.[32]

It may also be informative to examine the facility used to "rehabilitate" an offender. A recent survey of representative police and county jails revealed reformation was not a firm objective.[33] The average age of jail facilities surveyed was 34.5 years with little modernization. Several facilities were squeezed into a single floor of the local county courthouse. Not a single county maintained educational facilities nor were study release programs provided. Each had occasional work release programs but none were permanently established. None of the counties surveyed provided equipment or space for inmates' physical activity or exercise. One county referred to the "pen" where inmates were allowed fresh air, and occasional jogging exercises were allowed in catwalks surrounding the cells. There were no full time personnel assigned to care for any jail within the counties surveyed. Supervision and responsibility for inmates' welfare was distributed among a curious group with various other responsibilities and backgrounds, e.g., dispatchers, records keepers, janitors and city patrol. The interest with which these people attended to the responsibility necessarily was secondary to their primary duties. Rehabilitation was not well-advanced.[34]

The American Bar Association has recommended sentencing alternatives which feature the individual's freedom.[35] This is at least a tacit recognition that our jails and prisons have not accomplished rehabilitative goals. Indeed, they tend to institutionalize offenders, rendering them even less capable of social integration because of broken ties with the outside community.

Indeterminate sentencing and semi-detention have been devised as means to assure a more rehabilitative approach in criminal incarceration. An indeterminate sentence consists of two confinement periods announced by the court, one being a minimum, the other a maximum.[36] A prisoner so sentenced is eligible for parole after the minimum term is completed, depending on his rehabilitation, and he must be discharged at completion of the maximum.[37] The procedure's asserted advantages of flexibility and evenhandedness seem quite worthy; however, the meager rehabilitative capacities of local penal institutions have already been noted. Justifying such a sentence on rehabilitative bases seems tenuous at best. Indeterminate sentences are also criticized for lack of guidance afforded a judge in formulating terms of incarceration[38] and the procedure's tendency to subject a prisoner to an "unknown destiny, [and] sure probing, prodding, poking, etc. to determine release; like a ripe olive."[39] The American Bar Association has taken the position it is "unsound" for a legislature to require a minimum term of imprisonment.[40]

[29] Approximately 95% of all offenders incarcerated are eventually released. NATIONAL COUNCIL ON CRIME & DELINQUENCY, GUIDES FOR SENTENCING 2 (1957).

[30] *See* Note, *Sentencing Felons to Imprisonment under the Kansas Criminal Code: The Need for a Consistent Sentencing Policy*, 10 WASHBURN L.J. 270, 271 (1971).

[31] WALKER, *supra* note 4, at 148–49.

[32] *Id.*

[33] The survey was conducted in 1973 by a local government agency. The source has requested the agency's name and those of the counties surveyed remain confidential. However, all findings are verifiable in UNITED STATES DEP'T OF JUSTICE, LOCAL JAILS: A REPORT REPRESENTING DATA FOR INDEPENDENT COUNTY AND CITY JAILS FROM THE 1970 NATIONAL JAIL CENSUS (1973).

[34] D. Lay, *A Judicial Mandate*, TRIAL, Nov., 1971, at 14. "Our prisons have been bluntly described as little more than 'warehouses of human degradation,' 'they are nothing more than 'a walled institution where adult criminals in large numbers are held for protracted periods, with economically meaningless and insufficient employment, with vocational training or education for a few, with rare contacts with the outside world in cellular conditions varying from the decent to those which a zoo would not tolerate, the purposes being to lead the prisoners to eschew crime in the future and to deter others of like mind from running the risk of sharing their incarceration." *Id.* at 14. *See also* N. Carlson, *The Law and Corrections*, 6 U. SAN FRAN. L. REV. 77, 83 (1972).

[35] ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.5(c) Commentary (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS]. "A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary."

[36] *See, e.g.*, KAN. STAT. ANN. § 21–4603 (Supp. 1973).

[37] *See* CONRAD, CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES 52 (1967); GLASER, COHEN & O'LEARY, THE SENTENCING AND PAROLE PROCESS 9 (1966).

[38] S. Rubin, *The Model Sentencing Act*, 39 N.Y.U.L. REV. 251, 258 (1964). *Butt see* KAN. STAT. ANN. § 21–4606(2) (Supp. 1973).

[39] M. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 38 (1972).

[40] ABA STANDARDS, *supra* note 35, § 3.2(a).

Semi-detention utilizes a weekend custody intended to deprive the offender of leisure hours without interfering with his working week. Night custody is another form. Both are desirable because they help to avert adverse influences on an offender by reducing his contract with fellow inmates while permitting him to retain normal social contacts.

The diversionary program has also been implemented to soften the harsh impact of the criminal justice system. Essentially, it is an agreement between prosecutor and offender whereby the latter is conditionally diverted out of the system before an adjudication of guilt. Should the offender violate the conditions during the diversion period, prosecution for the defendant is discharged without a conviction.[41]

Penologists have become increasingly aware that the criminal justice system has not been achieving some of its valued objectives.[42] Many believe undue emphasis has been placed on retribution, thus creating a system which is often counter-productive. Imprisonment, for example, is the most expensive method of dealing with a criminal, both in terms of custodial cost[43] and in loss of the prisoner's productive power and support for dependents. It also frequently subjects the prisoner to cruel and inhumane conditions which reinforce his resort to crime upon release.[44]

Semi-detention and diversion have not been extensively incorporated into sentencing systems. However, these experiments may lead to the general adoption of more innovative sentencing concepts.

IV. SOCIAL SATISFACTION WITHOUT IMPRISONMENT

Many penologists now believe that fear of detection and moral condemnation better advance the ends of reprobation, retribution and deterrence than does imprisonment.[45] It may be postulated that social vengence is sought only to the extent outrage and indignation are released pursuant to a defendant's arrest and conviction. Once this is done, the vengence campaign melts out of the social memory even prior to sentencing.[46] The question then arises whether incarceration is necessary to placate or protect society, at least in the case of certain criminals and crimes.

A. Offender and Criminal

Many offenders society punishes are not habitual or dangerous criminals, but merely persons who at one time inadvertently or by irresistible impulse committed a legally punishable offense. Such offenders generally lack moral culpability and responsibility.[47] Unlike those who commit dangerous offenses or deliberately choose crime as a way of life,[48] the chance offender is usually a repentant having no desire to be "hissed off the social stage"[49] through social reprobation or retribution. Thus, the plea has been made that punishment be commensurate with guilt and subjective motivation rather than merely determined by the crime's objective severity.[50] The chance offender would be an excellent subject for new and innovative sentencing techniques.

[41] *See generally* MODEL PENAL CODE § 9, Comment (Proposed Official Draft 1962); WALKER, *supra* note 4, at 83–85.

[42] Brancale, *Diagnostic Techniques in Aid of Sentencing*, 23 LAW & CONTEMP. PROB. 442 (1958); KOTH, *Of Crime, Criminal Justice and Corrections*, 6 U. SAN FRAN. L. REV. 27, 45–63 (1966).

[43] Offenders can be kept under probation supervision at much less cost than in institutions. The average state spends about $3,400 a year to keep an offender imprisoned while it costs only about one-tenth that amount to keep him on probation. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 28 (1967).

[44] *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 11–12 (1967); WALKER, *supra* note 4, at 76–77; Lay, *A Judicial Mandate*, TRIAL, Nov., 1971, at 14; Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 604–05 (1970).

[45] *See* WALKER, *supra* note 4, at 19–22.

[46] *See* PACKER, *supra* note 1, at 103–35; SAILELLES, *supra* note 5, at 232–35.

[47] *Id.*

[48] *See* MODEL SENTENCING ACT § 5 (1963). This section establishes criteria for identifying dangerous offenders, placing them in any one of three categories: (1) one who commits a crime which inflicted or was an attempt to inflict serious bodily harm, coupled with a propensity to commit crime; (2) one who commits a crime seriously endangering another's life or safety and having a previous criminal conviction; and (3) one who participates in organized crime or racketeering.

[49] Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1016 (1940).

[50] *See* Williams v. New York, 337 U.S. 241, 248–49 (1949); SAILELLES, *supra* note 5, at 9; Decore, *Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity*, 6 CRIM. L.Q. 324, 356 (1963).

B. Offense and Crime

Society has long struggled with the problems associated with crime prevention. However, it is not every crime against which society demands protection by means of an offender's incapacitation.[51] The reason is that incapacitative measures are extremely drastic and, as noted, often not necessary to satisfy the social conscience. Crimes involving extreme violence, organized racketeering and narcotics trafficking, because of their gravity, should be dealt with more severely than non-violent or victimless crimes.[52] The latter category, together with the chance offender category noted above, is the focus of the following sentencing principles: the creative sentence.

V. THE CREATIVE SENTENCING TECHNIQUE

At the present time, the trial judge's options regarding imposition of punishment are extremely limited. Essentially he has three: imprisonment, fine or some form of probation. It has been said these alternatives are "too restrictive to achieve the remedial action that is required in the bulk of cases."[53] However, by improving upon the third—probation—it is hoped an effective sentencing policy might be devised to treat the nonviolent or chance offender. A key element in this strategy is dealing with the problem in its social context. Therefore, the proposed creative sentencing technique places a premium on the individual's interaction with the community; incarceration is considered only as a drastic alternative. In this context, the proposal demands basically three things of a sentence: physical restitution, correlation to the offense committed, and significance to the individual offender.

A. Restitution

The offender must make physical restitution to society or the individual victim of his offense. This measure is designed to appease the social conscience by economic or moral reparation rather than vengence inflicted by imprisonment or fine.[54] For example, many perpetrators of securities fraud, forgery, petty larceny and similar offenses can profit handsomely from their illegal activities. Often, victims are without resources to seek restitution civilly, or the perpetrator himself has already distributed the ill-gotten gains for his own benefit.[55] A creative sentence might require the offender to repay these sums on an installment basis or lump sum contribution according to his ability to pay.[56] When the offender is without means to provide economic reparation for property damage or personal injury, he may be required to perform services for his victim, such as machine repairs or yard work, according to his capabilities.

Should the particular crime be victimless, the perpetrator may be directed to work for the community's benefit in a social agency, at no public cost during his free time. If the offender has some outstanding ability or talent that can be used by the community or its agencies he could be required to

[51] WALKER, *supra* note 4, at 131.

[52] *But see* L. Pierce, *Rehabilitating Rehabilitation*, STUDENT LAWYER 9, 10–11 (Jan. 1974). The author notes a report based upon a 1970 survey of thirty-three states conducted by the ABA Commission on Correctional Facilities and Services. It shows 63% of the persons sentenced to prison for more than one year were sentenced for nonviolent crimes. In the federal system, 90% sent to prison each year are nonviolent offenders.

[53] Seymour, *Major Surgery for the Criminal Courts?*, 38 BROOKLYN L. REV. 571, 578 (1972).

[54] Monetary reparation or restitution to aggrieved parties for loss or damage caused by the defendant's criminal act is frequently made a condition of probation either pursuant to express statute or a broad grant of authority concerning probation conditions. Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 826–28. *See also* ABA STANDARDS, *supra* note 35, § 2.7(d); ABA STANDARDS RELATING TO PROBATION § 3.2(c)(viii), Commentary (Tent. Draft, 1970); MODEL PENAL CODE § 301.1(2)(h), Comment (Tent. Draft No. 5, 1956).

[55] In allowing reparation or restitution it must be remembered the criminal law is not meant to supplant a civil suit or reduce the criminal court to a collection agency. Two cases represent a divergence of opinion on the issue. State v. Morgan, 8 Wash. App. 189, 504 P.2d 1195 (1973), refused to consider the possible effect a damage award in a criminal action may have upon a future civil action arising from the same incident. In allowing the reparations, the court left this determination to the legislature. People v. Becker, 349 Mich. 476, 486, 84 N.W.2d 833, 836 (1957), on the other hand, suggests it may not be lawful to give the defendant a sentencing alternative which requires him to give up a hearing as to his civil liability. It may be wise to provide by statute that such probation conditions shall effect a set-off in any civil action brought to recover the same damages.

[56] One commentator suggest a fund be established by probationers whose activities have caused loss to large numbers of people. Upon filing a verified proof of claim, victims could recover proportionately from this fund. Seymour, *Major Surgery for the Criminal Courts?*, 38 BROOKLYN L. REV. 571, 576 (1972). For a description of a possible procedure to be used for an installment plan, see Towns v. State, 25 Ga. App. 419, 103 S.E. 724 (1920).

donate that particular talent, ability or skill where needed. The court could merely refer the offender to a participating agency which then notifies the court upon completion of the required term of service. Public welfare agencies, private social agencies, Alcoholics Anonymous, the church, physical and mental health services, and fraternal and service organizations are but a few of the places where such labor would be welcome.

The creative sentencing adjusts the punishment for each individual case to effect the greatest possible return to society. It accomplishes both reparation to the community and reformation of the offender through the responsibilities imposed upon him.[57]

B. Correlation

The punishment inflicted should have some correlation to the particular offense for which the individual has been convicted. For example, reimbursement may be a pertinent consequence for the offense of theft by means of a forged check. This would help the offender to acquire a sense of responsibility for the particular act as well as his own financial affairs. These desirable goals would not be achieved as readily by a similar program for an offense other than a theft, such as a narcotics violation.[58]

Social service work closely related to the offense or even a required writing on the particular evils of his act may disclose to the offender society's special interest in suppressing the conduct. For example, an Oregon court recently found a young lady guilty of recklessly causing a forest fire which cost $40,000 to extinguish. Her sentence was to accompany forestry officials on reforestation and reseeding projects, doing some of the work herself.[59] She also will be required to compile seasonal data on forest fires occuring within the state and be prepared to give talks at area schools on the dangers of forest fire.

Another example involves a duck hunter who had killed a rare polish mute swan, having "mistaken" it for a goose. He could have been sentenced to six months in jail and fined $500. Instead, he was ordered to spend two weeks working at a state game preserve and write a report on the book, "Ducks, Geese and Swans of North America."[60] Similar programs generally give offenders a sense of accomplishment that prison or fine rarely offer.

C. Significance

Probably the most important criterion of the creative sentencing technique is that punishment should have particular significance to the offender. Even those commiting petty offenses often become indifferent to an act's possible statutory consequences. The creative sentencing technique would relate the punishment to the offender's life pattern in order to create a realization that society will not allow such indifference to continue. A California court recently placed a convicted pickpocket on a year's probation. One of the conditions is that he wear mittens whenever venturing into a crowd.[61] Police are to arrest the pickpocket if they catch him barehanded in a crowded area during the probation period. Thus, the sentence is significant in its correlation with his offense as well as his means of "livelihood."

A recent Florida case followed a similar pattern when an unemployed artist was convicted for possession and sale of cocaine. The sentence required the offender to teach art in an area school for mentally retarded children. It was reported the experience has been so rewarding the individual is now a member of the school's paid staff.[62] Another case in Seattle, Washington, involving a person convicted of exhibiting obscene movies, ended in a sentence requiring one hundred hours of service to a charity of the offender's choice and establishment of a $2,000 trust fund to be used in purchasing educational films for area schools.[63]

[57] *See* Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 826–28 (1963).

[58] Indeed, there is a line of authority which holds restitution or reparation can be decreed only in cases where the crime directly gives rise to the loss or injury; not where the loss and crime are merely related in time and place. People v. Baker, 37 Cal. App. 3d 117, 112 Cal. Rptr. 137 (1974); People v. Williams, 247 Cal. App. 2d 394, 400, 55 Cal. Rptr. 550, 556 (1966); People v. Becker, 349 Mich. 476, 486, 84 N.W.2d 833, 838 (1957); State v. Barnett, 110 Vt. 221, 231, 3 A.2d 521, 525 (1939).

[59] NATIONAL OBSERVER, Oct. 15, 1973.

[60] *Id. But see* Butler v. District of Columbia, 346 F.2d 798 (D.C. Cir. 1965) (finding a condition the defendant write an essay outside the scope of the local probation statute).

[61] Topeka Daily Capital, Jan. 3, 1973, at 1, col. 2.

[62] TIME MAGAZINE, Sept. 2, 1974, at 79.

[63] Topeka Daily Capital, Jan. 3, 1973, at 1, col. 2.

Even in cases when the criminal law stands at the limit of its power, as when an offender is wholly unresponsive to punitive measures, a sentence may be geared to open new interests in socially acceptable undertakings. Rather than concentrating on what the law can do *to* convicted persons, it may serve rehabilitation to allow them to provide *for* others in a social service setting.

Utilizing the three criteria of restitution, correlation and significance, the creative sentencing technique offers judges broad powers to impose sentences designed to serve both accused and community. Purposes achieved by the technique are multiple:

1. It aids the offender in realizing and accepting his responsibilities as a member of society and begin a reformative program designed to promote self-satisfaction,[64]

2. It facilitates the offender's reintegration into the community, thereby avoiding various negative aspects of imprisonment and reducing the state's financial burden,[65]

3. It vindicates the law's authority as well as society's emotions and promotes public protection;

4. It minimizes the conviction's impact upon the offender's innocent dependents.

VI. LIMITATIONS ON APPLICATION

In devising a creative sentencing technique, one cannot overlook various necessary limitations on its application.

A. Statutory Authorization

The criminal law is essentially a creature of legislative formulation. Unless that body has facilitated creative sentencing's use by a broadly stated sentencing provision, a judge's alternatives are restricted. Although some commentators condemn use of imprecise policy provisions,[66] many jurisdictions have enacted them. Federal law, for instance, states that the court: "may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best."[67]

Kansas law provides that its article on sentencing: "be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities . . . whenever . . . not detrimental to the needs of public safety."[68]

Further provisions state "nothing . . . contained [within the sentencing article] shall limit the authority of the court to impose or modify any general or specific conditions" as long as compatible with sentencing policy.[69] Theoretically, such authority frees judges from any substantial limitations on creative sentencing.

Although a statute authorizes courts to exercise broad discretion concerning probation conditions, the judgment exercised still must be a legal judgment, consonant with constitutional and statutory safeguards. Hence, conditions imposing a jail term under the rationale it deters offenders by giving them a taste of incarceration generally have been held invalid absent express statutory authority.[70] The same has been said of general exile from the community[71] and restitution for losses not arising directly from the particular act for which

[64] The main objective [of the criminal law] is to change the person's attitudes and to help him cope with his circumstances, gain insight into his own motvations, reorient his feelings, and achieve a measure of self-control, CRIMINAL CORRECTIONS, *supra* note 16, at 666.

[65] Jerome Hall has stated it a different way. "[T]he principle purpose of a system of criminal justice is to preserve and improve the moral fabric of impersonal relations upon which social life, freedom, and creativity depend." Address by Jerome Hall, *The Purposes of a System for the Administration of Criminal Justice*, at Georgetown niversity Law Center, Oct. 9, 1963.

[66] *See* M. FRANKEL, CRIMINAL SENTENCING: LAW WITHOUT ORDER 5 (1973); CRIMINAL CORRECTIONS, *supra* note 16, at 130–45.

[67] 18 U.S.C. § 3651 (1970).

[68] KAN. STAT. ANN. § 21–4601 (Supp. 1973). *See also* MODEL SENTENCING ACT § 1 (1963).

[69] KAN. STAT. ANN. § 21–4610 (Supp. 1973).

[70] State v. Van Meter, 7 Ariz. App. 422, 440 P.2d 58 (1968); People v. Ledford, 173 Colo. 194, 477 P.2d 374 (1970); People v. Robinson, 253 Mich. 507, 235 N.W. 236 (1931). The apparent reasoning behind these decisions is probation serves to maximize individual liberty; therefore, incarceration is disallowed as not effecting this goal. *But see Ex parte* McClane, 129 Kan. 739, 284 P. 365 (1930); Gray v. Graham, 128 Kan. 434, 278 P. 14 (1929).

[71] State *ex rel.* Baldwin v. Alsbury, 223 So. 2d 546 (Fla. 1969); Weigand v. Commonwealth, 397 S.W.2d 780 (Ky. App. 1966); People v. Smith, 252 Mich. 4, 232 N.W. 397 (1930); State *ex rel.* Halverson v. Young, 278 Minn. 381, 154 N.W.2d 699 (1967).

the defendant was convicted.[72] Hopefully, such restrictions will be used sparingly to the end creative sentencing's purposes can be achieved.

B. Reasonableness

Any sentence imposed must have a reasonable relationship to the accused's treatment and the public's protection or reparation.[73] In this sense, creative sentences should be used only when they will serve a constructive purpose and their enforcement is practical. A reasonableness test has invalidated provisions requiring banishment,[74] waiver of the right to appeal a conviction,[75] discontinuance of certain employment,[76] cutting one's hair[77] and refraining from playing college or professional basketball.[78] Under proper circumstances, as when a particular activity or condition has directly contributed to the crime's perpetration, any one of these measures may have survived the reasonableness test.

A patently unreasonable probation condition was approved by the California Court of Appeals in 1936.[79] The condition required the defendant submit to sterilization by vasectomy pursuant to his conviction for statutory rape. In reaching its decision, the court relied on the defendant's also having veneral disease. The condition was held to be reasonably related to the defendant's rehabilitation because the judge believed this disease could be transmitted to the offender's progeny. However, a moment's thought discloses that this measure would not directly affect the defendant's physical sexual motivation nor reduce the tendency to spread disease because conception is not a prerequisite. The case has been criticized for imposing a condition which is excessive in view of the crime committed.[80]

Reasonableness also requres any restitution or reparation be related to the offender's ability to pay. In this way the sentence does not prevent his successful re-establishment in the community nor automatically end with a jail term for failure to meet impossible requirements.[81]

C. Personal Right

Admittedly, a defendant forfeits certain personal rights upon his conviction for a crime. This forfeiture includes many rights which are essential ingredients of life, liberty and the pursuit of happiness. Despite his conviction, however, the defendant nevertheless retains some rights unimpaired. On occasion, a sentence may be imposed which violates such rights. In one case, the United States Court of Appeals for the Ninth Circuit held invalid as an unwarranted intrusion on the accused's privacy a condition he donate a pint of blood to the Red Cross.[82] This case, involving a threat of direct physical abuse, demonstrates a clearer example of the criminal law's limitations than those dealing with rights not usually protected, e.g., prohibition of certain employment from

[72] People v. Williams, 247 Cal. App. 3d 394, 55 Cal. Rptr. 550 (1966); People v. Becker, 349 Mich. 476, 84 N.W. 833 (1957); State v. Barnett, 110 Vt. 221, 3 A.2d 521 (1939).

[73] A probation condition is invalid if it:
(1) has no relationship to the crime of which the defendant is convicted,
(2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality.
Peple v. Mason, 5 Cal. 3d 759, 764, 488 P.2d 630, 632, 97 Cal. Rptr. 302, 304 (1971). *See also In re* Bushman, 1 Cal. 3d 767, 776–77, 463 P.2d 727, 733, 83 Cal. Rptr. 375, 381 (1970); People v. Keefer, 35 Cal. App. 3d 156, 169, 110 Cal. Rptr. 597, 606 (1973).

[74] State *ex rel.* Baldwin v. Alsbury, 223 So. 2d 546 (Fla. 1969); Weigand v. Commonwealth, 397 S.W.2d 780 (Ky. App. 1966); State *ex rel.* Halverson v. Young, 278 Minn. 381, 154 N.W.2d 699 (1967). The *Young* case stated the provision was "repugnant to the underlying policy of the probation law, which is to rehabilitate offenders without compromising the public safety." *Id.* at 385, 154 N.W.2d at 702.

[75] State v. Rhinehart, 267 N.C. 470, 148 S.E.2d 651 (1966).

[76] People v. Brown, 133 Ill. App. 2d 861, 272 N.E.2d 252 (1971). Defendant was convicted of assault and battery. The court held there was no reasonable basis for requiring him to cease his employment as a bartender, a circumstance in itself unrelated to the offense committed.

[77] Inman v. State, 124 Ga. App. 190, 183 S.E.2d (1971). Here, defendant's conviction was for possession of narcotics; his hair did not affect the act itself.

[78] People v. Higgins, 22 Mich. App. 479, 177 N.W.2d 716 (1970). Defendant's conviction was for an unrelated breaking and entering. The court found the condition more likely to impede rehabilitation than promote it.

[79] People v. Bankenship, 16 Cal. App. 2d 606, 61 P.2d 352 (1936).

[80] People v. Dominguez, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967). This case held invalid a condition the defendant not become pregnant again while in an unmarried state. The conviction had been for robbery and the defendant, already the unwed mother of two, was again pregnant at the time of sentencing.

[81] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 18–19 (1967).

[82] Springer v. United States, 148 F.2d 411 (9th Cir. 1945).

which the accused derives his livelihood[83] or requiring certain religious behavior.[84] Such conditions are at least questionable. However, because the defendant does forfeit certain rights and also has acquiesced in the sentencing conditions imposed, the court's authority is quite broad. For instance, one condition regularly found valid is an agreement to submit to warrantless police searches at any time, even when probable cause is lacking.[85]

The United States Constitution, although it guarantees to all citizens the equal protection and enforcement of the law,[86] permits qualitative differences in meeting out punishment.[87] There is no requirement that two persons convicted of the same offense and whose individual characteristics differ must receive identical sentences.[88] However, the guarantee does prohibit substantial differences in penalties having no rational basis in fact.[89]

The rationale used in many states for permitting conditions such as banishment,[90] warrantless searches[91] and temporary confinement[92] is that the defendant, once having accepted probationary terms, cannot later complain of them. These jurisdictions hold probation to be a privilege,[93] and something the defendant may reject when sentenced should he consider the terms harsher than the penalty the court would otherwise impose. Other courts, however, have realized a defendant does not actually have a great measure of choice in deciding to accept probation, despite questionable conditions, over a term of incarceration.[94] It seems reasonable to assume that when a condition requires a waiver of precious constitutional rights, it must be narrowly drawn to achieve its purpose. To the extent the condition is overbroad it is not reasonably related to a defendant's reformation or the community's protection and therefore is an unconstitutional restriction.

D. Fairness

Any condition imposed must be fundamentally fair. A court should not require behavior which would be illegal, immoral or impossible of performance.[95] Hence, conditions requiring one's consent to unannounced police searches of a premises he manages, but does not own,[96] or that a chronic alcoholic immediately give up liquor forever,[97] have been disallowed as impossibilities. Nor should a condition result in harsher punishment than the maximum available under alternatives of imprisonment or fine.

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[83] *Cf.* People v. Brown, 133 Ill. App. 2d 861, 272 N.E.2d 252 (1971). *But see* People v. Keefer, 35 Cal. App. 3d 156, 110 Cal. Rptr. 597 (1973) (condition prohibiting probationer's selling furnaces because he used unfair practices); People v. Frank, 95 Cal. App. 2d 740, 211 P.2d 350 (1949) (discontinuance of practice of medicine because probationer inticed a child during an examination); Yarbrough v. State, 119 Ga. App. 46, 166 S.E.2d 35 (1969) (discontinue practice of law where conviction of unrelated offense found unprofessional).

[84] Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946) (overturning condition requirin gregular church attendance).

[85] People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971); Russi v. Superior Court, 33 Cal. App. 3d 160, 108 Cal. Rptr. 716 (1973); People v. Bremmer, 30 Cal. App. 3d 1058, 106 Cal. Rptr. 797 (1973); Himmage v. State, 88 Nev. 296, 496 P.2d 763 (1972); State v. Schlosser, 202 N.W.2d 136 (N.D. 1972). However, it must appear the probation order contained the provision and the defendant specifically agreed to it, thereby waiving his fourth amendment rights. People v. Calais, 37 Cal. App. 3d 898, 112 Cal Rptr. 685 (1974); People v. Grace, 33 Cal. App. 3d 447, 108 Cal. Rptr. 66 (1973).

[86] U.S. CONST. amend XIV, § 1.

[87] Williams v. Illinois, 399 U.S. 235, 243 (1970).

[88] *See* CRIMINAL CORRECTIONS, *supra* note 16, at 134–36.

[89] *See* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 439 (1958); 21 AM. JUR. 2d *Criminal Law* § 582 (1965). *Cf.* Williams v. Illinois, 399 U.S. 235 (1970).

[90] *Ex parte* Sherman, 81 Okla. Crim. 41, 159 P.2d 755 (1945); *Ex parte* Snyder, 81 Okla. Crim. 34, 159 P.2d 752 (1945).

[91] People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971).

[92] *In re* McClane, 129 Kan. 739, 284 P. 365 (1930); Gray v. Graham, 128 Kan. 434, 278 P. 14 (1929).

[93] *Accord*, Earnest v. Willingham, 406 F.2d 681, 682 (10th Cir. 1969); Thomas v. United States, 327 F.2d 795, 797 (10th Cir. 1964); Yates v. United States, 308 F.2d 737, 738 (10th Cir. 1962).

[94] State v. Oyler, 92 Idaho 43, 48, 436 P.2d 709, 712 (1968); People v. Becker, 349 Mich. 476, 486, 84 N.W.2d 833, 836 (1957).

[95] Huffman v. United States, 259 A.2d 342, 346 (D.C. App. 1969); State v. Harris, 116 Kan. 387, 389, 226 P. 715 (1924); *In re Patterson*, 94 Kan. 439, 146 P. 1009 (1915).

[96] Huffman v. United States, 259 A.2d 342 (D.C. App. 1969).

[97] Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965); State v. Oyler, 92 Idaho 43, 436 P.2d 709 (1968). *Contra*, Upchurch v. State, 289 Minn. 520, 184 N.W.2d 607 (1971); Sobata v. Willard, 247 Ore. 151, 427 P.2d 758 (1967). These latter cases apparently hold the defendant's consent bound him to the condition.

which the accused derives his livelihood[83] or requiring certain religious behavior.[84] Such conditions are [illegible]ast questionable. However, because the defendant does forfeit certain righ[illegible]nd also has acquiesced in the sentencing conditions imposed, the court's authority is quite broad. For instance, one condition regularly found valid is an agreement to submit to warrantless police searches at any time, even when probable cause is lacking.[85]

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The rationale used in many states for permitting conditions such as banishment,[90] warrantless searches[91] and temporary confinement[92] is that the defendant, once having accepted probationary terms, cannot later complain of them. These jurisdictions hold probation to be a privilege,[93] and something the defendant may reject when sentenced should he consider the terms harsher than the penalty the court would otherwise impose. Other courts, however, have realized a defendant does not actually have a great measure of choice in deciding to accept probation, despite questionable conditions, over a term of incarceration.[94] It seems reasonable to assume that when a condition requires a waiver of precious constitutional rights, it must be narrowly drawn to achieve its purpose. To the extent the condition is overbroad it is not reasonably related to a defendant's reformation or the community's protection and therefore is an unconstitutional restriction.

D. Fairness

Any condition imposed must be fundamentally fair. A court should not require behavior which would be illegal, immoral or impossible of performance.[95] Hence, conditions requiring one's consent to unannounced police searches of a premises he manages, but does not own,[96] or that a chronic alcoholic immediately give up liquor forever,[97] have been disallowed as impossibilities. Nor should a condition result in harsher punishment than the maximum available under alternatives of imprisonment or fine.

[83] *Cf.* People v. Brown, 133 Ill. App. 2d 861, 272 N.E.2d 252 (1971). *But see* People v. Keefer, 35 Cal. App. 3d 156, 110 Cal. Rptr. 597 (1973) (condition prohibiting probationer's selling furnaces because he used unfair practices); People v. Frank, 95 Cal. App. 2d 740, 211 P.2d 350 (1949) (discontinuance of practice of medicine because probationer inticed a child during an examination); Yarbrough v. State, 119 Ga. App. 46, 166 S.E.2d 35 (1969) (discontinue practice of law where conviction of unrelated offense found unprofessional).

[84] Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946) (overturning condition requirin gregular church attendance).

[85] People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971); Russi v. Superior Court, 33 Cal. App. 3d 160, 108 Cal. Rptr. 716 (1973); People v. Brommer, 30 Cal. App. 3d 1058, 106 Cal. Rptr. 797 (1973); Himmage v. State, 88 Nev. 296, 496 P.2d 763 (1972); State v. Schlosser, 202 N.W.2d 136 (N.D. 1972). However, it must appear the probation order contained the provision and the defendant specifically agreed to it, thereby waiving his fourth amendment rights. People v. Calais, 37 Cal. App. 3d 868, 112 Cal Rptr. 685 (1974); People v. Grace, 33 Cal. App. 3d 447, 108 Cal. Rptr. 66 (1973).

[86] U.S. Const. amend XIV, § 1.

[87] Williams v. Illinois, 399 U.S. 235, 243 (1970).

[88] *See* Criminal Corrections, *supra* note 16, at 134–36.

[89] *See* Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 439 (1958); 21 Am. Jur. 2d *Criminal Law* § 582 (1965). *Cf.* Williams v. Illinois, 399 U.S. 235 (1970).

[90] *Ex parte* Sherman, 81 Okla. Crim. 41, 159 P.2d 755 (1945); *Ex parte* Snyder, 81 Okla. Crim. 34, 159 P.2d 752 (1945).

[91] People v. Mason, 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971).

[92] *In re* McClane, 129 Kan. 739, 284 P. 365 (1930); Gray v. Graham, 128 Kan. 434, 278 P. 14 (1929).

[93] *Accord*, Earnest v. Willingham, 406 F.2d 681, 682 (10th Cir. 1969); Thomas v. United States, 327 F.2d 795, 797 (10th Cir. 1964); Yates v. United States, 308 F.2d 737, 738 (10th Cir. 1962).

[94] State v. Oyler, 92 Idaho 43, 48, 436 P.2d 709, 712 (1968); People v. Becker, 349 Mich. 476, 486, 84 N.W.2d 833, 836 (1957).

[95] Huffman v. United States, 259 A.2d 342, 346 (D.C. App. 1969); State v. Harris, 116 Kan. 387, 389, 226 P. 715 (1924); *In re Patterson*, 94 Kan. 439, 146 P. 1009 (1915).

[96] Huffman v. United States, 259 A.2d 342 (D.C. App. 1969).

[97] Sweeney v. United States, 353 F.2d 10 (7th Cir. 1965); State v. Oyler, 92 Idaho 43, 436 P.2d 709 (1968). *Contra*, Upchurch v. State, 289 Minn. 520, 184 N.W.2d 607 (1971); Sobata v. Willard, 247 Ore. 151, 427 P.2d 758 (1967). These latter cases apparently hold the defendant's consent bound him to the condition.

VII. SENTENCING GUIDELINES

A. The Problem With Judges

As noted at the outset, criminal sentencing is probably the most weighty action taken by a judge.[98] As a result, the trial judge must be meticulous in his decision. He must not allow social vindictiveness to sway him to undue severity nor advanced social science to sway him toward a degree of clemency unacceptable to the public conscience.[99]

Although various codes provide express criteria to be considered by judges when imposing sentences of imprisonment[1] or fine,[2] there are generally no criteria explaining how or what type of probation conditions should be imposed in a particular case.[3] Major criticisms of present sentencing practices focus upon the extraordinarily broad discretion allowed judges which inevitably injects self-formulated philosophies, personal attitudes and individual concerns into each judgment.[4] In addition, absence of meaningful legislative standards governing imposition of probationary conditions has been said to aggravate sentence disparity in two respects. A judge may fail to consider possible relevant data furnished in a pre-sentence report due to lack of guidance in its use. He also may be reluctant to risk public criticism in the event of further criminality by the probationer when he is unable to justify his action at least in part by legislative direction.[5]

The primary argument justifying total discretion is that punishment's individualization through the creation of "free agents" best achieves rehabilitative goals.[6] However, most judges lack extensive training in the use of information supplied by pre-sentence reports.[7] As a result, they sometimes fail to draw intelligent conclusions concerning sentence types or probation conditions to be imposed in an individual case.[8] Judge Marvin Frankel suggests liberal appellate review of sentences[9] and mixed sentencing tribunals[10] as remedies to reduce sentence disparity. Professor John Hogarth suggests using sentencing institutes to provide short-term initial training and periodic refresher courses for trial judges.[11] Commendable attempts have been made to educate judges in this very important decision-making process, including sentencing institutes,[12] regional seminars[13] and courses offered by the National College of State Trial

[98] *See* United States v. Wiley, 184 F. Supp. 679, 680 (N.D. Ill. 1960).

[99] J. Ulman, *The Trial Judge's Dilemma: A Judge's View*, Probation and Criminal Justice 114 (S. Glueck ed. 1933).

[1] *See, e.g.*, Kan. Stat. Ann. § 21–4606 (Supp. 1973); Model Penal Code §§ 7.03, 7.04, Comment (Proposed Official Draft 1960).

[2] *See, e.g.*, Kan. Stat. Ann. § 21–4607 (Supp 1973); Model Penal Code § 7.02, Comment (Proposed Ocial Draft 1966).

[3] Kansas, for instance, has a statute which suggests a list of conditions a judge may choose from in prescribing probation. Kan. Stat. Ann. § 21–4610 (Supp. 1973). However, there is nothing to tell a judge when he sould prefer one condition over another in any particular case. He has full discretion to choose among those suggested.

[4] M. Frankel, Criminal Sentencing: Law Without Order 5 (1973). "[O]ur legislators have not done the most rudimentary job of exacting meaningful sentencing 'laws' when they have neglected even to sketch democratically determined statements of basic purpose. Left at large, wandering in deserts of unchartered discretion, the judges suit their own value systems insofar as they think about the problem at all." *Accord*, Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 916 (1962); S. Rubin, *The Model Sentencing Act*, 39 N.Y.U.L. Rev. 251, 257–58 (1964).

[5] President's Commission on Law Enforcement and Administration of Justice. Task Force Report: The Courts 22–23 (1967).

[6] *See* Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 Geo. L.J. 1, 3–4 (1973).

[7] *See* J. Hogarth, Sentencing as a Human Process 390–91 (1971); Burr, *Appelate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. Pitt. L. Rev. 1, 9 (1971); Woods, *Punishment Under Law*, 1, Crim. L. Q. 423 (1959).

[8] *Cf.* Salelles, *supra* note 5, at 185.

[9] M. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 23–24 (1972).

[10] M. Frankel, Criminal Sentencing: Law Without Order 74 (1973). Judge Frankel's suggested sentencing tribunal would consist of the judge, a psychiatrist or psychologist, a sociologist and educator.

[11] Hogarth, Sentencing as a Human Process 389–90 (1971).

[12] Congress has authorized federal institutes and joint councils on sentencing. 28 U.S.C. § 334(a) (1970). To date there have been approximately eight such gatherings involving various circuit court systems. *See, e.g.*, Seminar and Institute on Disparity of Sentences for the Sixth, Seventh and Eighth Judicial Circuits, 30 F.R.D. 401, 428–57 (1961); Sentencing Institute, Ninth Circuit, 27 F.R.D. 287, 303–25 (1960); Pilot Institute on Sentencing, 26 F.R.D. 231, 264–321 (1959).

[13] Sentencing councils have met regularly in the Federal District Courts for the Eastern District of Michigan, Eastern District of New York and Northern District of Illinois. *See* President's Commission on Law Enforcement and Administration of Justice. Task Force Report: The Courts 24–25 (1967); M. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 20–21 (1972).

Judges in Reno, Nevada. However, these training sessions have not been frequent nor widespread in use and generally have been narrow in scope.[14]

B. Check List for Determination

Starting with the premise that inconsistency in sentencing begins with vagueness in the law, the President's Task Force on the Administration of Justice recommends general reduction of outright prohibitions and restrictions on probation and, in their stead, the provision of statutory standards to guide the courts in using their decision-making discretion.[15] Acknowledging judges' expertise in the law, but also their inadequacies regarding sentencing in its social setting, the proposed creative sentencing technique would provide a statutory check list similar to the following for determination of probation conditions.

A. Crimes Committed
  1. Crime Type
    a. Gravity According to Legislative Classification
    b. Crime Against Persons or Property
  2. Actual Circumstances Surrounding the Crime
    a. Manner In Which Committed
    b. Amount of Violence Involved
  3. Degree of Culpability
    a. Premeditation
    b. Intent to Directly Cause or Threaten Serious Harm
    c. Provocation or Excuse
  4. Extent of Crime
    a. Isolated Offense
    b. Organized Criminal Enterprise
  5. Use of Dangerous Weapons
  6. Extent of the Crime's Impact on the General Public
B. General Deterrence Considerations
C. History of Prior Delinquency or Criminal Activity
D. Offender's Attitude
  1. Toward the Crime
    a. Remorse, Repentence
    b. Willingness to Make Reparaton or Restitution
    c. Hostility
  2. Towards Society Generally
  3. Towards People Generally
E. Personality Traits
  1. Propensity to Commit Crime
  2. Likelihood Offender Will Respond to Probationary Treatment
F. Lifestyle and Background
  1. Employment
  2. Hobbies and Interests
  3. Special Skills or Knowledge
G. Financial Condition
H. Potential Injurious Effects of Institutionalization to the Individual or Dependents

The purpose of such standards is to create an image of the defendant as an individual which will assist the judiciary in determining the probation condition's purpose, extent and character. To assist in proper consderation of a case, it would be helpful and expeditious to require the court to use a sentencing study sheet or assessment guide listing the above criteria.[16] This will assure that all relevant aspects of the sentencing problem in an individual case will be weighed and considered. Thus, creativity is facilitated and the general purposes of the criminal law satisfied.

VIII. CONCLUSION

Creative sentencing, as a theory, should be implemented through an expanded probationary format. At present, statutes do little more than define probation as a term[17] while courts attempt to expound its objectives.[18] It is apparent traditional probationary measures have a marked rehabilitative emphasis.[19] They rarely are propounded as a means to satisfy other necessary objectives of the criminal law.[20] Creative sentencing, on the other hand, should attempt to balance conflicting legal and social principles, including reprobation, reformation and deterrence.[21] To achieve this end it is acknowledged a creative sentence should have inherent sting and the restrictions imposed should be realistically punitive in quality.

The three elements of a proper creative sentence—restitution, correlation and significance—are based on the premise that the sentencing court should have available a full panoply of remedies to administer as circumstances warrant. Options available should increase beyond the extremes of total institutional confinement and nonrestrictive probation. To aid this development and reduce uncertainty and lack of agreement among judges, sentencing criteria should be implemented either by statute or general adherence to specific sentencing principles by the judiciary.

The author does not presume to offer sure cures or panaceas for post-conviction inadequacies in the law. Criminal jurisprudence is an extremely complicated institution of civilized society. What is proposed here only seeks a more flexible approach toward correction of essentially antisocial behavior within a framework of "ordered liberty." Further study and formulation of alternatives is encouraged and a plea made to sentencing magistrates to use their imagination, but to use it in a manner "adapted to the sense of justice." [22]

UNITED SOUTHEASTERN TRIBES, INC.,
Sarasota, Fla., April 24, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, Senate Judiciary Committee, Subcommittee on Separation of Powers, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: This letter is intended as a comment to SB–1, with particular references to those sections which pertain to Native Americans. (Sections 203(a)(3); 205(a)(2); 685(b); 1861 and 1863.

First, I wish to compliment the Senate Judiciary Committee on its excellent and comprehensive work which has brought SB–1 to its present state. The task you have set for yourselves in recodifying and updating Title 18 was certainly a monumental one—as witness the three volumes of reports issued by your committee.

I am head of the Legal Research and Service Department of United Southeastern Tribes, Inc., an inter-tribal council of seven federally-recognized tribes. Our members are: the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Mississippi Band of Choctaw Indians, the Seneca Nation of Indians of New York, the Eastenr Band of Cherokee Indians of North Carolina, the Chitimacha Tribe of Louisiana and the Coushatta Tribe of Louisiana.

It is not easy to classify the circumstances in which our member tribes find themselves. Some of our member tribes are in 280 states, others are not. All

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[14] *See* M. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 18–21 (1972).

[15] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 18–19 (1967). *See also* J. HOGARTH, SENTENCING AS A HUMAN PROCESS 386–87 (1971); Note, *Criminal Procedure: Capital Sentencing by a Standardless Jury*, 50 N.C.L. REV. 118, 122 (1971).

[16] See J. HOGARTH, SENTENCING AS A HUMAN PROCESS 395–96 (1971).

[17] *See, e.g.*, KAN. STAT. ANN. § 21–4602(3) (Supp. 1973). "'Probation' is a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court after imposition of sentence, without imprisonment subject to conditions imposed by the court and subject to the supervision of the probation service of the state, county or court."

[18] The United States Supreme Court has described probation as: "an amelioration of the sentence by delaying actual execution or providing a suspension so that the stigma might be withheld and an opportunity for reform and repentence be granted before actual imprisonment should stain the life of the convict." United States v. Murray, 275 U.S. 347, 357 (1928). *See also* Yates v. United States, 308 F.2d 737 (10th Cir. 1962).

[19] *See* Logan v. People, 138 Colo. 304, 308, 332 P.2d 897, 899 (1958); People v. Becker, 349 Mich. 476, 494, 84 N.W.2d 833, 839 (1957); J. HOGARTH, SENTENCING AS A HUMAN PROCESS 4 (1971).

[20] *See* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING 13 (1957); Address by Judge William Herlands, Institute on Sentencing for United States District Judges, Denver, Colo., Feb. 1964, in 35 F.R.D. 381, 490 (1964); 21 AM. JUR. 2d *Criminal Law* § 565 (1965).

[21] *See also* Williams v. New York, 337 U.S. 241, n.13 (1949). The Court cites with approval certain basic considerations for determining an appropriate sentence: (a) the reformation of the offender; (b) the protection of the community; (c) the disciplining of the wrongdoer; and (4) the deterrence of others from committing like offenses.

[22] SALEILLES, *supra* note 5, at 3.

of them must constantly deal with the difficult questions of Federal—State—Tribal jurisdiction. Some are in the process of developing new tribal codes or modifying existing ones. All are even now digesting and adjusting to the 1968 Civil Rights Act as it applies to them. Some are in the process of considering amendments to their constitutions.

In each of these situations lies a long history of development of tribal customs and traditions as well as inter-relationship between the Tribe, the State, and the Federal Government. In short, the questions dealt with in SB–1 relating to Native Americans are extremely complex. They are at the very root of the tribal government's responsibilities to tribal members and of the tribal government's responsibilities to tribal members and of the relationship of law that requires careful study and much contact at the tribal level to adequately consider the respective rights and needs of the people to be affected by the laws; as well as to properly understand the effect of any changes in the relationship between the tribe, its members, the state, and the federal government. At this point I respectfully suggest that it does not appear that this essential study has yet been undertaken by the Judiciary Committee.

On the other hand, Congress has now undertaken a study—encompassing the very questions involved here—as one responsibility of the American Indian Policy Review Commission. Even though there is a two-year timetable for the full report of the study commission they will surely begin on this portion quite soon, since an amendment to P.L. 83–280 is before the Congress and there is so much concern by Indian people over that law.

In matters relating to American Indians changes need to be made too quickly. And once made they take effect relatively slowly. As a result, it seems only reasonable for Indians to hope and expect that Congress will use much effort to comprehensively study the specific problems related to them when undertaking changes such as those in question in SB–1.

I have reviewed the comments of Alan R. Parker, Marvin J. Sonosky, Robert Pirtle, Robert Dellwo and James B. Hovis, and heartily agree with them. In particular, I concur with the conclusion that the status quo not be changed so as to expand Federal or State jurisdiction over Indian tribes or tribal members until there has been an opportunity for both further study and more intensive Indian input. On this latter point I have grave concerns over Section 203, which fails to consider that Indian country has a different history from Federal enclaves or that there exist tribal governments responsible to the people who live on the reservations—governments which trace their origins to a period predating the founding of the U.S. Government as an independent nation.

In conclusion, I urge the Committee to change or delete those portions of Sections 203(a)(3); 205(a)(2); 685(b); 1861 and 1863, so as to maintain the status quo until further study can be made and detailed Indian input can be assured.

Yours very truly,

DONALD JAY SOLOMON,
Department Head.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,
Washington, D.C., March 21, 1975.

Senator JOHN L. MCLELLAN,
Senate Judiciary Committee, Subcommittee on Criminal Laws and Procedures,
Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in further response to your letter of October 15, 1974, concerning the revised bill, S. 1, which has now been introduced in the 94th Congress.

The bill was forwarded to to Judicial Conference's Committee on the Administration of the Criminal Law which has conducted an extensive study of the bill, and its predecessors, during the past five years.

At its meeting on March 7, 1975, the Judicial Conference of the United States considered and approved the report of the Committee on the Administration of the Criminal Law, making specific proposals and comments relating to S. 1 as introduced in the 94th Congress. A copy of the full report of the Conference on this matter is enclosed, together with the report of the Committee.

Neither the Conference nor the Committee has made at this time any further recommendation on the provisions of S. 1 relating to appellate review

of sentencing. The Conference has expressed on the record its firm opposition to this concept and at its September 1974 meeting approved the report of the Committee on the Administration of the Criminal Law in favor of the approach embodied in the proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure with certain modifications.

We will be pleased to furnish any additional information or assistance concerning S. 1 that may be helpful.

Sincerely yours,

WILLIAM E. FOLEY,
Deputy Director.

Enclosures.

REVISION OF THE FEDERAL CRIMINAL CODE

At the four previous sessions of the Conference held in 1973 and 1974 the Committee reported on phases of three proposals for the revision of the Federal Criminal Code; one submitted by the Brown Commission, one submitted by the Senate as S.1, 93rd Congress, and a third containing the views of the Department of Justice, introduced as S. 1400, 93rd Congress. Judge Zirpoli stated that S. 1 as introduced in the 94th Congress takes into account the opinions received from all sources on the three prior proposals, including an acceptance of several of the recommendations made by the Committee and previously approved by the Judicial Conference. The Committee, however, made certain specific proposals and comments relating to the new S. 1, 94th Congress, which the Conference approved and requested Judge Zirpoli to present to the Congress at the time hearings are held on S. 1, as follows:

MATTERS RELATING TO CONSTRUCTION

Section 112(a) of the new S. 1 would abrogate the rule of strict construction. The Committee expressed its objections to this provision, and the Conference concurred in this view at the April 1973 session (Conf. Rept., p. 15). The Conference agreed that the abrogation of the rule will introduce a litigable issue at the trial and appellate levels without corresponding benefits to the litigants. The Conference agreed that introducing the words "fair import of their terms to effectuate the general purpose of this title" as a rule of construction might result in an undesirable imprecision in drafting criminal legislation and in unnecessary constitutional confrontations.

JURISDICTION

Judge Zirpoli reported that S. 1, 93rd Congress, and S. 1400, 93rd Congress, would generate the least expansion of federal jurisdiction and were, therefore, preferable to the National Commission approach. He advised that this preference had been accepted in the draft of S. 1, 94th Congress. The new bill recognizes the concern for the efficient administration of court calendars which are dependent upon a wise and sensitive exercise of prosecutorial discretion by requiring in an amendment to 28 U.S.C. 522 that the Attorney General submit annual reports to the Congress, setting forth the number of prosecutions commenced during the preceding fiscal year under each section of Title 18, identifying the number of such prosecutions commenced under each jurisdictional base applicable to each such section.

CULPABLE STATES OF MIND

S. 1, 94th Congress, classifies the offense elements into (1) conduct, (2) circumstances surrounding the conduct, and (3) the results of the conduct, and then defines the state of mind with relation to each. The Conference agreed that this complex be productive of unnecessary litigation; that it will confuse judges and juries and that it may perhaps cause injustice. The Conference agreed with the Committee recommendation that the preferred definitions are:

A person engages in conduct: (1) "Knowingly" if, when he engages in the conduct, he does so voluntarily and not by mistake, accident or other innocent reason; (2) "intentionally" if, when he engages in the conduct, he does so knowingly and with the purpose of doing that which the law prohibits or failing to do that which the law requires; (3) "recklessly" if, when he engages in conduct with respect to a material element of an offense, he disregards a risk of which he is aware that the material element exists or will result from his conduct. His disregard of that risk must involve a gross deviation from

the standard of care that a reasonable person would observe in the situation; except that awareness of the risk is not required where its absence is due to voluntarily intoxication; (4) "negligently" if, when he engages in conduct with respect to a material element of an offense, he fails to be aware of a risk that the material element exists or will result from his conduct. His failure to perceive that risk must involve a gross deviation from the standard of care that a reasonable person would observe in the situation.

BARS TO PROSECUTION

Section 511 provides that a prosecution for an offense necessarily include in the offense charged shall be considered to be timely commenced even though the period of limitation for such included offense has expired, if the period for limitation for the offense charged has not expired and there is, after the close of evidence at the trial, sufficient evidence to sustain a conviction for the offense charged. This is contrary to existing law and the Conference agreed with the Committee that the rationale for a lesser period of time for a lesser offense applies whether it is the offense charged or a lesser included offense.

Section 512 provides that immaturity prevents prosecution, other than for murder, of any person under sixteen years of age but does not bar a juvenile delinquency proceeding under Chapter 36, Subchapter A (Sections 3601-3606). This provision does not take cognizance of the new treatment of juveniles contained in Public Law 93-415 (1974) and the Conference is of the view that this subchapter should accordingly be redrafted. The Conference also expressed concern that the formulation of Section 512 does not treat the problem of persons less than sixteen years old committing minor offenses in areas under exclusive control of the United States and urged that specific authority be granted magistrates to deal with such cases.

DEFENSES

Under this heading appear the following defenses: Section 521. Mistake of Fact or law, Section 522. Insanity, Section 523. Intoxication, Section 531. Duress, Section 541. Exercise of Public Authority, Section 542. Protection of Persons, Section 543. Protection of Property, Section 551. Unlawful Entrapment, and Section 552. Official Misstatement of Law.

The Conference agreed with the Committee's criticisms, which are generally applicable to all of these defenses: that codification is not necesary or desirable. The Conference noted particularly that Section 522 on insanity contains a formulation not previously considered by the Committee or the Conference. It treats mental disease or defect as a defense only when the state of mind required as an element of the offense is lacking as a result of mental disease or defect. The Conference agreed with the Committee recommendation that this section should not be codified but if a section on mental disease or defect be included, it favors the adoption of the National Commission's version. This follows the formulation of the American Law Institute.

It is believed that Section 522, as drafted, would freeze the insanity defense and not permit changing concepts and knowledge to work their way into the law. This would only serve to increase litigation and confuse juries. The Conference agreed with the need of an alternative verdict "not guilty by reason of insanity" but expressed the view that such a verdict should be incorporated in the Federal Rules of Criminal Procedure.

Section 551 relating to unlawful entrapment also involves codification of an offense which the Conference believes should not be codified because of the intricacies inherent in evolving legal concepts. Further, important procedural issues, such as the type of proof needed to raise the issue of entrapment, whether the defense may be pleaded inconsistently and the kinds of evidence admissible to show predisposition, are not codified.

OFFENSES OF GENERAL APPLICABILITY

The Conference favors substitution in Section 1001, criminal attempt, of the phrase "intent to commit" in place of "state of mind required for the commission of a crime" and the substitution of "substantial step" for "amounts to more tha nmere preparation for, and indicates his intent to complete." The Conference agreed with the Committee recommendation that a clearer formulation would read "A person is guilty of an offense, if acting with intent to commit a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime."

As to Section 1002, criminal conspiracy, the Conference prefers the present language "do any act to effect the object of the conspiracy" to the language in S. 1 "engages in any conduct with intent to effect any objective of the agreement."

Section 1003, criminal solicitation, previously criticized by the Conference, was again regarded as effective in that there is no demonstrated need for a general provision on solicitation; the provision is fraught with the potential for abuse as a prosecutorial tool; and the substance of the proposal is already covered by the provisions on complicity-accomplices. The Conference reaffirmed the view that the defense of renunciation is too closely circumscribed.

REVIEW OF SENTENCING

Judge Zirpoli advised the Conference that his Committee did not make any further recommendation on the provision of S. 1 relating to appellate review of sentencing inasmuch as the Conference has already firmly expressed itself in opposition to this concept. He reiterated the view of his Committee presented to the September 1974 session of the Judicial Conference (Conf. Rept., p. 58) that the Committee favors the alternative to appellate review of sentences provided by the proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure with certain modifications, as follows: (1) that the panel of review judges consist of one circuit and two district judges, (2) that membership on the panel be rotated as far as is practicable in the discretion of the assigning judge and (3) that the motion to review such sentences shall apply to any sentence which may result in imprisonment regardless of the period thereof.

COMMITTEE ON THE ADMINISTRATION OF THE PROBATION SYSTEM

The report of the Committee on the Administration of the Probation System was presented by the Chairman, Judge Albert C. Wollenberg.

ITEM FOUR.—THE PROPOSED NEW FEDERAL CRIMINAL CODE—SENATE 1, AS AMENDED JANUARY 4, 1975

In the preparation of this report, which is limited to Parts I and II of S. 1, as amended January 15, 1975, and in which we make specific recommendations, the Committee was fortunate to have had the benefit of the assistance of Mr. Harold Koffsky, former head of the Legislation and Research Section of the Criminal Division of the Department of Justice, without whose able and precise comparative study of previously considered proposed new federal criminal codes this report could not have been prepared within the limited time available to the Committee.

The committee reported to the Judicial Conference on the Proposed New Federal Criminal Code suggested by the National Commission on Reform of Federal Criminal Laws, chaired by Governor Edmund G. Brown in April, 1972. This Report was limited to Part A. General Provisions, and the Committee intended to continue its examination of other parts of the Code. Before the other parts of the Proposed Code could be reviewed, Senators McClellan, Ervin, and Hruska introduced on January 6, 1973, S. 1, 93rd Congress, 1st Session. Thereafter, in February, 1973, the Office of Management and Budget requested the views of the Judicial Conference on a draft bill, prepared by the Department of Justice, which was introduced by Senators Hruska and McClellan on March 27, 1973 as S. 1400, 93rd Congress, 1st Session. Both S. 1 and S. 1400 covered the same areas as the Brown Commission proposal but both contain other important provisions worthy of study.

The Committee made a comparative study of the three proposals which related to the general provisions and a final report on these provisions was submitted in April, 1973. The Committee planned to continue its comparative study. However, after extensive hearings by the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, S. 1, 94th Congress, 1st Session, was introduced on January 15, 1975. This is an extremely large bill surpassing its predeccessor in the 93rd Congress, which had been described as the largest bill ever introduced in the Senate. The Office of Management and Budget had again asked for Judicial Conference views on S. 1, 94th Congress, 1st Session. Once more this report must be limited to General Provisions and Offenses of General Applicability (Criminal Attempt, Criminal Conspiracy and General Solicitation) of S. 1, 94th Congress, due to the constraints of time.

PRELIMINARY STATEMENT

The Committee reaffirms the Preliminary Statement in its April, 1973 report with these additional observations. We wish to add to the praise given to the Brown Commission for its magnificent endeavors, our appreciation of the efforts of the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, and the Department of Justice in building on the work of the Brown Commission. In addition, we pointed out, in our April, 1973 report, the distinguished performance of the federal courts in meeting the problems of increased workload and responsibility. We believe that the novel problems of a code, together with the challengs to be met in implementing the Speedy Trial Act of 1974 will also be handled in an exemplary manner.

The Committee was particularly pleased that many of its recommedations were adopted in S. 1, 94th Congress. We note Chapter 4., Complicity, has been drafted so as to comply significantly with the Committee's recommedations. In addition, we opposed a criminal facilitation provision. S. 1 omits this area. Some of the other acceptances of the Committee's recommedations appear below. However, we regret that several important recommendations were not accepted, particularly those related to codification of defenses. The Committee remains convinced that rules for the exercise of public authority, protection of persons and property, and use of deadly force are not proper subjects for codification. Such rules would pose formidable problems for judges in instructing juries. Our continued objections are treated specifically below.

In our April, 1973 report we commented on the Brown Commission's codification of presumptions (section 103). This area is treated under Rule 25.1—Burdens of Proof, F.R.Cr.P. in the rules portion of S. 1, 94th Congress and is a concern of the Advisory Committee on the Criminal Rules rather than this Committee.

MATTERS RELATING TO CONSTRUCTION

Section 112(a) of S. 1, 94th Congress, 1st Session, would abrogate the rule of strict construction. The Committee expressed its objections to this provision in its report of April, 1973 to the Judicial Conference. We reiterated these objections since we believe that abrogation of the rule will introduce a litigable issue at the trial and appellate levels without corresponding benefits to the litigants. The Committee is of the opinion that introducing the words "fair import of their terms to effectuate the general purpose of this title" as a rule of constuction might result in an undesirable imprecision in drafting criminal legislation and in unnecessary constitutional confrontations.

JURISDICTION

The Committee has studied the provisions of S. 1, 94th Congress, with regard to the expansion of federal jurisdiction which would be caused by enactment of these provisions. Our review of the National Commission proposal, S. 1, 93rd Congress, 1st Session, and the Department of Justice bill, S. 1400, 93rd Congress, 1st Session, led us to conclude that the latter two bills would generate the least expansion of federal jurisdiction and therefore were preferable to the National Commission approach. The Committee's preference in this regard has been accepted in S. 1, 94th Congress.

The Committee's recommedations as to limiting phraseology and drafting technique are followed in this last version of the Code. The drafting technique recommended and utilized requires that in each instance, those offenses which may be appended for prosecution in connection with a particular offense must be set forth.

In the Committee's comment of April, 1973, it was stated that: ". . . we believe that the efficient administration of court calendars would be, to a large extent, dependent upon a wise and sensitive exercise of prosecutorial discretion, ..." S. 1 of the 94th Congress recognizes this concern and attempts to meet it by requiring, in an amendment to 28 U.S.C. § 522 that the Attorney General submit annual reports to the Congress setting forth the number of prosecutions commenced during the preceding fiscal year under each section of Title 18, identifying the number of such prosecutions commenced under each jurisdictional base applicable to each such section. This procedure is designed to act as a restraint on the exercise of concurrent Federal jurisdiction and as a means for Congress to review such exercise.

CULPABLE STATES OF MIND

The Committee devoted a substantial amount of time to intensive consideration of a formulation of the degrees of culpability and in its April, 1973 report offered definitions of "knowingly," "intentionally," "recklessly," and "negligently." (The Committee agrees with abolishment of the degree of culpability—"willfully.") The Committee believes firmly that its formulationis preferable to any of the other versions proposed.

S. 1, 94th Congress classifies the offense elements into (1) conduct, (2) circumstances surrounding the conduct, and (3) the results of the conduct and then defines the state of mind with relation to each. This complex procedure causes the Committee more concern than most of the previously considered formulations. The Committee believes that it will be productive of unnecessary litigation, that it will confuse judges and juries, and that it may perhaps cause injustice. Acceptance of a guilty plea under Rule 11, F.R.Cr.P. will be more complex and difficult causing even a bright defendent to have difficulty in understanding the differences among the degrees of culpability. The same difficulties would appear in charging juries. The Committee's formulation is simpler, clearer, would achieve the same objectives as S. 1, and would not alter the substantive sections of the Code if adopted. The definitions we prefer are:

"A person engages in conduct:

"(1) 'knowingly' if, when he engages in the conduct, he does so voluntarily and not by mistake, accident or other innocent reason;

"(2) 'intentionally' if, when he engages in the conduct, he does so knowingly and with the purpose of doing that which the law prohibits or failing to do that which the law requires;

"(3) 'recklessly' if, when he engages in conduct with respect to a material element of an offense, he disregards a risk of which he is unaware that the material element exists or will result from his conduct. His disrgard of that risk must involve a gross deviation from the standard of care that a reasonable person would observe in the situation; except that awareness of the risk is not required where its absence is due to voluntary intoxication;

"(4) 'negligently' if, when he engages in conduct with respect to a material element of an offense, he fails to be aware of a risk that the material element exists or will result from his conduct. His failure to perceive that risk must involve a gross deviation from the standard of care that a reasonable person would observe in the situation."

BARS TO PROSECUTION

Section 511, Time Limitations, provides, among other things, that a prosecution for an offense necessarily included in the offense charged, shall be considered to be timely commenced, even though the period of limitation for such included offense has expired, if the period of limitation for the offense charged has not expired and, there is, after the close of evidence at the trial, sufficient evidence to sustain a conviction for the offense charged. This is contrary to existing law. *Askins* v. *U.S.*, 251 F.2d 909 (D.C. Cir., 1958). We believe that the rationale for a lesser period of limitation for a lesser offense applies whether it is the offense charged or a lesser offense included offense.

Section 512. Immaturity, prevents prosecution, other than for murder, of any person under sixteen years of age. However, it does not bar a juvenile delinquency proceeding under Chapter 36, subchapter A (sections 3001-3006). It is noted that cognizance of the new treatment of juveniles contained in P.L. 93-415 (1974) is not taken in subchapter A. This subchapter should accordingly be redrafted. The Committee has expressed its concern that the formulation of section 512 does not treat the problem of persons less than sixteen years old committing minor offenses in areas under the exclusive control of the United States. We believe that specific authority should be granted magistrates to deal with such cases.

DEFENSES

Under this heading appear the following defenses: Section 521. Mistake of Fact or Law, Section 522. Insanity, Section 523. Intoxication, Section 531. Duress, Section 541. Exercise of Public Authority, Section 542. Protection of Persons, Section 543. Protection of Property, Section 551. Unlawful Entrapment, and Section 552. Official Misstatement of Law.

The Committee reiterates its criticisms which are generally applicable to all

these defenses, that codification of them is not necessary or desirable. This codification is an ambitious attempt to put in statutory form principles which are evolving and which would be best left to continue to develop through decisional law. It would do no harm to the structure of the code to omit them and the benefit of continued testing of ideas in court greatly outweigh any benefit to be derived from freezing the concepts contained in these sections.

In addition to these general comments, the Committee believes particular comment on several sections are appropriate.

Section 522. Insanity, contains a formulation not previously considered by the Committee. It treats mental disease or defect as a defense only when the state of mind required as an element of the offense is lacking as a result of mental disease or defect. The procdure for treating offenders with mental disease or defect it set forth in Sections 3611 through 3617. It should be noted that Section 3612(c) provides for a special verdict of (1) guilty, (2) not guilty, or (3) not guilty by means of insanity.

The Committee did not have Section 522 before it prior to its April, 1973 report. However, after careful consideration, the Committee continues its recommendation that this subject not be codified but if a section on mental disease or defect be included, the Committee favors the adoption of the National Commission's version which follows the A.L.I. formulation. The Committee is persuaded to recommend against Section 522 by the reasoning of the National Commission which rejected it. The National Commission reasoned "that any effort to refer the mental illness issue to the general formulations on culpability could lead only to a confusing and contradictory judicial interpretation of the culpability requirements, as judges were forced, without legislative guidance, to develop a jurisprudence relating to mental illness under the rubrics of 'intent,' 'knowledge,' and 'recklessness.'" The Committee believes that the problem would be exacerbated by the proposed complicated culpability definitions. In another view, it is tautological to provide that if a person lacks the state of mind required as an element of the offense, he is not guilty of the offense.

In sum, Section 522 would freeze the insanity defense and would not permit changing concepts and knowledge to work their way into the law, it would increase litigation and confuse juries. The Committee agrees with the need of an alternative verdict of "not guilty by reason of insanity" but we believe such a verdict should be incorporated in the Federal Rules of Criminal Procedure.

Another section upon which the Committee wishes to make specific comment it Section 551. Unlawful Entrapment. In both of the prior reports, the Committee recommended against codification of this defense because of the intricacies inherent in evolving legal concepts. The Committee also notes that important procedural issues, such as the type of proof needed to raise the issue of entrapment, whether the defense may be pleaded inconsistently and the kinds of evidence admissible to show predisposition, are not codified. Accordingly, the Committee's belief that this defense should not be codified until all issues are clarified is strengthened.

OFFENSES OF GENERAL APPLICABILITY

Section 1001. Criminal Attempt, was endorsed by the Committee in its April, 1973 report as to concept, but the Committee suggested clearer language which was not accepted in S. 1, 94th Congress. The Committee would substitute "intent to commit" instead of "the state of mind required for the commission of a crime" and substitute "substantial step" for "amounts to more than mere preparation for, and indicates his intent to complete." The Committee's recommended formulation would read, "A person is guilty of an offense, if acting with intent to commit a crime, he intentionally engages in conduct, which, in fact, constitutes a substantial step toward commission of the crime." We believe that this formulation is clearer and more readily understood by a jury and a defendant pleading guilty, and we also believe that it narrows the breadth of the provision.

Section 1002. Criminal Conspiracy, occasions two comments by the Committee. Under present law, it is generally held that acquittal of all but one of the conspirators requires acquittal of the remaining conspirator. Section 1002 would not mandate such a result. We believe the concept of agreement in a conspiracy militates against this innovation. S. 1 requires that the overt act requirement be met by: "engages in any conduct with intent to effect any objective of the agreement." Present law states: " . . . do any act to effect the object of the conspiracy. . . ." Whether any change in result was intended is not clear. In any event, the Committee believes the language which is well understood and has been used for many years is preferable.

Section 1003. Criminal Solicitation, was criticized in our April, 1973 report for three reasons: (1) no need for a general provision on solicitation has been demonstrated, (2) the provision is fraught with the potential for abuse as a prosecutorial tool, and (3) the substance of the proposal is already covered by the provisions on complicity-accomplices. We reaffirm this position.

In all three sections, an affirmative defense of renunciation is permitted. In Criminal Conspiracy and Criminal Solicitation the defense must include the prevention of the crime by the defendant. In Criminal Attempt the standard is "the defendant avoided the commission of the offense attempted by abandoning his criminal effort, and if mere abandonment was insufficient to accomplish such avoidance, by taking affirmative steps which prevented the commission of the offense." It was the position of the Committee in its April, 1973 report and which we reaffirm as to S. 1, 94th Congress, that the defense of renunciation is thus too closely circumscribed. For the defendant to prove that he prevented the commission of the offense would render this defense nugatory.

Respectfully submitted,

ALFONSO J. ZIRPOLI,
Chairman.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Washington, D.C., March 24, 1975.

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

DEAR MR. CHAIRMAN: The Associated General Contractors of America is a national association representing 8,500 construction firms which perform about 80 percent of the annual contract construction volume of the United States. Our membership represents the full range of the industry, including the construction of highways, buildings, municipal and utilities projects, and heavy and industrial facilities. The industry employs approxmately five million workers, about 3.5 million of whom are employed directly on construction job-sites.

We appreciate the opportunity to present our views on S.1, the Criminal Justice Reform Act of 1975, and we hope the Subcommittee finds our comments helpful in its deliberations on this important legislation.

This association commends the Subcommittee for its efforts to reform the substantive criminal laws of the United States. As an industry closely tied to all aspects of interstate commerce, we are especially aware of the need for a codification of Federal criminal law.

Under the present system, the Federal law, in many instances, is unclear or inconsistent. This has led to varying interpretations in different parts of the country. Thus justice often depends upon a local interpretation of the offense, the defenses permitted, the jurisdiction and the penalty. It is the matter of jurisdiction which is of particular concern to our industry.

In recent years the construction industry, accounting for over 10% of the Gross National Product, has been repeatedly harassed by wanton job-site violence. There have been many cases of serious construction site violence resulting in bodily injury and loss of millions of dollars in property. Because local authorities are usually reluctant to act, most of this violence goes unpunished and unabated.

Therefore, the Associated General Contractors of America commends the inclusion in this Bill of strong criminal sanctions against persons or groups of persons who interfere with interstate commerce by organizing to commit violent, threatening, or coercive actions, regardless of their motivation. Such provisions, if enacted, would alleviate the situation caused by the *Enmons* decision (*U.S. v Travis Paul Enmons*, 410 U.S. 396, 1973) whereby the Supreme Court held that the Hobbs Act was not applicable to employer-employee disputes.

We urge Congress to act swiftly on this much needed and long overdue legislation. Our views were well summarized by Senator Roman Hruska in his statement of January 15, 1975. "S.1 offers Congress the opportunity to restructure Federal criminal law so as to better serve the ends of justice in its broadest sense—justice to the individual, and justice to society as a whole."

Sincerely,

J. M. SPROUSE,
Executive Director.

THE AMERICAN LAW INSTITUTE,
New York, N.Y., May 14, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman,
Subcommittee on Criminal Law and Procedures,
Senate Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR MCCLELLAN: A copy of the 1975 charted results of our annual survey on the status of substantive penal law revision projects in 53 jurisdictions is enclosed for your and the Subcommittee's possible interest.

With high regard,
Very truly yours,

RHODA LEE BAUCH,
Assistant to the Director.

Enclosure.

STATUS OF SUBSTANTIVE PENAL LAW REVISION [1]

I. *Revised codes; effective dates:* (25)
* Ark. Crim. Code, Act 280 of 1975; 1/1/1976.
* Colo. Rev. Stat. Ann., Ch. 40 (1971 Perm. Cum. Supp.); 7/1/1972.
Conn. Gen. Stat. Ann., Tit. 53A; 10/1/1971.
* Del. Code Ann., Tit. 11; 7/1/1973.
Fla. Laws 1974, Ch. 74-383; 7/1/1975; see also Ch. 74-379 (death penalty).
* Ga. Code Ann., Tit. 26; 7/1/1969.
* Hawaii Laws 1972, Acts 9 & 102; 1/1/1973.
* Ill. Ann. Stat., Ch. 38, § 1-1; 1/1/1962.
Ill. Unified Code of Corrections, Ill. Ann. Stat., Ch. 38, § 1001-1-1; 1/1/1973.
* Kan. Stat. Ann., § 21-3101 (1973 Cum. Supp.); 7/1/1970.
* Ky. Rev. Stat., Ch. 500; 1/1/1975.
La. Rev. Stat., Tit. 14; 1942.
Minn. Stat. Ann., Ch. 609; 9/1/1963.
* Mont. Rev. Codes Ann., Tit. 94 (1973 Special Pamphlet); 1/1/1974.
* N.H. Rev. Stat. Ann., Tit. 62 (1973 Supp.); 11/1/1973.
N.M. Stat. Ann., Ch. 40a; 7/1/1963.
* N.Y. Rev. Pen. Law; 9/1/1967.
N.D. Cent. Code, Tit. 12.1 (1973 Supp.); N.D. Laws 1973, Ch. 116; 7/1/1975.
* Ohio Rev. Code, Tit. 29 (1974 Replacement Unit); 1/1/1974.
Ore. Rev. Stat., Tit. 16 (1973 Replacement Part); 1/1/1972.
* Pa. Stat. Ann., Tit. 18; 6/6/1973.
* P.R. Pen. Code, Act 115 of July 22, 1974; 1/22/1975.
* Texas Pen. Code (Vernon's Texas Code Ann. 1974); 1//1974.
Utah Code Ann., Tit. 76 (1973 Supp.); 7/1/1973.
Va. Code, Tit. 18.2; 10/1/1975.
* Wis. Stat. Ann., Tit. 45; 7/1/1956.

II. *Current substantive penal code revision projects:*

A. *Revision completed; not yet enacted:* (18)
* Alabama (Proposed Revision of Criminal Code]Oct. 1974[to be introduced in 1975 Legislature)
Alaska (status uncertain)
* California (Proposed Criminal Code reintroduced [S.B. 565]) (S.B. 1239 [Corrections Code] introduced 5/2/1973)
* Indiana (H.B. 1314 introduced 1/14/1975; tabled)
Iowa (S.F. 1150, introduced Feb. 1974, reintroduced as S.F. 85 Feb. 1975 & passed by Senate, as amended; pending in House)
* Maine (Proposed Criminal Code, Leg. Doc. No. 314, introduced in Senate, S.P. 113, 1/28/1975; pending in Judiciary Committee)
* Maryland (Proposed Draft of Proposed Code expected to be referred to Legislative Council)
* Michigan (Bill reintrodced in 1975; pending in Senate Judiciary Committee)

[1] As of April 1975 (53 jurisdictions). This chart was prepared and is maintained by Rhoda Lee Bauch, The American Law Institute, 435 W. 116th St., New York City 10027. Information as to any changes to be noted will be gratefully received.
* Indicates publication of substantial commentary.

* Missouri (S.B. 93 & H.B. 179 introduced in 1975)
Nebraska (Proposed Code to be reintroduced)
* New Jersey (Assembly Bill 3282 introduced 4/7/1975)
Oklahoma (S.B. 46, introduced in 1975, being studied by Senate Committee on Criminal Jurisprudence)
* South Carolina (Crime Study Committee of Legislature plans to introduce proposed revised Criminal Code in next legislative session)
South Dakota (State Bar Committee's Proposed New Criminal Code [1974] to be considered by Judicial Council in May & by State Bar at Annual Meeting in June)
* Tennessee (S.B. 600 & H.B. 677 pending in Legislature)
* United States (S. 1 introduced 1/15/1975; pending in Judiciary Subcommittee on Criminal Law & Procedure) (H.R. 333, introduced 1/15/1975, & H.R. 3907, introduced 2/27/1975, pending in Judiciary Subcommittee on Criminal Justice)
* Vermont (H. 419, introduced 4/3/1975, passed by House as amended; Senate will consider bill Jan. 1976 legislative session)
* Washington (Proposed Criminal Code: E.S.B. 2230, S.B. 2314, S.S.B. 2093, S.S.B. 2092 & S.S.B. 2313, introduced 1975, 44th Reg. Sess. of Legislature)

B. *Revision well under way:* (1) Arizona.

C. *Revision authorized—work not yet begun:* (2) District of Columbia, North Carolina.

D. *Contemplating revision:* (1) West Virginia.

III. *Revision completed but abortive:* (2)
Idaho (Idaho Penal & Correctional Code, Tit. 18, enacted effective 1/1/1972 but repealed effective 4/1/1972)
* Massachusetts (Bill reported to have failed in Committee)

IV. *No overall revision planned:* (4) Mississippi, Nevada (recodification with minor changes enacted 1967), Rhode Island, Wyoming

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HOVIS, COCKRILL & ROY,
Yakima, Wash., May 5, 1975.

Mr. PAUL C. SUMMIT,
Chief Counsel, Subcommittee on Criminal Laws and Procedures, U.S. Senate,
New Senate Office Building, Washington, D.C.

DEAR PAUL: Enclosed please find a copy of "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians" by Carole E. Goldberg, that was recently published in Volume 22 UCLA Law Review, p. 535. Ms. Goldberg has prepared this article under a research grant and it is apparent that she has devoted considerable time to its preparation. It clearly supports legislation retroceding state jurisdiction on the request of Indian tribes, and should be considered by you and the committee.

Sincerely yours,

By JAMES B. HOVIS.

PUBLIC LAW 280: THE LIMITS OF STATE JURISDICTION OVER RESERVATION INDIANS

(By Carole E. Goldberg *)

I. INTRODUCTION

Since the earliest years of this nation, courts and legislatures of both the federal government and the states have struggled to define the relationship between the American Indian and the multiple governments of the United States.[1] Although many separatist and culturally distinct groups have presented special legal problems because their culture is closely tied to the land, because they occupied much of North America prior to the European settlement and the American westward expansion, because they were specially subjected to federal control in the United States Constitution,[2] and because the Government of the United States reserved areas of land for them in trust under treaties ending

* Acting Professor of Law, University of California, Los Angeles; B.A. 1968, Smith College; J.D. 1971, Stanford. This Article was supported in part by the NSF, Rann. Div., Research Grant No. NSF-61-294-22 to the Lake Powell Project.
[1] *See, e.g.*, Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
[2] U.S. CONST. art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce with . . . the Indian tribes . . . ."

years of warfare.[3] The persistent question has been the degree of autonomy the Indians retain within their reserved lands. Court decisions have firmly established plenary congressional power over the affairs of the nation's Indian "wards."[4] What remains less certain is the allocation of power between the tribes and the states absent congressional action. While early decisions of the United States Supreme Court intimated that reservations were wholly separate from the states and hence immune from state legislative and judicial intrusion,[5] this principle has been undermined,[6] and no comparably clear-cut standard has emerged to replace it.

Over the years, Congress and the Department of the Interior, which have shared responsibility for formulating and implementing Federal Indian policy, have operated on a variety of divergent models for appropriate interaction between the Indians and the states. One model focuses on the inclusion of Indian reservations within the state boundaries, the rights of Indians as state citizens, and the desirability of Indian assimilation into the mainstream of American culture; its policy implications have included removing Indian lands from trust status and subjecting Indians to state law.[7] Another model focuses on the unique status of Indian tribes as sovereignties antedating the European settlement of America, the special federal responsibility for Indian welfare, and the decentralized nature of jurisdiction in the United States generally; it has tended to produce policies fostering tribal autonomy and economic development of reservations through federal training, subsidies, loans, technical assistance, and insulation from the burdens of state law.[8] In between are models which favor either assimilation or tribal autonomy, but interpose the federal government as an umpire, protecting Indian or state interests against extreme abuses by the other.

Since assimilation is cheaper for the federal government and preferred by states that dislike the presence of an Indian sovereignty within their borders, only feelings of respect and responsibility for the Indians have prevented the federal government from consistntly folowing this poicy regardess of its frequently adverse effects on the Indians.[9] This article concerns the most recent significant and comprehensive attempt by Congress to reconcile the conflicting impulses—Public Law 280 (hereinafter referred to as PL–280).[10] Passed in 1953, PL–280 was an attempt at compromise between wholly abandoning the

[3] Under this arrangement, the Indians acquired a beneficial right to use and occupy the land, while the federal government retained the fee and thus the power to decide whether the land should be sold, leased, encumbered, or taxed. *See, e.g.*, 25 U.S.C. § 392 (1970): U.S. Dep't of the Interior, Regulations of the Indian Office (1904), *quoted in* M. PRICE, LAW AND THE AMERICAN INDIAN 530–31 (1973). *See* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1268–69 (1971).

[4] McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973); United State v. Kagama, 118 U.S. 375 (1886).

[5] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 593 (1832).

[6] *See, e.g.*, Williams v. Lee, 358 U.S. 217, 219–20 (1959) (states have jurisdiction over reservation Indians if such jurisdiction does not infringe on tribal self-government) (dictum); United States v. McBratney, 104 U.S. 621, 624 (1882) (states may prosecute non-Indians for crimes committed against other non Indias on the reservation).

[7] This policy shaped the Allotment Act of 1887, ch. 119, 24 Stat. 388–91 (profusely amended, this Act is still in force, 25 U.S.C. §§ 331–58 (1975)), which distributed reservation lands to individual Indians as an incentive to the development of an agrarian way of life. The allotted lands were to be removed from trust status when the Indians demonstrated their adaptation to that way of life. Although no such alteration occurred, the allotment system resulted in indiscriminate liquidation of the federal trust responsibility, often over Indian protests, and a sharp decline in Indian land holdings.

The same policy accounted for the numerous statutes passed during the 1950's terminating the trust status of individual reservation. *See, e.g.*, 25 U.S.C. § 677 (1970) (Ute); 25 U.S.C. §§ 691–708 (1970) western Oregon tribes), 25 U.S.C. §§ 891–902 (1970) (Menominee).

[8] Tribal self-government and economic development were encouraged by the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-78 (1970).

A return in recent years to similar policies is manifested in President Nixon's 1970 Message to Congress, 116 CONG. REC. 23131 (1970), and in recent federal legislation facilitating long-term leasing of Indian land. 25 U.S.C. § 415 (1970). *See also* S. Con. Res. 26, 92d Cong., 1st Sess. (1971); S. 3157, 92d Cong., 2d Sess. (1972).

[9] In 1970 President Nixon acknowledged in a message to Congress: "The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before." 116 CONG. REC. 23132 (1970).

[10] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588–90 (now codified as amended in scattered sections of 18, 28 U.S.C.).

Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction. The statute originally transferred to five willing states[11] and offered all others, civil and criminal jurisdiction over reservation Indians regardless of the Indians' preference for continued autonomy.[12] PL–280 did not, however, terminate the trust status of reservation lands.[13]

From the outset, PL–280 left both the Indians and the states dissatisfied, the Indians because they did not want state jurisdiction thrust upon them against their will, the states because they resented the remaining federal protection which seemed to deprive them of the ability to finance their newly acquired powers. Predictably, disagreement between the Indians and the states erupted over the scope of jurisdiction offered by PL–280 and the means by which transfers of jurisdiction were to be effected. Among the matters in dispute were whether states assuming jurisdiction under PL–280 acquired the power to tax and zone on Indian reservations, and whether states asserting PL–280 jurisdiction had satisfied the procedural prerequisites for doing so.

Recent social, economic, and political developments have made the Indians and states especially anxious that their respective interpretations of PL–280 prevail. The expansion of metropolitan areas near Indian reservations has increased the states' interest in regulating and exploiting residential and recreational development on trust land. States have been notably desirous of ac-

[11] The five were California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added in 1958. Act of Aug. 8, 1958, Pub. L. No. 85–615, § 2, 72 Stat. 545. With respect to civil jurisdiction the Act provides:

"Each of the States or Territories [sic] listed shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of—	*Indian country affected*
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

28 U.S.C. § 1360(a) (1970).

In regard to criminal jurisdiction in the mandatory states the Act provides:

"Each of the States or Territories [sic] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of—	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

18 U.S.C. § 1162(a) (1970).

[12] Section seven of the Act originally offered all other states the option to take jurisdiction, yet had no requirement that Indians in those "optional" states consent. "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." Act of Aug. 15, 1953, ch. 505, § 7, 72 Stat. 590, *as amended* BE *U.S.C.* §§ 1321–26 (1970) (requiring Indian consent for future assertions of jurisdiction).

[13] 28 U.S.C. § 1360(b) (1970); 18 U.S.C. § 1162(b) (1970).

quiring pollution and subdivision control.[14] The discovery of substantial energy resources on reservations, and consequent industrial development, have spurred similar state interest in regulating and taxing those activities.[15] At the same time, tribal governments have been receiving encouagement from the federal government to develop tribal enterprises and strengthen their administrative apparatus,[16] increasing their interest in freedom from state power.[17] Finally, growing demands on the part of Indians that they receive their share of state services and their share of representation in state legislatures[18] have produced concomitant demands on the part of the states that Indians submit to state jurisdiction.

The jurisdictional stakes are considerably higher today than they were when PL–280 was enacted; at the same time federal Indian policy is more devoted to fulfilling federal responsibility for Indians and building effective tribal governments. Broadly speaking, the model for federal Indian policy seems to be changing from one favoring state power with minimum protection for Indian interests to one favoring tribal autonomy with minimum protection for state interests. Nevertheless, since PL–280 is the most direct evidence of congressional intent with respect to state jurisdiction, the debate over the scope of state power on Indian reservations must contend with policy choices Congress made when PL–280 was enacted. Amendments to the Act adopted in 1968 did, however, bring PL–280 more in conformity with current policy by rendering all *future* assertions of state jurisdiction under the Act subject to the affected Indians' consent, and authorizing states to return jurisdiction to the federal government.[19] But controversies persist over jurisdiction claimed by the states prior to these amendments.

This article will explore the legislative history of PL–280 and later amendments, the grounds for state and tribal objections to their provisions, and the ways in which the Indians and states have sought legislatively and judicially to resolve troublesome issues concerning the mechanisms and jurisdictional impact of PL–280. It will demonstrate how PL–280 has replaced complex jurisdictional doctrines as the touchstone for determining state power to affect the interests of reservation Indians, and how this statuory preemption has increased the need for careful statutory interpretation. Finally, it will suggest appropriate understandings of the most controversial provisions which both comport with the original legislative intent of PL–280 and complements current federal policy of encouraging strong trbal government while protecting state interests against serious tribal abuse.

II. LEGISLATIVE BACKGROUND

PL–280 differed from earlier relinquishments of federal Indian jurisdiction in that it authorized every state to assume jurisdiction at any time in the

[14] *See, e.g.*, Memorandum from Field Solicitor William G. Lavell to Acting Superintendent, Colorado River Agency, United States Dep't of Interior, Re: Sovereign Status of Chemehuevi Tribe of Indians (August 27, 1974) (copy on file in UCLA Law Review Office). The memo addressed the issue of whether county officials can regulate tribally owned campgrounds used primarily by non-Indians.

[15] *See* Bennett, *Problems and Prospects in Developing Indian Communities*, 10 ARIZ. L. REV. 649 (1968); Comment, *The Indian Stronghold and the Spread of Urban America*, 10 ARIZ. L. REV. 706 (1968); Comment, *Indian Law: The Pre-Emption Doctrine and Colonias De Santa Fe*, 13 NAT. RES. L.J. 535, 536 (1973).

[16] *E.g.*, President Nixon's 1970 Message to Congress on Indians strongly urged that Indian tribes assume responsibility for administering federal social welfare programs on the reservation. 116 CONG. REC. 23132–33 (1970). *See* Executive Proposal No. 32, submitted to Congress by the Secretary of Interior, April 1, 1971, *cited in* T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 142 n.17 (1972) [hereinafter cited as INDIAN CITIZENS]. Over 800 contracts between the Bureau of Indian Affairs (hereinafter referred to as B.I.A.) and the tribes were in effect on October 4, 1971, varying from the management and operation of educational and social welfare programs to the rental of dump trucks. Interior News Release (Oct. 4, 1971), *reported in* INDIAN CITIZENS, *supra* at 143 n.19.

[17] A good example of this emerging conflict is evident on the Navajo reservation, where the tribal government recently established an Environmental Protection Commission with power to impose fines and issue cease and desist orders to persons or entities violating Commission orders. Resolution, Navajo Tribal Council, Aug. 10, 1972 (Copy on file in UCLA Law Review Office).

[18] *See* Shirley v. Superior Court, 109 Ariz. 510, 514 P.2d 939 (1973), *cert. denied*, 415 U.S. 917 (1974) (holding that the immunity from service of process and tax exempt status of a reservation Indian did not disqualify him from holding a county elective office); Acosta v. County of San Diego, 126 Cal. App. 2d 455, 272 P.2d 92 (4th Dist. 1954); *In re* County of Beltrami v. County of Hennepin, 264 Minn. 406, 119 N.W.2d 25 (1963) (Indians entitled to state welfare benefits); ARIZONA STATE INDIAN SEMINAR, SUBCOMMITTEE REPORT ON TAXATION AND SERVICES TO ARIZONA RESERVATION INDIANS (1973). These efforts have been stimulated by the work of federally funded Indian legal services offices.

[19] U.S.C. §§ 1321–26 (1970).

future. Previous transfers had been limited to some or all of the reservations in a single state,[20] and had followed consultation with the individual state and affected tribes by the Bureau of Indian Affairs (hereinafter referred to as B.I.A.).[21] Although PL–280 itself had begun as an attempt to confer jurisdiction on California only,[22] by the time it was reported out of the Senate, the prevailing view was that "any legislation in [the] area should be on a general basis, making provision for all affected States to come within its terms . . . ."[23] The Senate Report of the bill in committee suggests why Congress was concerned with effectuating a general transfer of jurisdiction after years of an ad hoc policy which had involved careful evaluation in each case from the point of view of both Indians and the states. The Report indicates the foremost concern of Congress at the time of enacting of PL–280 was lawlessness on the reservations and the accompanying threat to Anglos living nearby.[24] In 1953, responsibility for law enforcement on the reservations was irrationally fractionated. If a non-Indian committed a crime against another non-Indian or a crime without an apparent victim, such as gambling or drunk driving, only state authorities could prosecute him under state law.[25] But if either the offender or victim was Indian, the federal government had exclusive jurisdiction to prosecute, applying state law in federal court under the Assimilative Crimes Act.[26] Finally, if offender and victim were both Indians, the federal government had exclusive jurisdiction if the offense was one of the "Ten Major Crimes;"[27] otherwise, tribal courts had exclusive jurisdiction.[28] Since federal law enforcement was typically neither well-financed nor vigorous,[29] and tribal courts often lacked the resources and skills to be effective,[30] the result, described by House Indian Affairs Subcommittee member Wesley D'Ewart, of Montana, was "[t]he complete breakdown of law and order on many of the Indian reservations . . . ."[31] Throughout the hearings on PL–280 and its predecessor bills in the previous Congress, Representative D'Ewart repeatedly voiced "[t]he desire of all law abiding citizens living on or near Indian reservation for law and order."[32] The primary law enforcement thrust of PL–280 is further evidenced by the fact that several predecessor bills offered the states criminal jurisdiction only,[33] and PL–280 itself exempted several reserva-

[20] Act of June 8, 1940, ch. 276, 54 Stat. 249 (criminal jurisdiction to Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (criminal jurisdiction to North Dakota over the Devils Lake Reservation); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (criminal jurisdiction to Iowa over the Sac and Fox Reservations); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (criminal jurisdiction to New York) (codified at 25 U.S.C. § 232 (1970)); Act of Oct. 5, 1949, ch. 604, 63 Stat. 705 (civil and criminal jurisdiction to California over Agua Caliente Reservation); Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (civil jurisdiction to New York).

[21] For a description of this process in New York see Comment, *The New York Indians' Right to Self-Determination*, 22 BUFFALO L. REV. 985 (1973).

[22] H.R. 1063, 83d Cong., 1st Sess. (1953); Transcript of Hearings on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953). These hearings were not published. A transcript was produced by the United States during the briefing of McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) before the United States Supreme Court. Copies of the transcript for two days of hearings—June 29, 1953 and July 15, 1953—are on file in the library of the UCLA School of Law and in the UCLA Law Review Office. The June 29 transcript will hereinafter be cited as Hearings Transcript I and the July 15 transcript will hereinafter be cited as Hearings Transcript II.

[23] S. REP. No. 699, 83d Cong., 1st Sess. 5 (1953) [hereinafter cited as S. REP. No. 699].

[24] *See, id.*

[25] No federal legislation asserted jurisdiction over such crimes. State jurisdiction was affirmed by United States v. McBratney, 104 U.S. 621, 624 (1882).

[26] 18 U.S.C. § 1152 (1970). This is still the case in non-PL-280 states today.

[27] 18 U.S.C. § 1153 (1970). The jurisdiction granted by this section is expressly excluded where the state has accepted PL-280 jurisdiction. *See* 18 U.S.C. § 1162(c) (1970); 25 U.S.C. § 1321 (1970). The absence of state jurisdiction over such crimes has been affirmed. *In re* Carmen's Petition, 165 F. Supp. 942 (N.D. Cal. 1958), *aff'd sub nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959) (despite arguments that the Indians' advanced social development made them no longer subject to federal guardianship).

[28] *See* Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62 (1959); Taylor, *Development of Tripartite Jurisdiction in Indian Country*, SOL. REV., July 1973, at 1.

[29] Statement of Representative D'Ewart in *Hearings on H.R. 459, H.R. 3235, and H.R. 3624 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs on State Legal Jurisdiction in Indian Country*, 82d Cong., 2d Sess., ser. 11, at 14 (1952) [hereinafter cited as 1952 *Hearings*].

[30] This inadequacy was due as much to long distances between Indian reservations and federal courthouses, as to lack of coordination of efforts by B.I.A. and F.B.I. investigators. For a contemporary study of the problem refer to 5 NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN (1974).

[31] 1952 *Hearings*, *supra* note 29, at 16.

[32] *Id. See also* Hearings Transcript I, *supra* note 22, at 23–24.

[33] H.R. 459, H.R. 3235, H.R. 3624, 82d Cong., 2d Sess. (1952).

tions completely from state jurisdiction solely because they had legal systems and organizations "functioning in a reasonably satisfactory manner." [34]

Of course, conferring jurisdiction on the states was not the only available solution to the very real law enforcement problem. The B.I.A. could have encouraged greater use of existing cooperative agreements between the tribes and state law enforcement officials which permitted the states to make arrets for the most widespread and troublesome Indian crimes; [35] the Justice Department could have deputized more state officials; [36] and the federal government could have strengthened federal law enforcement efforts or offered financial and technical assistance to enable the tribes to develop their own courts and other law enforcement machinery. Anw of these solutions might have been attempted had the goal of Congress been merely to improve law enforcement services pending the development of adequate tribal institutions. State criminal jurisdiction was preferred to other alternatives however, because it was the cheapest solution; Congress was interested in saving money as well as bringing law and order to the reservations.[37]

There is much less evidence of the congressional rationale for conferring civil jurisdiction on the states, and much less factual support for that decision. State civil jurisdiction over reservation Indians was believed to have been somewhat more extensive than state criminal jurisdiction,[38] though typically, state courts were powerless to resolve claims against reservation Indians arising on the reservation.[39] Since federal law governed many important civil relations involving Indians,[40] the B.I.A., charged with administering these laws,[41] played a considerable governing role on the reservations. In this context, the Senate Report on PL–280 declared that the Indians "have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction . . . ." [42] The implication of this and similar statements was that Indians were just as socially advanced as other state citizens, and should therefore be released from second-class citizenship as well as the paternalistic supervision of the B.I.A.

Considering the absence of any significant investigation of the Indians' stage of social development prior to the broad delegation of jurisdiction to every state by PL–280, it seems unlikely that Congress knew or cared about the Indians' readiness for state jurisdiction.[43] Furthermore, it is difficult to reconcile this theme of advanced accultration with the prevailing notion that state

[34] S. REP. No. 699, *supra* note 23, at 6. The Red Lake of Minnesota, Warm Springs of Oregon, Menominees of Wisconsin, and later the Metlakatlas of Alaska were all excepted, although the Menominees sought and obtained submission to PL–280 in 1954. 18 U.S.C. § 1162 (1970); 28 U.S.C. § 1360 (1970) (originally enacted as Act of Aug. 24, 1954, ch. 910, § 2, 68 Stat. 795). *See* S. REP. No. 2223, 83d Cong., 2d Sess. (1954).

[35] The agreements are described in INDIAN CITIZENS, *supra* note 16, at 163; INSTITUTE OF INDIAN STUDIES, UNIV. OF SOUTH DAKOTA, PROGRAM AND PROCEEDINGS—THIRD ANNUAL CONFERENCE ON INDIAN AFFAIRS: INDIAN PROBLEMS OF LAW & ORDER (1957) [hereinafter cited as LAW & ORDER].

[36] The practice is described in STATE LEGISLATIVE RESEARCH COUNCIL, SOUTH DAKOTA, JURISDICTION OVER INDIAN COUNTRY IN SOUTH DAKOTA 7 (rev. version 1964) [hereinafter cited as JURISDICTION IN SOUTH DAKOTA]; W. FARBER, P. ODEEN & R. TSCHETTER, INDIANS, LAW ENFORCEMENT AND LOCAL GOVERNMENT 78–79 (Gov't Research Bureau in cooperation with Institute of Indian Studies, niv. of South Dakota, Rep. No. 37, 1957) [hereinafter cited as LOCAL GOVERNMENT].

[37] 99 CONG. REC. 9263 (1953) (statement of Rep. Harrison of Wyoming).

[38] For example, Brown, *The Indian Problem and the Law*, 39 YALE L.J. 307, 314–15 (1930), asserts that reservation Indians "may, except where specially restricted by act of Congress, . . . sue and be sued in the state . . . courts." *See* Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957) (upholding state jurisdiction over a personal injury suit between two Indians involved in an auto accident on the reservation).

[39] State courts have been found without jurisdiction to enforce sales taxes on reservation lands (Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P2d. 950, *cert. denied*, 368 U.S. 915 (1961)), to hear tort actions arising on the reservation against reservation Indians (Valdez v. Johnson, 68 N.M. 476, 362 P.2d 1004 (1961); Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967)), to hear divorce actions between reservation Indians (Whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960)), and to hear dependency petitions against reservation Indian parents (State *ex rel.* Adams v. Superior Court, 57 Wash. 2d 181, 356 P.2d 985 (1960); *In re* Colwash, 57 Wash. 2d 196, 356 P.2d 994 (1960)). Recently, however, the Supreme Court of New Mexico approved service of state process on reservation Indians for claims arising off the reservation. State Sec., Inc. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973). The same court sanctioned a support order entered in state court against a reservation Indian where the marriage and support obligation arose off the reservation Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972).

[40] *E.g.*, 25 U.S.C. § 415 (1970) (leasing of trust lands); 25 U.S.C. § 262 (1970) (trade with the Indians).

[41] 25 U.S.C. § 2 (1970).

[42] S. REP. No. 699, *supra* note 23, at 5–6.

[43] The B.I.A. did consult with some Indian tribes in states which were to be granted immediate jurisdiction. As a result, it recommended that certain reservations be exempted from those grants. The investigation went no further, however. Hearings Transcript I, *supra* note 22, at 17–18.

criminal jurisdiction was necessary because the Indians were disorderly and incapable of self-government.[44] Most likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations, added because it comported with the pro-assimilationist drift of federal policy, and because it was convenient and cheap.[45]

The choice Congress made in PL–280 did not wholly satisfy either the tribes or the states. The source of the Indians' displeasure was the absence of a provision for tribal consent prior to state assumption of jurisdiction. The states, on the other hand, were unhappy about the absence of a provision either granting federal subsidies to states that accepted jurisdiction or removing reservation lands from tax-exempt trust status. These aspects of the law have generated efforts directed at Congress, the state legislatures, and the courts to mold or remold PL–280 to suit the Indians' or states' preferences. The next section of this Article will explain the origins of these dissatisfactions and evaluate the legislative solutions proposed for them in Congress and the state legislatures. The final section will consider struggles in the courts over the proper interpretation of procedural and substantive provisions of PL–280 and will suggest the solutions dictated by legislative history read in light of general principles of jurisdiction on Indian reservations.

III. OBJECTIONS TO PL–280

A. Controversy Over Indian Consent

Indian antagonism to PL–280 has stemmed almost entirely from its initial unilateral imposition of state law. Congress omitted a tribal consent requirement from PL–280 for the same reasons it abandoned its policy of conferring jurisdiction state by state after consultation with the affected tribes.[46] In both instances, concern about bringing law and order to the reservations at reduced federal expense dictated immediate transfers of jurisdiction to the states. Thus, when Congressperson D'Ewart inserted a tribal consent provision in one of the predecessor bills to PL–280 [47] in order to obtain the support of the tribes in his state, B.I.A. Commissioner Dillon S. Meyer stated:

"[I]t might be possible to pass a referendum in some of the reservations against action by the State, where they have a completely inadequate law and order code and completely inadequate court system and completely inadequate policing system, and we would recommend if we found that situation that they be included anyhow.[48]"

Indian opposition to the absence of a tribal consent provision in PL–280 was initially based on the principle of tribal sovereignty. The departure from past practice of consulting with the Indians prior to transferring jurisdiction was considered a deliberate slight.[49]

Another reason for opposition was the fear that state jurisdiction would in practice operate to the disadvantage of the Indians. The Indians in many instances preferred federal to state jurisdiction because the B.I.A., for all its faults, at least perceived the Indians as its special responsibility and concern. Many Indians feared that their people would be discriminated against in state courts and given longer sentences simply because they were Indians; [50] that state law enforcement officials would ignore crimes when Indians were

[44] *See* S. REP. No. 699, *supra* note 23, at 5.

[45] Most of the pre-1953 bills conferring jurisdiction over Indians on the states had applied only to criminal jurisdiction, and the predecessor bills to PL–280 on which hearings were held in 1952 extended jurisdiction to the states only over criminal offenses committed by or against Indians. *See* notes 20, 33 & accompanying tekt *supra*. These bills clearly did not contemplate the preeminence of state regulatory power over the reservations, since they allowed for concurrent federal and tribal jurisdiction as well. *E.g.*, H.R. 459, 82d Cong., 2d Sess. (1952). All that the bills seemed to envision was a switch from the federal government enforcing state criminal law under the Assimilative Crimes Act to the states enforcing their own laws.

[46] Refer to accompanying notes 20–34 *supra*.

[47] H.R. 459, 82d Cong., 2d Sess. (1952) (as amended in Committee). 1952 *Hearings*, *supra* note 29, at 10–11.

[48] 1952 *Hearings*, *supra* note 29, at 27.

[49] *See* Statement of Frank George, First V.P., Nat'l Cong. Am. Indians, in 1952 *Hearings*, *supra* note 29, at 87; LAW & ORDER, *supra* note 35.

[50] LAW & ORDER, *supra* note 35, at 50, 71; 5 U.S. COMM'N ON CIVIL RIGHTS, REPORT: JUSTICE 146–47 (1961) [hereinafter cited as CIVIL RIGHTS REPORT]; 1 NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, JUSTICE AND THE AMERICAN INDIAN: THE IMPACT OF PUBLIC LAW 280 UPON THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS 5–11 (1974) [hereinafter cited as THE IMPACT OF PL–280]; J. McCluskey, Indian Needs and Concerns Regarding the Criminal Justice System, Part I: Problems, Aug. 1973 (submitted to Wis. Council on Crim. Justice) (copy on file in UCLA Law Review Office). The foregoing authorities indicate the need for further empirical study before this widespread belief can be proved or disproved.

the victims but act vigorously when a white was harmed,[51] and that many of their elders were not sufficiently fluent in the language and customs of white America to enable them to cope with state jurisdiction.[52] They disliked the ousting of their functioning tribal courts[53] and law-making bodies and feared that the state institutions taking their place would be neither sufficiently sensitive to Indian traditions nor adequately staffed and financed. The latter fear was especially warranted in view of PL–280's failure to provide a tax base or subsidies to the states to support their newly acquired law enforcement obligations.

Between 1953 and 1968, a wide variety of influential persons and organizations urged Congress to add an Indian consent provision to PL–280.[54] Some states, however, did not wait for Congress to act. Instead, they undertook by themselves to accommodate the Indians' desire to determine when and how state jurisdiction should be assumed. Since the 1968 amendments (adding Indian consent provisions) to PL–280 did not affect prior assertions of jurisdiction under the Act, the nature and validity of these efforts retain importance.

The five, later six, states that were granted PL–280 jurisdiction immediately and irrevocably (mandatory states)[55] lacked the flexibility to condition their jurisdiction on Indian consent. By virtue of language in PL–280 any jurisdiction other than state jurisdiction on the reservations was henceforth invalid, except as provided in the Act. While Congress had consulted with these states prior to passage of PL–280 in order to ascertain their desire for such jurisdiction, and had exempted certain reservations in these states at the Indians' request, it had not authorized the mandatory states to create further exemptions in response to Indian wishes. In contrast, the states merely authorized to assume jurisdiction at their discretion (optional states) could take the Indians' wishes into account before asserting their power, and many did so, either formally or informally. For some states, this recognition of Indian sovereignty was spontaneous; in others, it was formed by the bitter experience of states such as Wyoming,[56], South Dakota,[57] Washington,[58] and New Mexico,[59] in which the Indians had waged vigorous and successful battles against bills and constitutional amendments imposing state jurisdiction unilaterally. Although Arizona[60] and Iowa[61] simply asserted jurisdiction without seeking concurrence of the affected Indians, and Idaho and Washington ignored Indian preferences as to some subject matters,[62] Florida first solicited the consent of the Seminole tribe,[63] Nevada consulted with every tribe in the state prior as assuming jurisdiction,[64] and Idaho,[65] Montana,[66] North Dakota,[67] South Dakota,[68] and Washington[69] established some form of Indian consent procedure despite the absence of a requirement in PL–280.

These state-imposed Indian consent provisions took several forms. Typically, they announced that the state would assume jurisdiction over any tribe that registered its assent in a tribal referendum. But sometimes, as in South Dakota, they shifted the burden of objecting to state jurisdiction to the tribe,[70] providing that state jurisdiction would prevail throughout the state unless a tribe voted to the contrary. North Dakota even permitted individual Indians to certify their consent to state jurisdiction.[71] Finally, at least one state established procedures whereby a tribe that had tendered its consent to state jurisdiction could revoke it.[72]

Although PL–280 did not specifically authorize the assumption of state jurisdiction on a reservation-by-reservation or Indian-by-Indian basis, these states chose to interpret it in that manner, as did the courts reviewing the validity of the jurisdiction so acquired.[73] Nevertheless, assumption of jurisdiction in either manner was questionable. The language of section seven of PL–280 which authorized optional assumption of jurisdiction speaks in terms of the United States consenting to state acceptance of civil and criminal jurisdiction "as provided for in this act." This language suggests that the optional states were to assume as much jurisdiction as the mandatory states, that is, jurisdiction over "[a]ll Indian country within the state."[74] If that language is interpreted narrowly, it could invalidate not only the jurisdiction accepted one reservation at a time, but also the jurisdiction which has been accepted in some states one county at a time, or one subject matter at a time.

It is possible that Congress intended to demand congruence between the way mandatory and optional states acquired jurisdiction. Its goal may have been to force the states to assume the entire financial burden of Indian jurisdiction within their boundaries, even if there was only one trouble-spot for state purposes. However, prior to passage of PL–280, Congress had granted jurisdiction to states over fewer than all the reservations within their borders,[75] and PL–280 itself had exempted several well-governed individual tribes in the

[51] LAW & ORDER, *supra* note 35, at 55; CIVIL RIGHTS REPORT, *supra* note 50, at 146–47; THE IMPACT OF PL–280, *supra* note 50, at 7.

[52] LAW & ORDER, *supra* note 35, at 47–48, 52–53, 72–73.

[53] The role of tribal courts in states exercising PL–280 jurisdiction remains unclear. The Associate Solicitor, Indian Affairs, for the Department of the Interior, has indicated that because PL–280 preserved tribal hunting and fishing rights, tribal courts may continue to adjudicate controversies concerning those rights. 78 Interior Dec. 103 (1971). Whether tribal courts may survive PL–280 as a general matter, so long as they apply state law or rules consistent with state law, has never been tested.

[54] President Eisenhower announced when he signed PL–280 that although it was desirable as a step toward complete Indian equality, the sections authorizing state jurisdiction without Indian consent left him with "grave doubts". W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 186 (1966).

The President recommended immediate amendment of the Act to remedy this error; but despite the introduction of twenty-three separate bills and pleas from very quarter, no changes were forthcoming from Congress. The prestigious Commission on the Rights, Liberties, and Responsibilities of the American Indian also recommended, in 1961, that a referendum provision be added, on the ground that:

"Under [PL–280] a State can now summarily take this drastic step [assuming jurisdiction over Indians] without considering the consequences to the Indians, without providing any safeguards against the discrimination which exists in some places, and without setting any standard for the services to be performed."

COMMISSION ON THE RIGHTS, LIBERTIES, AND RESPOSIBILITIES OF THE AMERICAN INDIAN, A PROGRAM FOR INDIAN CITIZENS 27 (1961) [hereinafter cited as AMERICAN INDIAN]. In his March, 1968, Message to Congress on the American Indians, President Johnson again put the prestige of the Presidency behind the principle of tribal participation and consent. 114 CONG. REC. 5394–95 (1968). *See also Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 27 (1968) [hereinafter cited as 1968 *Hearings*].

[55] *See* note 11 *supra*.

[56] In a state referendum in 1964, Wyoming rejected an attempt to amend its constitution to empower the legislature to accept PL–280 jurisdiction. The sponsor of the measure had not bothered to consult with the Indians prior to introducing it. Statement of Marvin J. Sonosky, in 1968 *Hearings*, *supra* note 54, at 110.

[57] In 1964, after the South Dakota legislature had enacted a measure unilaterally extending state jurisdiction to the reservations, the Indians instituted a referendum, bombarded the voters of the state with publicity and literature opposing the measure, and secured the law's defeat. DEP'T OF INDIAN AFFAIRS, STATE OF MONTANA, TRIBAL GOVERNMENTS AND LAW AND ORDER 19–20 (1968) [hereinafter cited as TRIBAL GOVERNMENTS].

[58] Washington's first attempt to accept PL–280 jurisdiction met with strong Indian opposition and was defeated. Thereafter, in 1957, a bill was passed with the support of the Indians which permitted Washington to assume jurisdiction only after a tribe had requested it do so. *See* CIVIL RIGHTS REPORT, *supra* note 50, at 145. The Indians were partially defeated on the tribal consent issue in 1963, however, when jurisdiction was extended unilaterally to some subject matters. WASH. REV. CODE §§ 37.12.010–060 (Supp. 1971).

[59] THE IMPACT OF PL–280, *supra* note 50, at 91.

[60] ARIZ. REV. STAT. ANN. §§ 36–1801, 36–1856 (Supp. 1973) (water pollution control).

[61] IOWA CODE ANN. §§ 1.12–.15 (Supp. 1974). Iowa extended its civil jurisdiction over the Sac and Fox Reservations, which were already subject to state criminal jurisdiction.

[62] IDAHO CODE § 67–5101 (1973); WASH. REV. CODE §§ 37.12.010–.60 (Supp. 1971).

[63] Letter from Harry R. Anderson, Assistant Secretary of the Interior, to Lewis A. Sigler, Consultant on Indian Affairs, Comm. on Interior and Insular Affairs, Mar. 28, 1968, in 1968 *Hearings*, *supra* note 54, at 29.

[64] LAW & ORDER, *supra* note 35, at 54. *Contra*, 1968 *Hearings*, *supra* note 54, at 29 (letter cited not 63 *supra*).

[65] IDAHO CODE § 67–5102 (1973).

[66] MONT. REV. CODE ANN. §§ 83–802, 83–806 (1966). For a discussion of the considerations that influenced Montana's decision to include a tribal consent provision, refer to DEP'T OF INDIAN AFFAIRS, STATE OF MONTANA, A STUDY OF PROBLEMS ARISING FROM THE TRANSFER OF LAW & ORDER JURISDICTION ON INDIAN RESERVATIONS TO THE STATE OF MONTANA 11 (1961).

[67] N.D. CENT. CODE § 27–19–02 (1974).

[68] S.D. COMPILED LAWS ANN. § 1–1–13 (1967). The law provides for state jurisdiction unless within three months the tribe rejects it in a referendum held at its own expense. The South Dakota Indians' objections to this law are discussed in LAW & ORDER, *supra* note 35, at 30–31, 49–50, 80–91.

[69] WASH. REV. CODE § 37.12.021 (Supp. 1971).

[70] S.D. COMPILED LAWS ANN. § 1–1–13 (1967). Refer to note 68 *supra*.

[71] *See* N.D. CENT. CODE §§ 27–19–02, 27–19–06 (1974). Although some individuals have done so, no individual tribe has accepted state jurisdiction to date. THE IMPACT OF PL–280, *supra* note 50, at 93.

[72] MONT. REV. CODE ANN. § 83–806 (1966).

[73] Makah Indian Tribe v. State, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970).

[74] *E.g.*, 28 U.S.C. § 1360(a) (1970). At least one state court has expressed the view that statewide acceptance of jurisdiction complied literally with PL–280 even if it was conditional on the affected Indians' or tribes' consent. Makah Indian Tribe v. State, 76 Wash. 2d 485, 457 P.2d 590 (1969). That court was correct to the extent that the state was not accepting jurisdiction one tribe at a time, but rather was accepting in advance for every tribe in the state that would assent.

[75] *See* note 20 *supra*.

mandatory states.[76] Thus Congress seemed to have recognized that the presence of several tribes within the same state was not a sufficient basis for treating them alike. Congress would hardly have disapproved of the states making the same assumption. Further evidence that Congress intended to permit state acceptance of jurisdiction contingent on Indian consent is the fact that the law and order purpose of PL–280 is not subverted if a state voluntarily agrees to assume the risk that a lawless reservation will reject state jurisdiction. Finally, if jurisdiction is assumed over an entire reservation (as opposed to individual Indians or subject matters) there should be no confusion resulting from the presence of overlapping legal systems and law enforcement officials. Thus, although there was some uncertainty about the permissibility of states accepting PL–280 jurisdiction subject to the consent of individual tribes,[77] there was never serious doubt in the state legislatures or the courts that such legislation conformed with PL–280.

In 1968, Congress eliminated the need for self-imposed limits on state jurisdiction in the future by establishing a tribal consent provision in PL–280 itself. Congress provided in the Civil Rights Act of 1968[78] that henceforth no state could acquire PL–280 jurisdiction over the objections of the affected Indians.[79] Furthermore, in an action which most legislators believed did no more than make explicit existing law, the 1968 Act declared that state jurisdiction could be acquired one tribe at a time, so long as a majority of the adult enrolled members of the tribe expressed their consent in a special election.[80] Finally, in a more controversial action, it allowed acceptance of jurisdiction over some subject matters, but not others.[81]

This change in PL–280 is significant evidence of a shift in federal Indian policy from the pro-assimilationist orientation of the 1950's to a greater concern for strengthenng tribal institutions and encouraging economic development on reservations.[82] Interestingly, the opposition to tribal consent was not couched in law and order language this time. Rather, the opponents stressed the need for state control of economic development on the reservations,[83] a need which has precipitatel much conflict over PL–280 in recent years, especially in the Southwest. Later actions by Congress indicate a willingness to permit enclaves of tribal sovereignty within a state, despite the parade of horribles described by state officials,[84] so long as the federal government maintained control over tribal decisions which might seriously endanger state interests.[85]

The significance of the addition of a tribal consent provision to PL–280 lies not only in its recognition of the principle of Indian self-determination, but also in its new conception of the role of state jurisdiction on reservations. The tribal consent provision transformed PL–280 from a law which justified state jurisdiction on law enforcement, budgetary, and assimilationist grounds to one which justified state jurisdiction as a means of providing services to Indian communities. Among the strongest arguments in favor of the 1968 Act's

[76] *See* note 34 *supra*.

[77] Clarification was sought by the Commission on the Rights, Liberties, and Responsibilities of the American Indian among others. AMERICAN INDIAN, *supra* note 54, at 20.

[78] 25 U.S.C. §§ 1321–26 (1970). Congress substituted new mechanisms for accepting PL–280 in optional states, but preserved all jurisdiction acquired pursuant to the mechanism it replaced.

[79] 25 U.S.C. § 1326 (1970) provides: "State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election . . . when requested to do so by the tribal council or other governing body, or by 20 per centum of the such enrolled adults."

[80] Under 25 U.S.C. § 1321(a) (1970) (criminal jurisdiction) and 25 U.S.C. § 1322(a) (1970) (civil jurisdiction), a state may extend its power to all Indian country "or any part thereof." 25 U.S.C. § 1326 (1970) provides for the special election.

[81] 25 U.S.C. § 1321(a) (1970) provides that states may assume criminal jurisdiction "over any or all . . . offenses"; 25 U.S.C. § 1322(a) (1970) provides that states may assume civil jurisdiction over "any or all . . . civil causes of action arising within . . . Indian country . . . ."

[82] *See* President Johnson's Message to Congress of Mar. 6, 1968, 114 CONG. REC. 5394–95 (1968).

[83] Statements of Hon. B. L. Tims, Mayor of Scottsdale, Ariz., and Donald Rider, Executive Director, New Mexico Municipal League, in 1968 *Hearings*, *supra* note 54, at 76–91.

[84] Among the projected problems were "thousands of similar homes and the supporting business and industry—on the reservation. The same people living 100 feet apart, one subject to State law, the other perhaps not." *Id.* at 77. Others mentioned were mosquito control, and the reservation turning into a "hijackers' hangout" because of lack of law enforcement. *Id.*

[85] *E.g.*, control over long-term leasing decisions that might result in severe air pollution in areas adjacent to the reservation. 25 U.S.C. § 415 (1970).

amendment was that the institution of state jurisdiction under PL–280, far from improving reservation law and order and elevating Indians from second-class citizenship, had subjected them to discriminatory treatment in the courts. as well as discrimination in the provision of state services.[86] Once tribal consent became a prerequisite to state jurisdiction, and jurisdiction could be acquired one subject matter at a time, the way was opened for tribes and states to negotiate for the extensio of state jurisdiction in those situations where it was to their mutual advantage.

The beneficial impact of the 1968 amendments to PL–280 should not be overemphasized, however. The Indian consent provision was not made retroactive, and thus earlier assumptions of state jurisdiction over Indian objections were not affected. Moreover, it did not enable Indians who had consented to state jurisdiction under a state-initiated consent provision to reconsider their decisions.

B. Controversy Over Fnancing State Jurisdiction

The absence of an Indian consent provision in PL–280 reflected insensitivity to the interests of the Indians; the absence of federal subsidies to PL–280 states demonstrated similar insensitivity to the dilemma of states handed jurisdiction but simultaneously denied the means to finance it. This financial dilemma drives from a basic inconsistency in federal policy. On the one hand, Congress wished to satisfy state demands for improved law and order on the reservation; on the other hand, Congress was itself unwilling to pay for such improvements or to enable the states to do so by lifting the tax-exempt status of Indian trust lands.[87]

The failure to resolve this inconsistency had disastrous consequences for states acquiring PL–280 jurisdiction. Local governments acquiring jurisdiction were required to hire more police, more judges, more prison guards, more probation and parole officers, and more juvenile aid officers, and to build new police stations, courthouses, and jails. It could have been predicted that a state which undertook law enforcement on the reservation as vigorously as elsewhere in the state would incur higher expenses than the federal government, even allowing for the greater expenses of operating a federal as opposed to a municipal court.[88] The new resources available to the states under PL–280 such as fines and court costs were clearly inadequate; estimates based on federal experience indicated such funds would cover only about 10 percent of all newly-acquired law enforcement expenses.[89] The mandatory PL–280 states were hardest hit;[90] they could not avoid the economic consequences of federal withdrawal from the reservations by refusing jurisdiction under the Act.[91]

[86] Harry R. Anderson, Assistant Secretary of the Interior, in a letter to Rep. Wayne N. Aspinall, Chairman, Comm. on Interior and Insular Affairs, May 27, 1968, stated the following with respect to the proposed amendment of PL–280 requiring tribal consent: "[This change] is highly desirable. Our files are replete with resolutions and communications from many Indian groups urging this change. The change would do much much to allay the fears, whether real or imagined, of the Indian people that they may be subjected to strange courts before they are ready, or before they are assured of fair and impartial treatment." Printed in 1968 *Hearings*, *supra* note 54, at 25.

[87] This inconsistency was exposed during the hearings on PL–280 when Congressperson Young of Nevada confronted counsel for the B.I.A., Harry Sellery, with the questionable value of offering the states jurisdiction but denying them the power to tax Indian property as the means of financing it. Counsel responded that if federal financial assistance were made availabl to fill the gap, "there [would] be some tendency . . . for the Indian to be thought of and perhaps to think of himself because of the financial assistance which comes from the Federal Government as still somewhat a member of a race or group which is set apart from other citizens of the State. And it is desired to give him and the other citizens of the State the feeling of a conviction that he is in the same status and has access to the same services, including the courts, as other citizens of the State who are not Indians." Hearings Transcript I, *supra* note 22, at 8. When counsel was reminded that differentiation between Indians and non-Indians would be *increased* by the failure to provide federal financial aid, since the Indians would enjoy a unique exemption from state property taxes, he replied curtly: "The Department [of the Interior] has recommended, nevertheless, that no financial assistance be afforded to the States." *Id.* at 9.

[88] *E.g.*, in South Dakota it was reported that if the state took jurisdiction over the Indians, and each county absorbed its own added cost of law enforcement, operating cost alone "would double law and order expenses in most affected counties, and multiply them many times in others." JURISDICTION IN SOUTH DAKOTA, *supra* note 36, at 11.

[89] In Arizona, for example, the tribes and federal government spent approximately $700,000.00 on law enforcement and tribal courts in 1958. Fines collected in tribal courts only totaled $90,000.00. J. ANGLE, FEDERAL, STATE AND TRIBAL JURISDICTION ON INDIAN RESERVATIONS IN ARIZONA 22 (Am. Ind. Ser. No. 2, Bureau of Ethnic Research, State of Arizona (1959)) [hereinafter cited as JURISDICTION IN ARIZONA].

[90] Letter from Harry R. Anderson, Assistant Secretary of the Interior, to Lewis A. Sigler, Consultant on Indian Affairs, Comm. on Interior and Insular Affairs, Mar. 28, 1968, in 1968 *Hearings*, *supra* note 54, at 30.

[91] Only Nevada had sufficient foresight to request that it be excluded from the group of mandatory states because certain county governments were unwilling to assume the future additional expenses. *See* S. REP. No. 690, *supra* note 23, at 6.

Financial hardship for the states translated into inadequate law enforcement for the reservations. The most notable failure among the mandatory states was Nebraska, where the Omaha and Winnebago reservations were left without any law enforcement at all once federal officers withdrew.[92] This bitter experience made Indians and local governments alike wary of state assumption of jurisdiction under the Act in the optional PL–280 states. State legislatures attempted to assuage local government fears or objections by (1) acceptance conditional upon federal reimbursement, (2) acceptance of jurisdiction only in consenting counties, (3) acceptance of jurisdiction over some subject matters but not others, and (4) acceptance of jurisdiction over non-trust lands only.

The first alternative of conditioning each county's jurisdiction on the receipt of federal aid, attempted in South Dakota,[93] was tantamount to not accepting PL–280 jurisdiction at all. Despite persistent pleas from the states, federal subsidies to localities exercising PL–280 jurisdiction were rare, the only reported instance being an Interior Department grant of $50,000.00 to Klamath County, Oregon in 1955 for the purpose of assisting in the development of a law enforcement plan on the Klamath Reservation.[94] Particularly during the 1950's, the budget of the B.I.A. was repeatedly slashed below Bureau requests, making grants from that quarter impossible.[95]

The second alternative of accepting jurisdiction only over consenting counties, although questionably valid under PL–280,[96] allowed the states flexibility

[92] The responsible local governments claimed that they lacked funds to station deputy sheriffs on the reservations, so they required the Indians to rely on the nearest sheriff to answer calls as he was able. CIVIL RIGHTS REPORT, *supra* note 50, at 148. As one member of the Omaha tribe described the situation: "We had some killings going on there, one right on main street, which could have been prevented if we had law and order. This is not exaggerating . . . How this situation can exist in the United States is beyond me. Someone starts kicking the ball around, and we're lost. . . . We had a special deputized sheriff for a while until they claimed that he arrested so many Indians. None of them could pay their fine, and they had to lay it out in the jail. They said that just by keeping the Indians they couldn't afford to furnish us with a deputy. . . . [N]ow the guys are daring him. They stand around in the streets and drink." LAW & ORDER, *supra* note 35, at 77. The situation was so desperate that in 1957, the governor of Nebraska flew to Washington to demand that the B.I.A. take back jurisdiction, something the Bureau was not authorized to do under PL–280. *Id.* at 40, 76. When this effort failed, Nebraska eventually provided for state aid in amounts up to $3,000.00 plus special state-appointed deputy sheriffs for each county containing more than thrity-five thousand acres of Indian trust or restricted land, as well as for each county in which "sixty percent or more of the persons convicted for violation of state criminal laws were Indians . . . ." NEB. REV. STAT. §§ 23–362, 23–364 (1070).

[93] JURISDICTION IN SOUTH DAKOTA, *supra* note 36, at 5–8, 11.

[94] *Id.* at 10.

[95] TRIBAL GOVERNMENTS, *supra* note 57, at 11; LAW & ORDER, *supra* note 35, at 54–55.

[96] A state which argues for acceptance of PL–280 jurisdiction county by county must claim that the language in section seven of PL–280 directing optional states to accept jurisdiction "as provided for in this Act" did not limit states to accepting jurisdiction at once and over all Indian country. Many of the reasons supporting jurisdiction conditioned on Indian consent also support jurisdiction over consenting counties only. But there are noteworthy difference between the two. First, county-by-county jurisdiction opens up the possiblity of only some portions of a reservation being subject to state jurisdiction, a situation likely to confuse reservation residents, thwart any assimilative functions of PL–280, and frustrate law enforcement efforts. This eventuality is rendered unlikely in Nevada, however, by the governor's power to deny a county's request for exemption from state jurisdiction (affirmed in Davis v. Warden, 88 Nev. 443, 498 P.2d 1346 (1972)), and impossible in Montana, where any county overlapping part of a given reservation may veto state jurisdiction over that entire reservation. The Montana solution is preferable, both because it completely precludes the undesirable situation, and because in Nevada the only way to avoid state jurisdiction existing over part but not all of a reservation is to force a decidedly unwilling county to assume jurisdiction. Either arrangement, however, should suffice for purposes of upholding the validity of this type of PL–280 acceptance.

A second distinguishing feature of jurisdiction conditioned on county acceptance as opposed to jurisdiction conditioned on Indian consent is that states have the power to elmiate local governments' objections to PL–280 jurisdiciton either by providing supplemental state aid or by taking over law enforcement itself on the reservations. Indian oblections to state jurisdiction, on the other hand, may rest on the desire to retain self-government, feelings of unpreparedness for state jurisdiction, or other concerns which the state could not necessarily alleviate. Given the states' greate rpower to remove the sources of counties' objections, it might be argued that optional states should be required either to make financial arrangements at the time they assume PL–280 jurisdiction to support added expenses across the state, or not accept that jurisdiction at all. There is little evidence, however, that Congress intended to put the states to this choice under PL–280. That Congress agreed to remove Nevada from the list of mandatory PL–280 states because of objections by local governments to the likely cost supports an interpretation of PL–280 that instead would allow each state to take the same objections into account. Thus, it is not surprising that when PL–280 was amended in 1968 to allow piecemeal state acceptance of jurisdiction over the state's Indian country (25 U.S.C. §§ 1321(a), 1322(a) (1970)), almost no one argued that such assumptions of jurisdiction had been impermissible in the past when jurisdiction over a particular area had been made conditional on county consent.

in responding to the financial needs of local governments in areas with Indian country. This scheme was tried with some variations in both Nevada and Montana. In Nevada, each county was required to take jurisdiction unless the governor approved its application for exemption.[97] Montana's law differed, in that the burden was not on the county to ask for an exemption; if any county encompassing any portion of a reservation declined jurisdiction, the state would not assume jurisdiction over that entire reservation.[98]

The third alternative, accepting jurisdiction over some subject matters but not others, was adopted by Arizona, Idaho, South Dakota, and Washington.[99] It allowed the states to assume responsibility for the reservations only in subject areas which were very important to the state and/or financially manageable.

It is clear that the 1968 amendments to PL–280 prospectively authorize this method of asserting jurisdiction; but previous assertions of this type are still in doubt.[1] There is nothing in the legislative history surrounding the enactment of PL–280 that definitely indicates whether Congress intended to permit partial jurisdiction by subject matter. The best evidence of congressional intent is a statement by Congressperson Aspinall of Colorado during congressional debates on the 1968 Civil Rights Act. Representative Aspinall, who had been on the Indian Affairs Subcommittee of the House Committee on Interior and Insular Affairs at the time PL–280 was enacted, and was Chairperson of the Committee in 1968, maintained that the 1968 Act "would substantially amend [PL–280] * * * by permitting states to assume partial jurisdiction over an Indian reservation."[2]

In view of the absence of a tribal consent provision in PL–280 and the paramount legislative purposes of saving federal money and bringing law and order to Indian reservations, it makes sense that Congress would not have allowed such partial assumptions of jurisdiction by optional states. So long as PL–280 jurisdiction could be unilaterally imposed by the states, a state asserting partial jurisdiction could, for example, extend its personal income tax to reservation Indians and provide no law enforcement at all; it could collect fines for speeding violations and make no further efforts at maintaining law and order. Such selective exercises of jurisdiction would do little more than exploit the Indians; they would hardly further the law enforcement, fiscal, or even the assimilative purposes of PL–280. Law enforcement would be complicated immensely. Indeed, during hearings on the 1968 Civil Rights Act, the Assistant Secretary of the Interior described several instances of just such confusion which had occurred in states with partial jurisdiction by subject matter.[3] Furthermore, the federal government might well be harmed fiscally by partially jurisdiction which absorbed sources of revenue on the reservations while ignoring the most expensive law enforcement problems. Arguments

[97] NEV. REV. STAT. § 41.430 (1967).

[98] MONT. REV. CODE ANN. § 83–802 (1966).

[99] Arizona assumed jurisdiction over air and water pollution on the reservation. ARIZ. REV. STAT. ANN. §§ 36–1801, 36–1856 (Supp. 1973). Idaho and Washington asserted jurisdiction over compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles over public roads. IDAHO CODE § 67–5101 (1973); WASH. REV. CODE § 37.12.010 (Supp. 1971). South Dakota took jurisdiction only over civil and criminal causes of action on highways through Indian country. S.D. COMPILED LAWS ANN. §§ 1–1–17, 1–1–21 (1967).

[1] Prior to the 1968 Civil Rights Act's amendments to PL–280, the Assistant Secretary of the Interior had expressed his belief that the power to accept jurisdiction by subject matter was implicit in the law. Letter from Harry R. Anderson, Assistant Secretary of the Interior, to Rep. Wayne N. Aspinall, Chairperson, Comm. on Interior and Insular Affairs, Mar. 29, in 1968 *Hearings*, *supra* note 54, at 25. But the greater uncertainty of others was manifest in legislation introduced by Senator Metcalf of Montana, in 1961, supported by a resolution from the Arizona legislature, proposing that "tribes and state governments be authorized to agree on piecemeal extension of jurisdiction namely, by one subject matter at a time," (TRIBAL GOVERNMENTS, *supra* note 57, at 28–29) as well as in the recommendation from the Commission on Rights, Liberties, and Responsibilities of the American Indian that same year that PL–280 be amended "to provide in express terms that, with tribal consent, a state may take jurisdiction piecemeal as to subject matter . . . ." AMERICAN INDIAN, *supra* note 54, at 29. In addition, when the 1968 Civil Rights Act was introduced, authorizing acceptance of jurisdiction by subject matter in the future, a representative from the Department of Justice contended that such authorization constituted a change in the law, in the direction of jurisdictional complication. Letter from Warren Christopher, Deputy Att'y Gen., to Rep. Wayne N. Aspinall, Mar. 29, 1968, in 1968 *Hearings*, *supra* note 54, at 28.

[2] 114 CONG. REC. 9615 (1968). On the uses of subsequent expressions of legislative intent in construing statutes refer to Mattz v. Arnett, 412 U.S. 481, 505 n.25 (1973).

[3] Letter from Harry R. Anderson, Assistant Secretary of the Interior, to Mr. Lewis A. Sigler, Consultant on Indian Affairs, Comm. on Interior and Insular Affairs, Mar. 28, 1968, in 1968 *Hearings*, *supra* note 54, at 30.

of this type convinced the Supreme Court of South Dakota to invalidate that state's attempt to assert partial jurisdiction by subject matter.[4]

In contrast, the Idaho and Washington supreme courts sustained their states' acceptance of jurisdiction only over certain subject areas[5] by pointing out that since their state laws authorize complete jurisdiction over any tribe that so requests, abuses of state power and jurisdictional complications cannot occur.[6] Any tribe concerned about uniformity can obtain it by consenting to complete state jurisdiction (although not by blocking state jurisdiction altogether). This analysis is misleading, however, since it fails to acknowledge the situation that is permitted to exist pending tribal consent to complete jurisdiction—a situation where reservation Indians look to state power for some purposes, and to tribal or federal power for others. Whether Congress intended for this condition to exist is the question the courts must decide, regardless of whether the states or the Indians are responsible for it. For example, Congress may have wanted to end the confusion generated by the existence of multiple law enforcement authorities on a single resrvation by forcing states to choose between assuming the entire jurisdictional burden for a given reservation and not assuming it at all. The Washington and Idaho solutions are inconsistent with this congressional intent and should be disapproved.

Many of the objections to partial jurisdiction are neutralized when tribal consent is required before even partial jurisdiction may be asserted. In fact, when PL–280 was amended in 1968 expressly to permit partial jurisdiction, it was also amended to require tribal consent prior to any assumption of PL–280 jurisdiction.[7] The combination of the two is important because it allows tribes to prevent state explotation of the reservations through selective subject matter jurisdiction. If Indians decide they are capable of governing themselves effectively except in a few selected areas, they may request the state to assume responsibility for only the few problem areas. The risk of confusion resulting from multiple jurisdictions operating in a single reservation would then be voluntarily undertaken by all the parties who might be affected by it.

Pre-1968 partial assumptions of jurisdiction should be struck down as inconsistent with PL–280 where they are still in force in Arizona, Idaho, and Washington. While these attempted acceptances of PL–280 jurisdiction may be responses to legitimate concerns about the cost of state jurisdiction, they do not comport with the spirit and intent of the original law.

The fourth alternative utilized by the states to minimize the financial hardship of PL–280—assumption of jurisdiction only over taxable non-trust lands within the reservations—is a unique feature of Washington's 1963 PL–280 jurisdiction.[8] Since there is no pattern to the distribution of trust and non-trust lands on a reservation, Washington has created a jurisdictional labyrinth by mandating that on non-trust land state jurisdiction encompasses every subject matter, while on trust land, it applies only to certain enumerated subject matters unless the tribe ask for full state jurisdiction under PL–280.

As in the case of partial jurisdiction, Washington may justify its complicated rules differentiating trust and non-trust land on the ground that the tribes are empowered to establish uniformity by tendering their consent.[9] But this justification fails for many of the same reasons. It is unlikely that Congress intended to permit the proliferation of law enofrcement authorities necessitated by Washington's differential treatment of trust and non-trust land, regardless of whether the Indians or the states are responsible. Indeed, one suit challenging this portion of the statute has raised the argument that the resultant confusion is so great as to create a denial of due process of law to reservation residents.[10] Without going this far, it is sufficient to say that PL–280 did not contemplate such fine distinctions on the part of states accepting its jurisdiction.

For those states which had received mandatory grants of jurisdiction or had accepted PL–280 without an adequate understanding of the financial hardship they were inviting, none of the four alternatives provided relief. The only real solution was federal aid or return of jurisdiction to the federal government and the tribes.

C. *Retrocession*

Had PL–280 originally contained a provision permitting the states and the tribes to demand the return or "retrocession" of state PL–280 jurisdiction to the federal government, much of the dissatisfaction with the Act would have been avoided, though federal dissatisfaction might have been greater. Retrocession would have allowed both states and tribes to experiment with state jurisdiction, the states to determine whether it was too costly, the tribes to determine whether it fairly met their needs. In addition, retrocession would have permitted jurisdictional arrangements to reflect changed circumstances. If a tribe subject to PL–280 jurisdiction developed new economic resources, or new generation of tribal members wished to establish strong tribal governing institutions,[11] the state could be required to relinquish jurisdiction.

Notwithstanding these potential benefits from retrocession, the device received little attention during the debates over PL–280 and its predeccor bills,[12] and no recognition in the statute itself. The failure to include a means by which states effect retrocession is perhaps attributable to a congressional wish to rid the federal government forever of its costly superviory responsibilities on the reservations. The omission of a provision allowing Indians to demand retrocession is undoubtedly explained by the very law and order and pro-assimilationist impulses that accounted for the absence of an Indian consent provision.

Eventually, however, Congress extended the advantages of retrocession to the states, although not to the Indians. By 1968, the states' financial difficulties with PL–280 had become so apparent that relief was provided in the form of a section of the 1968 Civil Rights Act enabling any state which had previously assumed jurisdiction under PL–280 to offer the return of all or any measure of its jurisdiction to the feedral government by sending a resolution to the Secretary of the Interior. The Secretary could accept or reject retrocession in his discretion.[13] Under this provision, the Indians could not participate in the retrocession decision, although they might attempt to do so informally through appeals directly to the Secretary.

The absence of an Indian veto over state-initiated retrocession was undesirable from the Indians' point of view because the states could decide to retrocede only part of their PL–280 jurisdiction, and might use that power to relieve themselves of the most costly forms of jurisdiction while retaining those most offensive to the Indians.[14] Perhaps Congress believed that the Secretary's veto power over a state's proposed retrocession would make a tribal veto unnecessary in those situations where a state's partial retrocession seriously disadvantaged

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[4] *In re* Hankin's Petition, 80 S.D. 485, 125 N.W.2d 839 (1964). This case held South Dakota's attempt to assert jurisdiction only over criminal and civil causes of action arising on highways within the reservation to be an improper acceptance of PL–280 jurisdiction. S.D. COMPILED LAWS ANN. § 1–1–21 (1967).

[5] Boyer v. Shoshone-Bannock Indian Tribes, 92 Idaho 257, 441 P.2d 167 (1968); Makah Indian Tribe v. State, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970).

[6] Makah Indian Tribe v. State, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970). The issue has been reopened in federal court and decided against the Indians. Confederated Bands & Tribes of the Yakima Indian Nation v. Washington, Civil No. 2732, at 5–6 (E.D. Wash., Dec. 1, 1972), *citing* Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967) (affirming the validity of partial jurisdiction). An appeal from that ruling is pending.

[7] 25 U.S.C. § 1326 (1970).

[8] WASH. REV. CODE § 37.12.010 (Supp. 1971).

[9] *See* notes 103–05 & accompanying text *supra*.

[10] Confederated Bands & Tribes of the Yakima Indian Nation v. Washington, Civil No. 2732, at 8–9 (E.D. Wash., Dec. 1, 1872), *discussed in* THE IMPACT OF PL–280, *supra* note 50, at 42–43.

[11] *See* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974).

[12] During the 1952 Hearings, one Indian spokesman did note:

"[T]he bill or bills as written provide for the Indians to have only one chance to decide whether or not they want State law and order. Furthermore, if they do decide to have State law and order, they cannot go back; they cannot change their minds later and go back to tribal or Federal law and order. At least they cannot do so without first getting the consent of Congress.

Statement of Frank George, First V.P. of Nat'l Cong. of Am. Indians, in 1952 *Hearings*, *supra* note 20, at 88.

[13] 25 U.S.C. § 1324 (1970). Why this opportunity was not extended to states acquiring jurisdiction *after* 1968 is somewhat unclear, since both optional and mandatory states were authorized to return jurisdiction accepted before 1968. A possible ground for distinction is that the 1968 Act, by expressly authorizing partial assumptions of jurisdiction, rendered retrocession less financially imperative for the states. In addition, Congress may have felt that states should not be as free as retrocede jurisdiction acquired after Indian consent which the 1968 Act's amendments of PL–280 required before jurisdiction could be acquired.

[14] There is little legislative history to illuminate why the Indian interests were ignored. With the exception of one protest in a written statement from the governor of the Pueblo de Santa Clara, New Mexico that "there is no provision made for the retrocession of jurisdiction back to its true owner" (1968 *Hearings*, *supra* note 54, at 66), the hearings, reports, and debates relating to the Act contain no more than rephrasing of the retrocession provision. *E.g.*, *id.* at 15, 21.

the Indians, or where the Indians actually preferred to retain complete state jurisdiction.

A more glaring omission was the failure to create any mechanism by which Indians could initiate and *force* retrocession on an unwilling state which had acquired jursdction. It is difficult to justify this omission on assimilationist grounds or on the ground of the inadequacy of tribal law enforcement facilities because other language in the 1968 Act required tribal consent before any initial extension of state jurisdiction, regardless of the quality of law enforcement machinery on the reservation. Perhaps objections to allowing tribal-initiated retrocession derived from concern that the tribes would seek to retrocede less than all the jurisdiction the state had initially assumed, under circumstances where the state was unwilling to exercise only the remainder. Or perhaps Congress felt that reservations which had already been subjected to PL–280 jurisdiction were so weakened as to be incapable of resuming self-government.

Just as they did not wait for Congress to require Indian consent to PL–280 jurisdiction, some states have not waited for Congress to authorize tribes to iutate retrocession, and have bound themselves under stae law to return jurisdiction at the Indians' request. Thus, when Montana extended its criminal jurisdiction to the Flathead reservation conditional upon tribal consent in 1963, it also enabled the tribe to withdraw its consent wthin two years after extending it.[15] The only state to assume PL–280 jurisdiction since 1968, Utah, has also accorded the Indians initiative and control over the retrocession process. In 1971, Utah bound itself to retrocede "all or any measure of the criminal or civil jurisdiction acquired by it . . . whenever the governor receives a resolution from a majority of any tribe . . . certifying the results of a special election and expressly requesting the state to retrocede jurisdiction over its people or lands or any portion thereof***." [16]

This provision is significant because it denies the state a veto over tribal decisions to retrocede, yet permits partial retrocessions as to subject matter or geographical area. It is noteworthy that despite forecasts that Indians will abuse their power to retrocede selectively, at least one state has willingly accepted that possiblity.

A bill recently introduced into Congress by Representative Pettis of California[17] sought to grant a limited amount of initiative in the retrocession process to those Indians who had not consented to jurisdiction in the first place.[18] Although the bill made little progress toward enactment, it is a useful focus for problems relating to retrocession that persists despite the 1968 Act's amendments. Under the terms of the bill, if a majority of a tribe votes for the removal of all state PL–280 jurisdiction over that tribe, the state automatically loses its jurisdiction one year after certification of the vote to the state and the Secretary of the Interior. If the vote is to remove less than all the state's PL–280 jurisdiction, however, it becomes effective only if the state consents. In neither situation may the Secretary exercise a veto over the tribe's decision to abolish the state's PL–280 jurisdiction.[19]

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[15] UTAH CODE ANN. § 63–36–15 (Supp. 1973).

[16] MONT. REV. CODE ANN. § 83–806 (1966). Montana's statute does not seems to have contemplated the tribe revoking consent as to less than all the jurisdiction the state had assumed originally. Nor does it concern itself with the necessity of obtaining federal acceptance of any revocations of tribal consent, acceptance which the Secretary of the Interior claimed he was incapable of making prior to his authorization in the 1968 Civil Rights Act. *See* LAW & ORDER, *supra* note 35, at 49 (describing Nebraska's attempted retrocession in 1957, rejected by the Secretary of the Interior); Proclamation of Governor Daniel J. Evans, State of Washington, Aug. 15, 1968 at 2 (noting the Justice Department's refusal to recognize an attempted retrocession of jurisdiction over the Quinault Tribe in 1965).

Since the Flathead tribe in Montana did not effect a valid revocation prior to 1968, the problem was conveniently avoided in that state. The tribe voted at one point to withdraw its consent but rescinded their vote eight days later. Since the withdrawal had not been communicated to the Governor the revocation of consent was deemed ineffective. State *ex. rel.* McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972).

[17] H.R. 8347, 93d Cong., 1st Sess. 2 (1973). No hearings were held on the bill.

[18] *Id.* The Pettis bill is inadequate because it denies initiative in the retrocession process to consenting tribes. Even if a tribe had the opportunity to decline state jurisdiction at the outset, it is possible that the tribe accepted jurisdiction in the mistaken belief that it would be beneficial. Especially since Congress, despite its trust responsibility, does not supply funds or experts to the Indians to assist them in evaluating the costs and benefits of state jurisdiction prior to consent, Congress should at least permit them to change their minds once the negative evidence is in, even if only during a one or two year trial period.

[19] The absence of a secretarial veto is not mentioned in the bill. But the bill refers in several places to the Indians' "right" to remove themselves from PL–280 jurisdiction. And all that is required, once the Indians for retrocession and obtain consent of the state if necessary, is that the Secretary be notified of the results.

This bill is at least partly a response to complaints by California Indians that state enforcement of laws such as housing codes and zoning ordinances on the reservation has been unduly interfering with tribal plans for economic development.[20] As a solution to such problems the bill is not wholly successful, since it permits tribes to rid themselves of offensive aspects of state jurisdiction over state objection only if they are willing to forego state jurisdiction altogether.

By requiring state consent for partial retrocessions, the bill may be expressing the legitimate concern that tribes will reject only those aspects of jurisdiction most lucrative or significant to the state, leaving the state with a burden it does not find worth shoulderng. This problem, which is equivalent to the problem Indians face now that states can retrocede only part of their PL–280 jurisdiction,[21] is not insoluble. The principle that states may be required to retain PL–280 jurisdiction which they do not want was established in PL–280 as originally enacted, was perpetuated in the 1968 Act's amendments,[22] and comports with the evolving view of state jurisdiction on Indian reservations as a means of providing services to the Indians. Even granting, however, that a state's preference regarding the extent of its remaining PL–280 jurisdiction is entitled to respect, a provision in the bill requiring secretarial approval of partial retrocessions initiated by the tribes would suffice to ensure such consideration, and would be consistent with the general trend in federal Indian policy favoring tribal autonomy within broad limits set by the federal government.[23]

Despite the generally salutary effects of the 1968 Act's amendments to PL–280, the retrocession provisions currently in existence, as well as those proposed in Congress, manifest an uneasy and unsatisfactory compromise between state and tribal demands. Now that assimilation and saving federal money are no longer highest priorities of federal Indian policy, and tribal autonomy coupled with minimum safeguards for state interests are prevailing goals, a coherent view of PL–280 as a measure designed to serve the Indians militates in favor of giving the tribes more initiative in the retrocession process, regardless of whether they initially consented to jurisdiction.

IV. COMPETING INTERPRETATIONS OF PL–280

Political debates over who should bear the cost of Indian jurisdiction and who should make decisions about allocation of Indian jurisdiction between the federal government, the states, and the tribes, should not be viewed apart from litigation that has arisen concerning (1) the procedures for effecting PL–280 transfers (2) the scope of the jurisdiction transferred. Judicial resolutions of these disputes affect both the degree to which Indians are displeased with unilaterally assumed state jurisdiction or limited retrocession, and the states with congressional failure to subsidize their assumptions of PL–280 jurisdiction. For example, insofar as a tribe's objections to PL–280 jurisdiction center on fears that they will be deprived of control over economic development by the application of zoning-type restrictions, those objections may be neutralized by an interpretation of PL–280 which excludes exercise of state jurisdiction by county as opposed to state legislative bodies (since counties more often exercise zoning powers). Similarly, a state's dissastifaction with the financial burden of PL–280 may vary depending on the scope of jurisdiction it

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[20] *Public Law 280 Status Report*, 5 CAL. INDIAN LEGAL SERVICES NEWSLETTER, Sept. 1973, at 11–16.

[21] *See* text accompanying notes 112–13 *supra*.

[22] This is evident in cases which declared that when a state offers to retrocede jurisdiction under the 1968 Act, the Secretary may accept some of the proffered jurisdiction and require the state to retain the rest, even if the state would prefer all or nothing. Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd.* 460 F.2d 1327 (8th Cir. 1972); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971). Nebraska had offered to retrocede jurisdiction over two reservations within a single county. The Secretary accepted retrocession as to one of the reservations only, since Indians on the other reservation desired continuation of state jurisdiction. Subsequently, the Nebraska legislature attempted to rescind the entire offer on the ground that the Secretary could not accept less than all of the proffered jurisdiction. The courts affirmed the Secretary's action relying on language in the 1968 Civil Rights Act empowering the Secretary to accept retrocession of "all or any measure of the . . . jurisdiction" acquired under PL–280. 25 U.S.C. § 1323(a). (1970).

[23] Such a provision could require that the Secretary determine whether the potential benefit to the tribe from the partial removal of state jurisdiction exceeds the potential detriment to the state, a determination similar to the one the Secretary presumably now makes in deciding whether to accept less than all of a state's proffered PL–280 jurisdiction.

acquires in exchange, such as zoning and taxing powers. Just as the resolutions of these disputes are affecting political positions regarding PL–280, so political concerns are in many instances motivating attempts to raise and judicially resolve these very disputes.

A. The Procedures for Effecting PL–280 Transfers

Indian oponents of PL–280 who lacked the power to prevent state jurisdiction before 1968 have attempted to invalidate that jurisdiction by attacking the means by which it was accepted. The states, on the other hand, have sometimes accepted PL–280 in ways that seemingly departed from the requirements of the Act because the mandated procedures were cumbersome or politically difficult to satisfy. Resultant controversies over the validity of purisdiction thus acquired have taken several forms because PL–280 divided the states into three groups for purposes of accepting jurisdiction over Indians; each group was provided with its own distinct transfer mechanism.

1. The Mandatory States

The original five mandatory states, with the addition of Alaska in 1958, comprised the first group.[24] PL–280 announced that hereafter those states "shall have jurisdiction" over offenses committed by or against Indians on the reservations, and over civil causes of action between or involving Indians which arise on the reservations, to the same extent that they have jurisdiction over such causes of action arising elsewhere in the state.[25] The language appears to be self-executing—to confer immediate jurisdiction on the states without the need for state legislation to make it effective.

Indian litigants have questioned, however, whether jurisdiction can be delegated to the states at all.[26] Furthermore, they have asked whether such delegation, if permissible, can be effectuated by unilateral congressional action. Such challenges to PL–280 failed in a protracted habeas corpus proceeding involving a Klamath Indian who had been convicted in an Oregon state court of having murdered a white man on the Klamath Reservation.[27] The thrust of the Indian's claim was that the federal government had plenary authority over tribal Indians pursuant to enumerated powers in the Constitution and that jurisdiction had never existed in any other governmental body. Thus, it was argued, Congress could not delegate its constitutionally ordained powers to the states; and even if Congress could, withdrawal of federal jurisdiction, rather than automatically instituting state law, would leave a jurisdictional vacuum due to the states' lack of residual power.

Both states and federal courts considering the habeas corpus petition disagreed, finding that the state'_s inherent police power sustained Oregon's exercise of jurisdiction pursuant to PL–280 even without legislative acceptance. They reasoned that congressional plenary power over tribal Indians, confirmed by the Supreme Court in 1886,[28] is effective only so long as Congress chooses to exercise it. In the absence of congressional action, state police power is automatically operative. One court which considered the petition relied upon the theory that federal power over Indian tribes is derived from congressional perception of the Indians' need for supervision, rather than from the Constitution.[29] Perhaps sensing the difficulties engendered bf postulating congressional power on expediency, another court ruled that federal power was limited to that actually exercised by Congress because the states only surrendered their sovereign powers to that extent.[30] This latter view was followed recently in Nebraska, also a mandatory state, where the state supreme court held:

> The inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field, and therefore the federal government may withdraw from the field and turn jurisdiction back to the states when it chooses to do so.[31]

Although the results in both cases undoubtedly effectuated Congress's intent

[24] *See* note 11 *supra*.
[25] 18 U.S.C. § 1162(a) (1970); 28 U.S.C. § 1360(a) (1970) (text cited in note 11 *supra*.
[26] Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F. Supp. 42 (C.D. Cal. 1972).
[27] Anderson v. Britton, 212 Ore. 1, 318 P.2d 291 (1957), *cert. denied*, 356 U.S. 962 (1958).
[28] United States v. Kagama, 118 U.S. 375 (1886).
[29] Anderson v. Britton, 212 Ore. 1, 16–19, 318 P.2d 291, 298–300 (1957).
[30] Anderson v. Gladden, 188 F. Supp. 666 (D. Ore. 1960), *aff'd*, 293 F.2d 463 (9th Cir.), *cert. denied*, 368 U.S. 949 (1961).
[31] Robinson v. Sigler, 187 Neb. 144, 148, 187 N.W.2d 756, 759 (1971).

in enacting PL–280,[32] the reasoning in both cases is troublesome, primarily because the cases fail to explore the possibility that the concept of inherent, residual state power over Indians might conflict with the concept of inherent sovereignty in the tribe. While the United States Supreme Court has recently cautioned in another context that "reliance on platonic notions of Indian sovereignty"[33] should be avoided whenever possible, it has also reaffirmed the Indians' semi-autonomous status "'as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they [reside].'"[34] The federal tradition of recognizing this sovereignty was established with the early practice, since abandoned, of dealing with Indian tribes by treaty. Thus it cannot be assumed, once Congress decides to forego the exercise of its plenary power over the Indians, that residual state power automatically fills the vacuum. More plausible is an approach which assumes that the constitutional grant of plenary power to regulate Indians under the Indian commerce clause and the treaty-making clause[35] directly transferred from the states to Congress the power to override preexisting rights of tribal self-government. The power thus acquired by Congress was not designed to overlap equivalent state power, as was much of Congress's power over interstate commerce. This difference is largely attributable to the historical need for a uniform national policy to protect hostile Indians and settlers from one another.[36] From this premise it follows that states can acquire jurisdiction over such matters only by express delegation from Congress. Congresional silence cannot serve as a license to the states to exercise residual police power.

Confusion over this question of residual state power accounts for much of the divergent case law interpreting the meaning and effects of PL–280. The souurce of thi sconfusion seems to be the non-territorial nature of Indian sovereignty as recofinized by the United States Supreme Court. That is, the Court has not defined such soverignty as exclusive power within the boundaries of the reservation. Rather, it has defined it as a collection of those powers necessary for the establishment and maintenance of viable, meaningful, self-government for Indian people. Once the Court acknowledged that according to its definition of Indian sovereignty the states were not precluded from asserting jurisdiction over non-Indians who had committed crimes against other non-Indians on the reservation,[37] the states swept to the conclusion that Indians and Indian reservations have no special status absent federal statutes or treaties occupying the field. What the Court meant, however, is that Indian self-determination is to be viewed functionally—in terms of the purposes for which people desire to govern themselves—rather than territorially. This functional approach has not always been successful in providing clear jurisdictional guidelines,[38] and is less satisfactory than a territorial concept for that reason; but its basic dictate, that Indians are free from state power in areas necessary to effectuate their self-determination, is wholly inconsistent with the notion of residual state police power over Indians and Indian country expounded in the Nebraska and Oregon cases deciding that mandatory PL–280 states need not formally accept its jurisdiction.[39]

[32] Congress obviously did not expect that mandatory PL–280 states would have to enact legislation accepting jurisdiction over reservation Indians, or they would have required such acceptance as they did for the optional states. Instead, Congress relinquished jurisdiction over the mandatory states and assumed state jurisdiction would follow.
[33] McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973).
[34] *Id.* at 173, *quoting* United States v. Kagama, 118 U.S. 375, 381–82 (1886).
[35] U.S. CONST. art. I, § 8, cl. 3, art. II, § 2, cl. 2.
[36] Compare, for example, congressional preemptive power in the area of foreign relations, which operates regardless of conflict between state law and international treaties. Zschernig v. Miller, 389 U.S. 429 (1968).
[37] United States v. McBratney, 104 U.S. 621 (1882).
[38] *Compare, e.g.*, Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (1969), *with* Commissioner of Taxation v. Brun, 286 Minn. 43, 174 N.W.2d 120 (1970), both of which attempted to utilize this approach in determining whether reservation Indians could be subjected to state income taxes.
[39] As in the case of the commerce power, there may be instances where the functional test does not require the state to stay its hand in the face of congressional silence; but the state would be ousted if Congress spoke or occupied the field. Assuming, for example, that states may serve process on Indian reservations for causes of action against tribal Indians arising off the reservations without running afoul of Indian sovereignty, Congress may nevertheless be able to prohibit such exercises of state power. Indeed, cases declaring the broad preemptive effect of PL–280 seem premised on the existence of such congressional power. *See* notes 182–84 & accompanying text *infra*. *But cf.* State Sec., Inc. v. Alabama, 84 N.M. 629, 506 P.2d 786 (1973). The closest analogy would be the functional test that is used to determine whether congressional silence in matters relating to interstate commerce is preemptive. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

If these decisions stemmed from a desire to effectuate congressional purpose, their concern was excessive. Even starting from the premise of residual state power, it does not necessarily follow that mandatory PL–280 states must take some action to accept jurisdiction over reservation Indians. In a 1960 opinion [40] advising Minnesota, a mandatory PL–280 state, that it need not take such action, the Attorney General of Minnesota conceded that absent federal treaty or statute conferring it, state jurisdiction does not extend to reservation Indians because the rights acquired by Minnesota's Enabling Act are subordinate to the Indians' "prior right of occupancy." [41] Yet he did not conclude from the absence of residual state jurisdiction that Congress is precluded from declaring effectively that state jurisdiction shall apply on the reservations. His position seems to have been that although a retreat by Congress from exercise of its jurisdiction over Indians does not automatically institute state jurisdicion, a retreat coupled with a directive that states shall asume such jurisdiction is operative regardless whether a state formally accepts it.

Recent United States Supreme Court decisions emphasizing congressional control over the means by which jurisdiction over Indians is transferred from the federal government to the states [42] suggest that the Court will agree with the Minnesota Attorney General that formal state acceptance by mandatory PL–280 states is unnecessary. If so, the peculiar contours of congressional power over matters affecting tribal sovereignty will be revealed.

Unlike congressional power over interstate commerce, this power never overlaps residual state police power. Yet unlike other nonoverlapping powers, such as congressional power to declare war, it is delegable to the states. Put another way it is capable of being conferred in whole or in part on the states if Congress feels that it is consistent with its responsibilities to the Indians to do so, yet otherwise not shared with the states at all.[43]

2. The Optional States

The remaining two groups of states set apart by PL–280 for purposes of accepting jurisdiction over reservation Indians were required by Congress to do precisely what the defendants in the Oregon and Nebraska cases had insisted that their states do—enact legislation accepting jurisdiction. Congress divided the optional states into two groups, those with disclaimers and those without. The disclaimers were provisions inserted in the proposed constitutions of candidates for statehood, which limited the jurisdiction which the newly admitted states would assert over Indians and Indian country. They were the result of negotiations between the federal government and territorial representatives, and corresponded to provisions in the federal legislation which eventually authorized statehood.

For the optional states without disclaimers, the procedure for accepting PL–280 was quite straightforward. Section seven of PL–280 provided that any state not included among the mandatory states and *not* prevented from assuming jurisdiction by provisions of its Enabling Act may assume civil and/or criminal jurisdiction to the same extent as the mandatory states "at such time and in such manner as the people of the State shall, by an affirmative legislative action, obligate and bind the State to assumption thereof." [44] Nevada (1955),[45] Florida (1961),[46] Idaho (1963),[47] and Iowa (1967) [48] all states without disclaimers, have assumed jurisdiction under this provision without generating any controversy over the procedural correctness of the transfer.[49]

[40] 1960 MINN. ATT'Y GEN. REP. 84.

[41] *Id.* at 87.

[42] McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971).

[43] It is perhaps closest to that area of interstate commerce regulation removed from state power by the commerce clause. Since Congress seems to have the power to determine which areas of regulation fall within that category by delegating powers to the states (Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), a parallel may be drawn to congressional power to delegate jurisdiction over reservation Indians to the states.

[44] Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588.

[45] NEV. REV. STAT. § 41.430 (1967). Nevada originally declined status as a mandatory state because of the financial burdens imposed by PL–280.

[46] FLA. STAT. ANN. § 285.16 (1962).

[47] IDAHO CODE §§ 67–5101 to 5103 (1973).

[48] IOWA CODE ANN. §§ 1.12–.14 (Supp. 1973).

[49] When the 1968 Civil Rights Act repealed section seven and replaced it with a tribal consent procedure, it explicitly preserved these pre-1968 transfers. 25 U.S.C. § 1323(b) (1970), *formerly* Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590.

Congress assumed the eight optional states with disclaimers [50] would have to repeal their disclaimers by constitutional amendment before PL–280 jurisdiction could be validly accepted. Indians have pressed to enforce the requirement because constitutional amendments cannot be effected without a referendum, and the Indians succeeded in several state ballotings prior to 1968 in convincing the public that PL–280 is both unfair to the Indians and an unacceptable burden on state taxpayers.[51]

The disclaimers generally declare that until the United States and "the people of the state" in question consent to the contrary, all lands held by any Indian tribe, the title to which has not been extinguished by the United States, shall remain "under the absolute jurisdiction and control of the Congress of the United States." [52] In debate over PL–280, members of Congress took the language to mean that even with congressional permission, legislatures in these states could not act to accept PL–280 before the disclaimers were eliminated by constitutional amendment.[53] Since in at least a few of these states, B.I.A. investigators prior to the passage of PL–280 had revealed that Indian tribes and/or local officials welcomed a transfer of federal jurisdiction to the states,[54] and since Congress was unwilling to remove barriers to state jurisdiction under the disclaimers by extinguishing Indian title, a provision (section six) was added to PL–280 stating:

"Notwithstanding the provisions of the enabling Act for the admission of a State, the consent of the United States is hereby given *to the people of any State* to amend, *where necessary*, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State *until the people* thereof have appropriately amended their State constitution or statutes, as the case may be." [55]

Six of the eight states with disclaimers have enacted legislation asserting full or partial jurisdiction over reservation Indians.[56] Yet five of these six—Washington, Montana, Arizona, North Dakota, and Utah—have not amended their state constitutions, claiming amendment is not a prerequisite to the assumption of jurisdiction under PL–280.

The states first argue that their constitutional disclaimers do not deny them the jurisdiction PL–280 offers.[57] The language of PL–280 provides that no law enforced by a state under its aegis may require the alienation, encumbrance, or taxation of Indian property held in trust by the United States, or the regulation of such property in a manner inconsistent with federal statute or treaty.[58] States argue that the disclaimers prohibit just such alienation, encumbrance, taxation or regulation, *but no more*; therefore, their repeal is not

[50] Although Alaska has a disclaimer, it was included with the mandatory states. The optional states with disclaimers are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.

[51] *See* notes 56–59 & accompanying text *supra*.

[52] *See, e.g.*, S.D. CONST. art. XXII.

[53] S. REP. No. 699, *supra* note 23, at 6–7 (including report on PL–280 by Dept. of Interior).

[54] *Id.*

[55] 25 U.S.C. § 1324 (1970) (emphasis added) (originally enacted as Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590) (insignificantly amended thereafter). The reference to amendment of state statutes was not intended as a possible substitute for constitutional amendment; rather it was directed at three states which had embodied disclaimers in statutes as well as their constitutions, since those states might feel that federal permission was necessary to repeal both forms of disclaimer. Hearings Transcript II, *supra* note 22, at 6–7.

[56] Arizona (1967), ARIZ. REV. STAT. ANN. §§ 36–1801, –1865 (Supp. 1973). Montana (1963), MONT. REV. CODE ANN. §§ 83–801 to –806 (1966). North Dakota (1963), N.D. CENT. CODE §§ 27–19–01 to –13 (1974). South Dakota (1957 and 1961), S.D. COMPILED LAWS ANN. §§ 1–1–12 to –21 (1967). Utah (1971), UTAH CODE ANN. §§ 63–36–9 to –21 (Supp. 1973). Washington (1957 and 1963), WASH. REV. CODE §§ 37.12.010–.070 (Supp. 1971).

[57] This position is advanced in State *ex rel.* McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972).

[58] Nothing in this section shall authorize the alientation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. 28 U.S.C. § 1360(b) (1970). A similar section is found in 18 U.S.C. § 1162(b) (1970).

necessary before states can accept jurisdiction under PL–280. Alternatively, they note that the disclaimers only require that Indian reservations "shall be and remain under the absolute jurisdiction and control of the United States." Since Congress can repeal PL–280 at will and return jurisdiction to itself, the states claim Indian lands are never outside the absolute control of Congress under the Act.[59]

Although numerous states have adopted this interpretation of the disclaimers,[60] it conflicts directly with historical explanations of the origins of these measures. At the time Congress required the disclaimers they were necessary to protect native Indian populations from homesteaders and settlers. By demanding the disclaimers, the federal government acknowledged its obligation to stand between these two hostile groups and prevent continuing exploitation of the Indians.[61] Congress began insisting on disclaimers of state jurisdiction over Indian reservations immediately after United States Supreme Court decisions first indicated the possibility that such jurisdiction could be exercised.[62] Viewed in this light, the disclaimers are more than protection against Indian loss of real property interests; they are congressional insulation against state jurisdiction over reservation Indians.[63]

The United States Supreme Court's dictim in *Organized Village of Kake* v. *Egan*[64] suggests to the contrary that the purpose of the Alaska disclaimer was to discourage Indian claims for compensation for their land, claims that might otherwise have been brought on the theory that the federal government had ceded Indian land to Alaska in making it a state.[65] This suggestion is wholly gratuitous, however. The basic issue in *Kake* was whether the Indians could claim an exemption from state regulation pursuant to the exception in PL–280 protecting hunting and fishing rights. Under the Court's holding, the state never needed the assistance of PL–280 to assert jurisdiction over the fishing area in question because the territory had never been reserved for the Indians by Congress. For this same reason the disclaimer which pertained only to lands reserved for Indians never precluded state jurisdiction of this type.[66] The scope of the disclaimer was thus irrelevant to the result and need not have been broached yet even accepting *Kake* as an authoritive interpretation of the Alaska disclaimer, that disclaimer may be a special case, since the Indians of Alaska were never isolated from and hostile to the rest of the population, as were Indians in the older western states. Accordingly, Congress may have had no interest in requiring Alaska to disclaim jurisdiction over Indians which the Alaska territory had always exercised and which the State of Alaska was expected to continue exercising.[67] It follows that states relying on *Kake* have been misinterpreting their disclaimers in order to escape the need to repeal them before accepting PL–280 jurisdiction.

Prevailing state interpretation of disclaimers are not simply incorrect; they also contradict the congressional understanding of the Enabling Acts when it passed PL–280.[68] However, since Congress has repealed the Enabling Acts for purposes of PL–280,[69] and has left it to the states to remove remaining barriers, the states' position is that even if Congress believed the state disclaimers were barriers, the states can effectively determine that they are not so for purposes of accepting PL–280.

Not only do these states contend that they are free to determine whether their disclaimers pose barriers to asserting PL–280 jurisdiction, they also maintain that even if the disclaimers do pose barriers, PL–280 leaves to the states the decision of how to go about removing them. Both the Washington and Montana supreme courts have held that legislative repeal is sufficient because state law allows it, despite unequivocal language in the hearings,[70] reports,[71] and floor debates[72] on PL–280 establishing that Congress believed disclaimers could be removed as barriers to assertion of PL–280 jurisdiction only by state constitutional amendment. These courts maintain Congress was only concerned about removal of disclaimers in a manner effective under state law,[73] and the Ninth Circuit has also adopted this position.[74] Attempts have been made to obtain a determination of the issue by the United States Supreme Court, but thus far the Court has managed to avoid it either by denying certiorari, or most recently in *Tonasket v. Washington*,[75] remanding the question to the state.[76]

Essentially, both the arguments that repeal is not necessary and that repeal by constitutional amendment is not necessary reduce the problem to a matter of congressional intent—how important was it to Congress that the procedures it prescribed in PL–280 be followed precisely? It is unlikely that Congress viewed constitutional amendment as fulfilling any function in the scheme of PL–280 other than satisfying state requirements, because Congress did not require states *without* disclaimers to hold a popular referendum before accepting jurisdiction. Nevertheless, the language of PL–280 clearly requires constitutional amendment, and the legislative history confirms the congressional intent

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[59] *E.g.*, State *ex rel.* McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972).

[60] In 1957, the Attorney General of Arizona contended that his state's disclaimer was absolute only with respect to the state's right to tax, dispose of, levy upon, or otherwise adversely affect land and property held in fee by the United States and the Indians. Otherwise, he asserted, that the state had disclaimed jurisdiction only in cases where Congress has exercised its "absolute jurisdiction and control." 1957 Op. Ariz. Att'y Gen. 96, 100. The Attorney General in office in 1966 reaffirmed this view, announcing that the state disclaimer applied "to Indian land considered as property, and not as a territorial area withdrawn from the sovereignty of the State." 1966 Op. Ariz. Att'y Gen. 41, 43, *quoting* Porter v. Hall, 34 Ariz. 308, 321, 271 P. 411, 415 (1928). The Attorney General of Utah reached the same conclusion in a 1962 opinion, in which he stated that his state's Enabling Act merely reserved title to Indian lands in the United States, and does not deprive the state of sovereignty or remove the land from the territorial jurisdiction of the state. 1962 Utah Att'y Gen. Biennial Rep. 210. Although the Supreme Court of North Dakota first interpreted its disclaimer to encompass jurisdiction over Indians themselves as well as their land (State v. Lohnes, 60 N.W.2d 508 (N.D. 1955)), the court later reversed its position with respect to civil cases (Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957)), and found that the disclaimer does not prevent assertion of state jurisdiction over tort actions between Indians arising on the reservation, even when jurisdiction has not been accepted under PL–280. Several New Mexico decisions (*e.g.*, Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966)), and a decision of the Supreme Court of Montana (State *ex rel.* Iron Bear v. District Court, 512 P.2d 1292 (1973)), relying on dictum by the United States Supreme Court interpreting the Alaska disclaimer (Organized Village of Kake v. Egan, 369 U.S. 60, 65–66, 69 (1961)), have asserted that the reservation of "absolute jurisdiction" over Indian lands to Congress in the disclaimer was not a reservation of "exclusive jurisdiction," and in any event that the disclaimer was of proprietary interest in the land, not of governmental interest. *See also* Tonasket v. State, 525 P.2d 744, 752 (Wash. Sup. Ct. 1974).

[61] Tribal Governments, *supra* note 57, at 3.

[62] Comment, *State Taxation on Indian Reservations*, 1966 Utah L. Rev. 132, 137.

[63] McClanahan v. State Tax Comm'n, 411 U.S. 164, 175–76 (1973).

[64] 369 U.S. 60 (1961).

[65] *Id.* at 65–66, 69.

[66] Alaska Const. art. XII, § 12. Alternatively, the interpretation of the disclaimer was dictum because Alaska was a mandatory PL–280 state. The language in PL–280 directing that Alaska "shall" have jurisdiction over Indian country superseded the disclaimer.

[67] Refer to discussion in Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962). In this regard, it is worth noting that Congress included Alaska among the mandatory PL–280 states rather than subsuming it under section six (cited in text accompanying note 154 *supra*), along with other states with disclaimers, some of which were interested in PL–280 jurisdiction from the outset. Congress may have felt free to do so, without concern about possible obstacles under state law to the exercise of jurisdiction under PL–280, because it thought Alaska's disclaimer had a more restrictive scope than those in the older western states. Interestingly, the disclaimer in the Alaska Constitution does not repeat the Alaska Statehood Act's reference to "absolute jurisdiction & Control" over Indian lands remaining in the United States.

[68] States adopting this interpretation seem to believe, however, that it is not the understanding of the clause that Congress holds which matters, but the states'. It is conceivable that Congress adopted the provision simply out of an excess of caution and fear that states would interpret the disclaimers broadly; yet the legislative history nowhere indicates that the provision in PL–280 requiring repeal was added out of anything other than a genuine belief that the disclaimers constituted a stumbling block to state exercise of PL–280 jurisdiction.

[69] The operative language in section six of PL–280 is "notwithstanding any provisions of the enabling Act." 25 U.S.C. § 1324 (1970) (originally enacted as Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590 (reenacted in Civil Rights Act of 1968, Pub. L. No. 90–284, tit. IV, § 404, 82 Stat. 79)). During hearings on PL–280, counsel for the House Committee on Interior and Insular Affairs stated that this language "would make clear that Congress was repealing the Enabling Act." Hearings Transcript II, *supra* note 22, at 9.

[70] Hearings Transcript II, *supra* note 22, at 2–4, 7–8, 23–24.

[71] S. Rep. No. 699, *supra* note 23, at 6–7.

[72] 99 Cong. Rec. 10782 (1953).

[73] *See* Makah Indian Tribe v. State, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970); State *ex rel.* McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972).

[74] Quinalt Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967).

[75] 411 U.S. 451 (1973).

[76] These delays have begun to influence decisions on the issues. On remand, the Supreme Court of Washington reaffirmed its ruling in *Tonasket* that Washington had effectively assumed PL–280 jurisdiction without a constitutional amendment, relying in part on the fact that it would be "manifestly unfair and unjust to those who have in good faith relied upon that jurisdiction or been affected by it." Tonasket v. State, 525 P.2d 744, 753 (1974). This disruption of prior legal relations should be compared, however, with the future unfairness of subjecting Indians to state jurisdiction over their opposition. Congressional authorization for retrocession upon Indian initiative would provide the least disruptive resolution of this problem, since it would alter jurisdiction prospectively only.

to impose that requirement.[77] Without question Congress has the power to impose conditions on a state's assumption of juridiction over reservation Indians, regardless of the soundness of congressional understanding of state law.[78] Thus, the burden would seem to fall on the states to demonstrate why the clearly manifest intent of Congress should be disregarded.

Two recent United States Supreme Court decisions suggest that this burden will be most difficult to sustain. In *Kennerly v. District Court*[79] and *McClanahan v. State Tax Commission*[80] the Court insisted on the preemptive effect of PL–280 on state efforts to acquire jurisdiction over reservation Indians.[81] In *Kennerly*, although Montana had a disclaimer, it asserted jurisdiction without complying with the formal requirements of PL–280, relying instead on a tribal ordinance which provided that state and tribal jurisdiction would be concurrent. In *McClanahan*, Arizona, also a disclaimer state, attempted to apply long-standing state income tax statutes to reservation Indians, although Arizona had not even obtained the formal tribal consent required by the 1968 Civil Rights Act. The Supreme Court denied the validity of jurisdiction in both cases because it had not been acquired in strict conformity with PL–280. Further, in *Kennerly* the Court implicitly rejected a mode of asuming PL–280 jurisdiction which could be considered a functional equivalent of requirements in the statute.[82] This rejection is especially significant for purposes of understanding whether states must repeal their disclaimers by means of popular referendums.

The Court's insistence on formal compliance is best comprehended in relation to its preference for statutory preemption over complex, abstract notions of Indian sovereignty as the tool for analyzing Indian jurisdiction problems. The Court's position now is that Congress has "in almost all cases" defined "the boundaries of federal and state jurisdiction," and that these comprehensive and detailed boundaries limit all attempts at assertion of jurisdiction over reservation Indians.[83] The *Kennerly* and *McClanahan* decisions have thus effectively dissuaded further state court assertions of jurisdiction in the absence of compliance with PL–280 requirements and strongly imply that the only valid way of assuming jurisdiction is by repealing disclaimers by constitutional

[77] On remand, the Supreme Court of Washington in *Tonasket* relied heavily on language in section six of PL–280 consenting to the repeal "*where necessary*, [of any] State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction . . . ." 25 U.S.C. § 1324 (1970) (emphasis added). According to the court, the italicized words establish an inference that "the question of whether a state constitutional amendment be necessary to comply with Public Law 83–280 is essentially one for state resolution." 525 P.2d at 753. This is a slender reed to rely on in rejecting weighty legislative history. The words "where necessary" may have been inserted as a means of indicating that not every state constitution had a disclaimer possibly interfering with jurisdiction over reservation Indians, or that not every state with a relevant disclaimer also had statutory restrictions.

[78] *See* text accompanying notes 26–42 *supra*.

[79] 400 U.S. 423 (1971).

[80] 411 U.S. 164 (1973).

[81] Ironically, it was two other Supreme Court decisions which had encouraged non-PL–280 states to attempt to increase state power over reservation Indians. Williams v. Lee, 358 U.S. 217 (1959), raised the question of a non-PL–280 state's jurisdiction to enforce a contract against a reservation Indian. Although the Court denied jurisdiction, it did so on the basis of a test which the states interpreted as an open invitation to exercise more control over the reservations. According to the Court in *Williams*, if state jurisdiction would impair the Indians' ability to govern themselves, the state could not exercise power in the subject area; if not, the state was not barred from exercising jurisdiction simply because a claim against an Indian arose on the reservation. Significantly, the Court did not consider PL–280 "applicable federal legislation" with preemptive impact. In Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Court's narrow interpretation of the Alaska disclaimer encouraged states with disclaimers not to view them as barriers to increased state power.

The effects of *Williams* and *Kake* were manifested in state court and attorney general opinions in every area of the law. *See* not 38 *supra*. Relying in part on the existence of PL–280, state courts did not utilize *Williams* and *Kake* to increase their jurisdiction over divorces between reservation Indians, determinations of dependency with respect to Indian children, imposition of sales taxes, and causes of action in tort against reservation Indians. See cases cited note 39 *supra*. *Williams* and *Kake* did, however, encourage aggrandizement of state power over: income taxes (Ghahate v. Bureau of Revenue, 80 N.M., 98, 451 P.2d 1002 (1969); [1957–1958] UTAH ATT'Y GEN. BIENNIAL REP. 292; 1957 OP. ARIZ. ATT'Y GEN. 96); enforcement of personal contracts unrelated to tribal matters (Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970), *vacated*, 400 U.S. 423 (1971)), and criminal actions against Indians acting on the reservation ([1959–1960] FLA. ATT'Y GEN. BIENNIAL REP. 473).

[82] 400 U.S. 423, 427 (1971).

[83] McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 n.8 (1973). Thus the question of residual state power was neatly skirted. The feeling persists, however, that the Court selected a preemption approach precisely to squelch claims of such residual power.

amendment, enacting legislation, and since 1968, obtaining Indan consent.[84] This conclusion is bolstered by the fact that sustaining the requirement will not thwart or subvert any purpose of PL–280, and in fact may provide the Indians with more influence on the state's decision to assume jurisdiction,[85] a result consistent with the thrust of PL–280 since 1968.

B. The Parameters of PL–280 Jurisdiction

Tribes which had state jurisdiction thrust upon them against their wishes pursuant to PL–280 have demonstrated their discontent not only by challenging the methods by which states assumed this jurisdiction, but also by arguing for a narrow reading of the powers PL–280 confers on the states. In particular Indians have contended that state jurisdiction under PL–280 is (1) limited in the civil area to jurisdiction over causes of action, so that states lack general regulatory power in areas such as zoning and taxation, (2) limited to enforcement of state as opposed to county or municipal laws, and (3) subject to explicit statutory exceptions in the areas of hunting and fishing rights, land use control, and taxation, which should be interpreted very generously in the Indians' favor. The resolution of these contentions will have important implications for the vitality of tribal governments in PL–280 states, because a judicial finding in favor of the Indians on these issues will limit state jurisdiction in those areas where tribes feel the strongest need for autonomy—areas like taxation and land use which affect opportunities for economic development.[86]

1. Is State PL–280 Jurisdiction Limited to Causes of Action?

Section four of PL–280 offers a state: "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, *and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State* * * *." [87]

On its face, the italicized portion of this section seems to preclude the argument that PL–280 simply authorizes state courts to serve process on reservation Indians for "causes of action such as tort law [and] contract law" [88] arising on the reservation, with regulatory and licensing functions to be performed by the tribes themselves.[89] Nevertheless, Indians who have disputed this broad understanding of state PL–280 jurisdiction have pointed out some

[84] Thus PL–280 was found to preempt state jurisdiction in Martin v. Juvenile Court, 493 P.2d 1093 (Colo. 1972) (paternity actions); Blackwolf v. District Court, 158 Mont. 523, 493 P.2d 1293 (1972) (delinquency proceedings); and Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133 (1971) (mortgage foreclosure). However in State *ex rel.* Iron Bear v. District Court, 512 P.2d 1292 (Mont. 1973), the Supreme Court of Montana refused to rule that the state's failure to accept PL–280 precluded it from granting divorces to two consenting reservation Indians. Prior to the passage of PL–280, the tribe had enacted an ordinance decreeing that no tribal marriage or divorce would be valid unless it was concluded in accordance with state law; furthermore, the tribe had ceased granting either marriages or divorces. Despite such evidence of tribal acquiescence in state jurisdiction, which was also present in the *Kennerly* case, the decision is incorrect in its disregard for the preemptive effect of PL–280. The concurring opinion's suggestion that a contrary result would deny Indians the equal protection of the laws ignores both the possibility that Montana could acquire jurisdiction to grant divorces under PL–280, and that no state law precludes the tribe from granting marriages and divorces entitled to recognition under state law. *Id.* at 1299.

[85] For example, since Indian support will be important in achieving passage of a constitutional amendment, the Indians can bargain for retrocession provisions in the state legislation accepting PL–280.

[86] Comment, *Indian Taxation: Underlying Policies and Present Problems*. 59 CALIF. L. REV. 1261 (1971); *Public Law 280 Status Report*, 5 CAL. INDIAN LEGAL SERVICES NEWSLETTER, Sept. 1973, at 15–16.

[87] 28 U.S.C. § 1360(a) (1970) (emphasis added).

[88] Opening Brief of Appellant at 34, Tonasket v. State, 525, P.2d 744 (Wash. Sup. Ct. 1974) (case heard on remand from the Supreme Court of the United States). *See also* Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F. Supp. 42, 48–49 (C.D. Cal. 1972); Israel & Smithson, *Indian Taxation, Tribal Sovereignty & Economic Developments*, 49 N.D.L. REV. 267 (1973).

[89] The statement in the Senate Report noting that PL–280 permits state courts both "to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States" seems to confirm this assessment of the law. S. REP. No. 699, *supra* note 23, at 5. The counsel for the B.I.A. at the hearings on PL–280 also supported this interpretation when he stated that the law "would mark a definite step forward in the inclusion into the general body of the people of the Indians of that particular State with respect to civil and criminal jurisdiction, so that they will be subject to the same laws and the same rules as the other citizens."
Statement of Harry A. Sellery, Jr., Chief Counsel, B.I.A., June 29, 1953, in Hearings Transcript I, *supra* note 22, at 5. Furthermore, the language of PL–280 excepting from state jurisdiction the power to encumber trust property or regulate it in a manner inconsistent with federal law would seem unnecessary if regulatory jurisdiction had not been conferred at all. 28 U.S.C. § 1360(b). (1970) (quoted in note 58 *supra*).

ambiguities of legislative intent and language that lend support to their contention that state civil power under the statute is not regulatory in nature.[90]

The first mention of civil jurisdiction during the 1952 Hearings over PL–280 appears in a letter from the Department of the Interior, suggesting that a proposed bill granting California jurisdiction over criminal offenses by or against Indians be amended to include the following provision:

"The courts of the State of California shall have jurisdiction, under the laws of the State, in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent that the courts of such State have jurisdiction in other civil actions and proceedings * * *." [91]

This language resembles language in the 1950 Act granting jurisdiction to the New York courts "in civil actions and proceedings" involving Indians.[92] Neither the Hearings nor the Act mentions general regulatory power. Furthermore, the 1968 Amendments to PL–280 repealing section seven and substituting a provision for Indian consent stated:

"State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or *civil causes of action*, or with respect to both, shall be applicable in Indian country only where the enrolled Indians . . . accept such jurisdiction by a majority vote * * *." [93]

The United States Supreme Court has interpreted this provision as extending "State civil and criminal jurisdiction to litigation involving Indians arising in Indian country," [94] notwithstanding reiteration in the 1968 Act's amendments of the language in original section four of PL–280 to the effect that civil laws of the state shall have the same force and effect on the reservation as elsewhere in the state.[95] Finally, during House hearings on the propsed amendment, Senator Sam Ervin, its chief sponsor, made the following significant statement:

"Public Law 280 *relates primarily* to the application of state civil and criminal law in court proceedings, and has *no bearing* on programs set up by the States to assist economic and environmental development in Indian territory." [96]

This legislative history fails to define the extent of civil jurisdiction under PL–280. While it is certain that Congress wanted state courts to hear civil lawsuits against reservation Indians and to apply *some* state law when it decided them, it is unclear how far Congress intended to go in eliminating tribal power over such public actions as licensing of professionals, regulation of land use, and taxation of activities on the tribal land. Such public actions are usually backed up by the threat of criminal or civil enforcement in the state courts. But to the extent that the language and history of PL-280 focus on litigation, there may have been some intention to reserve these largely administrative responsibilities to the tribes.[97]

Any attempt to put this distinction into practice encounters serious conceptual obstacles, however. If the Indians are arguing that PL–280 simply authorizes state courts to apply federal or tribal law in civil suits against reservation Indians, the arrangement could be understood as an instance of the general principle that a sovereign entity possessing judicial power over controversies ned not also possess power to make rules governing those controversies.[98] Although this distinction is conceptually workable, it defies the

[90] The precise outlines of this contention are not clear, for it could mean that only state judge-made law applies to Indian defendants with tribal and federal statutory law governing as in pre-*Erie* diversity cases; or, it could mean that only private rights of action may be enforced against Indians in state court, whether those rights be statutory or common law.

[91] Letter from Mastin G. White, Acting Assistant Secretary of Interior, to Hon. John R. Murdock, Chairperson, Comm. on Interior and Insular Affairs, Feb. 27, 1952, in 1952 *Hearings*, *supra* note 29, at 30.

[92] 25 U.S.C. § 233 (1970).

[93] 25 U.S.C. § 1326 (1970) (emphasis added).

[94] Kennerly v. District Court, 400 U.S. 423, 428 (1971).

[95] 25 U.S.C. § 1322(a) (1970).

[96] 1968 *Hearings*, *supra* note 54, at 136 (emphasis added).

[97] The language in section four of PL–280 providing that "any liberal ordinance . . . heretofore or hereafter adopted . . . in the exercise of any authority which [the tribe] may possess" will be given full force and effect in determining civil suits in state court only if they are consistent with state law (25 U.S.C. § 1322(c) (1970) (originally enacted as Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589)) is not dispositive, since it avoids the question of how much "authority" the tribe will retain after adoption of PL–280.

[98] The states, for example, can decide cases arising under the laws of the United States even though they lack the power to pass many laws on the same subjects. Thus, state courts can decide cases involving construction of federal patent laws, even though they are unable to enact their own patent laws. U.S. CONST. art. I, § 8. *See* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916); Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 WASH L. REV. 633 (1971).

language and purpose of PL-280 and has not been suggested by the Indians.[99] Rather, the Indians concede some state law is applicable to reservation Indians under PL–280, but only that related to such areas as torts and contracts.[1]

This distinction introduces a host of new and different interpretive problems. If it means that state common law but otherwise federal or tribal statutory law applies in suits against reservation Indians, it is difficult to discover either the basis for the distinction in the language of PL–280 or in the policy considerations that underlie it. Section four's reference to the "civil laws of such State" having the same force and effect on reservations as elsewhere in the state suggests no such limitation on the applicability of state law, nor does the language simply conferring jurisdiction on state courts to decide civil disputes involving reservation Indians. One reason why Congress might have intended to extend only state common law to the reservations is that state judges might encounter greater difficulties in discerning and applying tribal analogies to common law than in applying tribal statutes. It seems unlikely, however, that Congress intended that the applicability of state law to a case against an Indian defendant depend on whether a state or tribe has codified or modified by statute its common law rules.

If the Indians are not arguing that states wholly lack legislative jurisdiction or that they lack the power to apply anything but judge-made law in litigation against Indians, they may instead be arguing for a more functional distinction between state power to regulate and state power to adjudicate "causes of action." While states will usually enforce regulatory schemes by authorizing state agencies to bring injunctive "causes of action" or suits for civil penalties, the Indians may attempt to distinguish such litigation from litigation governed by state rules under PL–280 on the ground that the plaintiff is public, not private, or the interest vindicated is public, not private.[2] Again, it is difficult to connect this very specific distinction wth the much more general language of PL–280 applyng state law to the reservation, unless one focuses on use of the words "private persons or property"; but even with this hurdle surmounted, the precise contours of the distinction as well as its rationale are difficult to grasp. The public has *some* interest in every private lawsuit. Furthermore, any attempt to differentiate public and private suits on the basis of public versus private enforcement is difficult to justify in terms of PL–280 because a state's choice between public and private enforcement of a regulatory scheme, such as its fair employment practices law, has little bearing on the extent to which a law will infringe upon tribal authority.[3]

The purpose of pointing out these conceptual problems with the Indians' position regarding state regulatory power under PL–280 is to suggest that the language in the Act seized upon by the Indians as indicative of a limited role for state civil jurisdiction[4] was the product of ambiguous drafting, and not of fundamental policy choices. It is most likely that criminal and civil jurisdiction were designed to be coextensive, and similarly regulatory in nature. This conclusion does not mean that various forms of state regulation of activity

[99] For example, because of clear legislative history on the subject, the Indians do not usually acknowledge any limitation on state criminal jurisdiction under PL–280. Thus, state regulation of on-reservation activity seems to be permissible where the activity is subject to criminal sanctions, as in the case of tax fraud or the crime of practicing medicine without a license. The Indians might attempt to eliminate this inconsistency between the scope of state cvil and criminal jurisdicton by delneating two categories of state criminal laws, one "regulatory"—punishing for failure to comply with state law demanding affirmative action—and one merely "prohibitory." Conceptual difficulties would follow, however, since most requirements can be rephrased as prohibitions, and even a rough sense of what the distinction entails is lost when the difficulty of categorizing crimes such as failure to stop and assist at the scene of one's automobile accident is considered. On the other hand, these problems have not surfaced in non-PL–280 states, where state criminal law may be enforced by the federal government under the Assimilative Crimes Act (18 U.S.C. § 13 (1970)), but state law is inapplicable of its own force.

[1] *See* notes 88–90 & accompanying text *supra*.

[2] The distinction between suits to enforce public rights and suits to enforce private rights has been utilized in other areas of the law. Some courts, for example, have denied the existence of a constitutional right to trial by jury in certain suits to obtain monetary relief on the ground that the suits are vindicating the public inerest. *See* Mitchell v. Robert De Mario Jewelrry, Inc., 361 U.S. 288 (1960); Porter v. Warner Holding Co. 328 U.S. 395 (1946); Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1969). *See also* Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973).

[3] Until 1972, for example, only private individuals could bring actions under Title VII of the Civil Rights Act of 1964, if the suit did not involve a pattern or practice of discrimination. In 1972, the EEOC was empowered to bring such suits as well. Equal Employment Opportunity Act § 4(a), 42 U.S.C. § 2000e–5 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e–5 (1970).

[4] *See* text at note 93 *supra*.

on Indian reservations may not be offensive on other grounds—either because the regulation is accomplished by local as opposed to statewide legislation, or because PL–280 was not intended to confer particular kinds of regulatory power (such as power to override Indian tax exemptions or to regulate the use of trust land). But these are separate issues, to be discussed in greater detail below. The argument for denying such power on the ground that civil jurisdiction under PL–280 is not regulatory in nature, while supported to some extent by ambiguities in the language and legislative history of the Act, is weakened by substantial difficulties of conceptualization and application.

2. Does State PL–280 Jurisdiction Extend to Local Government?

Another focus for Indian attacks on the general scope of state PL–280 jurisdiction has been the language in section four extending only "those civil laws of such State or Territory that are of general application to private persons or private property" [5] to the reservation. The Indians' argue that only state statutes, not county or municipal ordinances, satisfy the requirement of "general applicability." [6] The basis for a similar argument on the criminal side [7] is the language in section two that state criminal laws "shall have the same force and effect within [the reservation] as they have elsewhere within the State . . . ." [8] At stake in these controversies is whether tribal governments are to remain viable, and whether reservations in PL–280 states are to be anything more than tax-free pieces of property, totally subject to regulation by local governmental entities as well as the state.

The defeat of the Indians' position on these issues in several California decisions since vacated by the Ninth Circuit on jurisdictional grounds [9] is attributable to a judicial misunderstanding of the underlying thrust of PL–280. Starting from the premise that PL–280 was primarily an assimilationist measure, these courts have concluded that laws of "general application" include county and local laws passed pursuant to general state home rule authorization or more specialized delegations, since that construction effectuates the purpose of wholly integrating the Indians into the dominant society.[10] The only explanation they venture for the addition by Congress of the words "of general application" is the existence of a legislative intent "to assure equal treatment of the Indians with all other citizens . . . ." [11] Presumably the statutory language accomplishes this purpose by prohibiting enforcement of state laws applying only to the reservation. Just as plausible, however, is a congressional intent to avoid application of special laws which the state enacted for particular cities or counties to reservations. Given the absence of any strong expression of intent to the contrary, and in view of the devastating impact it would have on tribal institutions to deprive them of as much power as the most diminutive of municipalities, an interpretation which renders reservations of co-equal status with counties and municipalities may be preferable, particularly since the Indians, who do not own their lands in fee, often cannot incorporate the reservations under state law and thereby acquire law-making powers.[12]

Assuming, PL–280 was first and foremost a law and order measure designed to control criminality on the reservation at reduced federal expense, and that any civil functions were afterthoughts, a construction that recognizes tribal autonomy on a par with cities or counties does not undermine the purpose of the Act. Congress may have taken into account that most important criminal laws are state-wide. Alternatively, the design of PL–280 in the criminal area and a larger sphere of action for tribal governments can be reconciled by

[5] 28 U.S.C. § 1360(a) (1970).

[6] Madrigal v. County of Riverside, Civil No. 70–1803–E.C. (C.D. Cal. Feb. 16, 1971), *vacated*, 495 F.2d 1 (9th Cir. 1974) (failure to satisfy amount in controversy requirement).

[7] Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), *vacated*, 495 F.2d 1 (9th Cir. 1974) (lack of a case or controversy).

[8] 18 U.S.C. § 1162(a) (1970).

[9] Refer to Note, *The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HAST. L.J. 1451 (1974) for a discussion of the decisions.

[10] Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), *vacated*, 495 F.2d 1 (9th Cir. 1974) (lack of a case or controversy).

[11] *Id.* at 375.

[12] CAL. GOV'T CODE § 34301 (West Supp. 1974).

This interpretation may seem more acceptable when considered in relation to self-contained reservations such as the Rincon in California and less so when considered in relation to reservations closely integrated into non-Indian communities such as the Agua Caliente in Palm Springs. However, the state would always be free to assume control where the existence of multiple rules within a relatively small geographical area becomes dysfunctional, as in the case of coastal zoning in California.

interpreting the criminal jurisdiction conferred by PL–280 to extend to local ordinances while interpreting the civil provision to apply only to state laws. While this construction creates on unfortunate discrepancy between the scope of civil and criminal jurisdiction possessed by local governments, it derives support from the language of PL–280; only the civil section contains the reference to state laws of general application.[13]

There is, moreover, positive indication in the legislative history that a significant legislative role was contemplated for tribal governments. Section four directs state courts to apply tribal ordinances or customs in civil suits when they are not inconsistent with "any applicable civil law of the state," [14] suggesting that tribal governments were not necessarily expected to dissolve as independent entities once PL–280 was enacted and accepted by a state. Although tribal rules are to govern only when they are consistent with "applicable" state law, the requirement that laws of the state be of general application before they are deemed "applicable" would reconcile this provision with a role for tribal governments equivalent to that of county and municipal governments. No tribal ordinance or custom would be considered inconsistent with any county or municipal ordinance; therefore, it would govern in state judicial proceedings against reservation Indians absent a statute to the contrary.[15]

Unless states responded by assuming many of the powers now exercised by local entities—a development which may take place for other reasons such as environmentalists' cries for more comprehensive land use planning—this interpretation would largely alleviate Indians' complaints about the way PL–280 interferes with economic development and even survival on the reservation. Making only state-wide laws applicable to the tribes is a sensible interpretation of PL–280 and one consistent both with the language of PL–280 and current trends in federal Indian policy.

3. Exceptions to PL–280: How Broad Is Their Reach?

During the hearings on PL–280, Congressperson D'Ewart of Montana asked Harry A. Sellery, Jr., Chief Counsel for the B.I.A., whether the bill protected Indian treaty rights and "the tribal estates." [16] Counsel reassured him by quoting the following provision attached to both the civil and criminal sides of PL–280:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." [17]

Indians have read this section expansively. The statutory exceptions concern matters of utmost importance to the tribes—the extent to which they can maintain their traditional livelihoods by hunting and fishing, as well as the extent to which they can acquire new livelihoods by regulating and taxing enterprises on the reservation. The states, on the other hand, have fought for a narrow construction. Because of the growth of metropolitan areas near reservations and tribal industrial and residential developments which have brought increasing numbers of non-Indians onto the reservations, the states have become increasingly disturbed at the presence of tribal enclaves within the state free of state control, potentially prejudicing neighboring residents by their poor land use planning, weak pollution control, or lower sales taxes.[18]

[13] *Compare* 28 U.S.C. § 1360(a) (1970), *with* 18 U.S.C. § 1162(a) (1970).

[14] 28 U.S.C. § 1360(c) (1970).

[15] This is not the technique Congress chose in 1950 when it extended state civil law to reservations in New York while attempting to maintain some measure of tribal autonomy. Congress authorized tribes to certify tribal laws and customs they wished preserved to the Secretary of the Interior; upon such certification, those rules would govern in courts of the state, whether or not they were consistent with state law. 25 U.S.C. §§ 232–38 (1970). In the past, state courts in New York had voluntarily applied tribal law to appropriate cases.

The distinct requirement of consistency between governing tribal laws and state law in PL–280, however, does not necessarily negate the possibility that Congress intended tribes in PL–280 states to exercise as much power as municipalities or counties. PL–280, unlike the New York law, contains the reference to "laws of general application."

[16] Hearings Transcript I, *supra* note 22, at 20.

[17] *Id.* at 20–21, *quoting from* 28 U.S.C. § 1360(b) (1970); 18 U.S.C. § 1162(b) 1970.

[18] 1968 *Hearings*, *supra* note 54, at 76–91.

a. *Hunting and Fishing Rights.* The PL–280 hunting and fishing rights exception has proven less controversial than the land use and taxation exception, perhaps because it involves preserving old ways rather than competing with the states for control of new developments. The most troublesome issue to confront the courts concerning hunting and fishing rights has been how to delineate the class of rights protected by "treaty, agreement, or statute." PL–280, unlike its legislative ancestors,[19] does not protect hunting and fishing rights grounded in "custom." Essentially the problem has been whether certain traditionally exercised rights can be conected to some treaty, statute, or agreement so as to come within the exception of PL–280. In general, courts have been willing to stretch the language of PL–280 to include such traditionally exercised rights.[20] This expansive reading demonstrates an appropriate concern with balancing the assimilationist goals of PL–280 with Indians' desires to maintain traditional ways of life.

b. *Regulation of Land Use.* The courts have not generally adopted the Indians' interpretation of the extent to which PL–280 authorizes states to regulate the use of reservation land. As Indian tribes have attempted to make their land more profitable by engaging in enterprises of their own[21] or by leasing reservation lands to others,[22] the impact of on-reservation activities has been felt increasingly off the reservation. Arizona, for example, was so concerned about the off-reservation effects of on-reservation pollution that in 1967 it accepted PL–280 jurisdiction, but only with respect to its air and water pollution laws and without repealing its disclaimer—an acceptance of questionable validity for both reasons.[23] As a result, the courts have in many instances attempted to construe PL–280's exceptions to accommodate the states' desires to gain control over reservation activities which present potential health and safey hazards off the reservation.

These court decisions resulted from litigation over the meaning of the language in the exception of PL–280 which denies states the power to alienate or encumber real or personal property held in trust by an Indian or tribe, and which prohibits state regulation of that property "in a manner inconsistent with a Federal treaty, agreement, or statute or with any regulation made pursuant thereto."[24] Indians in PL–280 states have asserted that state laws such as those requiring firebreaks,[25] prohibiting operation of card rooms,[26] and those regulating garbage disposal sites[27] are rendered inapplicable to reservation Indians under this language.

[19] H.R. 3624, 82d Cong., 1st Sess. (1952); H.R. 3235, 82d Cong., 1st Sess. (1952). The Supreme Court has explicitly declined to provide a definitive interpretation of the relevant language of the Act. Mattz v. Arnett, 412 U.S. 481, 485 (1973).

[20] *See* Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) (interpreting "statute" to include regulations made pursuant to statute); Donahue v. Justice Court, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (1st Dist. 1971) (holding that protected rights include the right to license non-Indians to fish on the reservation); Elser v. Gill Net Number One, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1st Dist. 1966) (suggesting that a written treaty or agreement is not necessary to claim a PL–280 exception). *See also* Quechan Tribe v. Rowe, 350 F. Supp. 106 (S.D. Cal. 1972) (indicating that an executive order creating a reservation "for Indian purposes" necessarily creates hunting and fishing rights as well).

The Wisconsin Attorney General has adopted a similar broad reading of the exception. *See* 56 OP. WIS. ATT'Y GEN. 11 (1967); 53 OP. WIS. ATT'Y GEN. 222 (1964). The California Attorney General, however, has tended to interpret the exception very narrowly, in one case requiring a written treaty or agreement to establish such rights (35 OP. CAL. ATT'Y GEN. 249 (1960)), and in another refusing to recognize that fishing rights were created by a 1960 federal statute (18 U.S.C. § 1165 (1970)). (42 OP. CAL. ATT'Y GEN. 147 (1963)). The first California opinion has been superseded by the legislature which enacted a law that preserves on-reservation hunting and fishing rights as they were exercised prior to passage of PL–280. CAL. FISH & GAME CODE § 12300 (West Supp. 1973).

[21] *See, eg.*, Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971) (card rooms).

[22] *See, e.g.*, Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967). Such leasing has been encouraged by the enactment of federal statutes authorizing longer-term leases. *See, e.g.*, 25 U.S.C. § 415 (1970).

[23] ARIZ. REV. STAT. ANN. §§ 36–1801, –1865 (Supp. 1973). *See* text at notes 90–106, 149–81, *supra*. Similarly, the New Mexico Attorney General affirmed that the state could enforce its minimum statewide air pollution regulations against an installation operated by non-Indians on reservation lands. He reasoned that the existence of an effect outside the reservation created jurisdiction, notwithstanding the state's disclaimer and its failure to enact legislation and amend the constitution to accept PL–280. 1965 N.M. ATT'Y GEN. REP. 44, *reaffirmed*, 1970 N.M. ATT'Y GEN. REP. 8.

[24] 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970) (relevant language cited in note 58 *supra*).

[25] People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (3d Dist. 1970).

[26] Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971).

[27] Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967).

The Secretary of the Interior claims PL–280 has not ousted the federal government and the tribes from their exclusive authority to regulate trust property.[28] The longstanding federal position[29] is that reservation lands are exempt from state and local zoning ordinances unless and until Congress decides otherwise.[30] On the strength of this policy the Secretary has issued regulations which prohibit the states from enforcing laws which limit, zone, regulate, or control the use of real or personal trust property leased from an Indian tribe.[31] The Secretary's position may be supported by PL–280 itself. It may be argued that a state regulation is an impermissible "encumbrance" on trust property, or that it is a regulation of trust property which is inconsistent with federal law.

Since there is no particular federal "treaty, agreement, or statute" announcing exclusive federal power to regulate use of all trust property, most litigation has centered on the encumbrance concept. The first case to consider whether state regulation of trust land constituted an encumbrance within the meaning of PL–280 *Snohomish County v. Seattle Disposal Co.*[32]—struck down a county zoning and licensing ordinance relating to garbage disposal as applied to a non-Indian lessee of trust lands. The court construed the word "encumbrance" to include any burden on the land which depreciates its value, even though it does not conflict with conveyance of the land in fee. Subsequent courts[33] have agreed with the dissent, however, which took the position that Indian immunities should not be available to non-Indian lessees; that the prohibition on encumbrances was designed to protect Indians from swindlers or from their own folly, and hence encompasses only burdens on the land which may impair alienability of the fee (such as a mortgage or lien); and that the prohibition was not intended to interfere with the states' full police power to prevent activities which "directly injure or endanger the surrounding area and its inhabitants or the state's citizenry at large, or reasonably appear to do so . . . ."[34]

Courts which have followed the dissent's narrower definition of "encumbrance" have viewed PL–280 as a strongly assimilationist measure, which results in near-total extinction of tribal sovereignty and identity. The alternative view of PL–280 as primarily a law enforcement measure and a means of servicing Indian communities suggests a more expansive definition of encumbrance. However, the definition of encumbrance could be expanded to include every potentially profitable activity on trust property, thereby undermining PL–280's purpose of conferring jurisdiction on the states. A serious conceptual difficulty which the courts have encountered with respect to the Indians' rejection of state regulation of trust property is the possibility that the claimed immunity would encompass every potentially profitable activity on the property, largely undermining the purpose of PL–280 to confer jurisdiction on the states. Thus, while courts might consider striking a residential zoning ordinance as constituting an encumbrance, even though it placed no re-

[28] Unpublished Opinion of Solicitor of the Department of the Interior M–367, Feb. 7, 1969.

[29] *The Effect of County Zoning Ordinances on Land Acquired by the U.S. in Trust for Indians*, 58 Interior Dec. 52 (1942).

[30] PL–280 has been considered in the context of established federal statutes, regulations and Interior Department opinions. A discussion of one of the statutes is illustrative of this background. 25 U.S.C. § 231 (1970), passed in 1929, provides that the Secretary of the Interior can prescribe rules and regulations permitting state health and safety laws to be enforced on reservations. The Secretary, however, has considered this section to be insufficiently explicit to authorize him to permit the application of state air and water pollution control laws on Indian reservations "if their enforcement, directly or indirectly, would impact or involve the regulation of trust property in any significant way." npublished Opinion of Solicitor of Department of Interior M–367, Feb. 7, 1969.

[31] 25 C.F.R. § 1.4 (1974). The validity of the regulation is highly questionable, however, since there is no statute expressly authorizing it. In Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Supreme Court held that such regulations must derive from specific authorizing statute. It can be said that 25 U.S.C. § 231 (1970), which enables the Secretary to apply state quarantine and sanitation measures to Indian reservations, only authorizes such regulations if all zoning laws are construed as sanitation measures. The law establishing the Secretary's general power to regulate Indian affairs, 25 U.S.C. § 2 (1970), is not sufficiently specific to provide the requisite authorization. A United States District Court in New Mexico, in fact, declared the regulation unconstitutional for lack of congressional authorization. Norvell v. Sangre de Cristo Dev. Co., 372 F. Supp. 348 (D.N.M. 1974).

[32] 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967).

[33] Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F. Supp. 42 (C.D. Cal. 1972); Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971); People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (3d Dist. 1970).

[34] Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 677, 425 P.2d 22, 29 (1967) (Hale, J., dissenting).

strictions on alienability of the fee, they might feel profoundly uncomfortable categorizing as an encumbrance a state criminal law punishing property owners who permitted prostitution on their premises. It is difficult to construct a definition of "encumbrance," however, which includes the zoning ordinance but not the anti-prostitution law as well.

The Interior Department's efforts to provide a refined definition of the scope of immunity from state laws relating to trust property are unfortunately vague and open-ended, focusing on whether state laws affect the "use or enjoyment [of such property] in any substantial way" or whether their enforcement would directly or indirectly impact that property "in any significant way."[35] This definition seems to preclude California from applying a law such as the one penalizing "[e]very person who keeps any disorderly house, or any house for the purpose of assignation or prostitution . . . ."[36] It is questionable whether the Secretary would approve this result. Also such a broad definition of "encumbrance" would render redundant the language in PL–280 which prohibits state "regulation" of trust property which is inconsistent with any federal "treaty, agreement, or statute."

One could attempt to refine the Interior Department's definition further by distinguishing between laws regulating what may be done with the land itself, and laws regarding or designed to regulate what may be done inside structures on the land. Alternatively, one could attempt to balance the Indians' interests in free use of their lands against the states' interests in exercising police power, giving greater weight to state laws protecting vital interests of citizens living off the reservations. Thus a state law protecting against brush fires[37] might be enforceable on the reservation while a state building code[38] would not be unless the dwellings were advertised for sale to non-Indians. It is impossible to know whether Congress intended such complex analyses of the statutory language. However, either analysis (or a combination of the two) may provide a satisfactory resolution of the tension between state jurisdiction and tribal sovereignty with respect to land use under PL–280.

Further justification for the Indians' and Secretary's position can be found by an expansive reading of federal statutes and treaties to determine whether state regulation is contrary to any federal "treaty, agreement, or statute." The legislative history indicates that during hearings on the 1952 predecessor bill to PL–280, the Interior Department proposed amendments which would have prohibited the states from adjudicating or regulating the use of trust lands.[39] The absence of a similar prohibition in PL–280 and the presence of a requirement that federal and state rules conflict suggest that Congress believed its trust obligations could be fulfilled by retaining federal statutory control over reservation land, and allowing state law to prevail only in the absence of congressional enactments. It is also possible, however, that Congress believed that most existing federal treaties and statutes already implicitly recognized exclusive federal power to regulate trust lands. If this is true then a court need only determine that the circumstances surrounding the creation of a particular reservation by treaty or statute indicate that it was understood that one consequence of the reservation's creation was immunity of reservation land from state regulation.[40] All state land use regulations would then be inapplicable to that particular reservation as inconsistent with federal law.

Using either a broad reading of the encumbrance concept or the notion of implied federal immunity from state land use regulation, many of the Indians' complaint about state interference with tribal control over reservation development can be obviated.[41]

[35] Unpublished Opinion of Solicitor of the Department of the Interior M–367, Feb. 7, 1969.

[36] CAL. PENAL CODE § 316 (West 1970).

[37] People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (3d Dist. 1970). The case involved the application of CAL. PUB. RES. CODE § 4291 (West 1972), requiring fire-breaks around buildings on or near forest-covered lands, held applicable to Indians on trust land.

[38] Ricci v. County of Riverside, Civil No. 71–1134–E.C. (C.D. Cal., Sept. 9, 1971) (county building code held applicable to Indian-built home on reservation) (vacated).

[39] 1952 *Hearings*, *supra* note 29, at 29.

[40] Such an individualized approach to jurisdictional disputes concerning Indians was approved in McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973). Compare the approach towards hunting and fishing rights. *See* note 20 *supra*.

[41] An interesting question, assuming PL–280 outlaws some state regulation of trust property, is whether it supersedes the state authority granted in section 231. If section 231 is interpreted to extend to enforcement of sanitation regulations affecting trust property, Indians in PL–280 states may enjoy greater protection for their trust lands than Indians in non-PL–280 states.

c. *Taxing Power.* Since federal funds have not been made available to states assuming the burdens of PL–280 jurisdiction, the extent of state taxing power under the Act has become a source of continuing controversy in the courts. As Indians began to share in the advantages of state citizenship, including the right to vote in state elections,[42] sit on state court juries,[43] and receive state welfare benefits,[44] and as more and more state citizens have undertaken economic ventures on land leased from the Indians, state interest in taxing Indian and non-Indian activities on the reservations has grown. At the same time the Indians have become increasingly concerned about the scope of that power because their economic development programs would naturally benefit from exemption from state taxes, and because exemption of non-Indian lessees from state taxes would enable the tribes to derive tax income from the growing number of lessee industrial, commercial, and residential projects on the reservation.[45]

Long before the enactment of PL–280, Indian trust property and profit-making activities by Indians were generally protected from state taxation.[46] Underlying these immunities was the federal goal of preserving and maximizing the value of the Indians' land base until such time as the United States determined that its trust responsibilities were fulfilled. The courts, even prior to PL–280, were reluctant to extend these protections to non-Indian lessees of reservation land.[47]

The impact of PL–280 on these immunities is not clear. The exception clause does prohibit states from taxing "any real or personal property, including water rights belonging to any Indian or any Indian tribe, band, or community that is held in trust or is subject to a restriction against alienation imposed by the United States . . . ." It is unclear, however, whether the exemption applies narrowly to state property taxes levied directly on trust property, or extends to state possessory interest taxes on non-Indian lessees, or to taxation of any profit-making activity on reservation land. Even assuming the narrow definition prevails, it is unclear whether all other kinds of taxes are authorized by implication despite conflict with longstanding policy favoring Indian tax immunities.

The Supreme Court was presented with these questions during the 1972 Term in *Tonasket v. Washington*,[48] a suit brought by an Indian to enjoin the State of Washington from collecting a tax on cigarettes sold in his store on the Colville Reservation. Tonasket claimed that even if his reservation was subject to PL–280 jurisdiction, the state could not lawfully impose the tax on his business because it would interfere with his tribe's sovereignty, and because Congress did not make manifest in PL–280 any intention to override traditional Indian tax immunities. Perhaps perceiving the difficulty of this issue, the Supreme Court of Washington for further consideration in light of another opinion issued by the United States Supreme Court casting doubt on whether states like Washington had PL–280 jurisdiction over the Colville Reservation in the first place.[49]

[42] This right has been recognized since the passage of PL–280 by states which have not accepted its jurisdiction. Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962). *Contra*, Allen v. Merrell, 6 Utah 2d 32, 305 P.2d 490 (1956), *cert. granted*, 352 U.S. 889 (1956), *vacated as moot*, 353 U.S. 932 (1957). The Utah decision rested on the state's lack of jurisdiction over reservations.

[43] 1959 OP. ARIZ. ATT'Y GEN. 223.

[44] Acosta v. County of San Diego, 126 Cal. App. 2d 455, 272 P.2d 92 (4th Dist. 1954); County of Beltrami v. County of Hennepin, 264 Minn. 406, 119 N.W.2d 25 (1963). With respect to non-PL–280 states, refer to [1960–1962] UTAH ATT'Y GEN. BIENNIAL REP. 210.

[45] The Navajo Generating Station and Mojave Power Plants on the Navajo Reservation are examples of recent industrial projects. The residential development of the Tesuque Pueblo in New Mexico is an example of use of long-term leases for construction of non-Indian communities on the reservation. *See* Comment, *The Pre-Emption Doctrine and Colonias de Santa Fe*, 13 NAT. RES. J. 535 (1973).

[46] The General Allotment Act of 1877, 25 U.S.C. § 331 (1970), protected Indian trust property from state taxation. *See* United States v. Rickert, 188 U.S. 435 (1903). Profit-making activities by Indians on trust property were exempt from state taxation either on grounds of interference with Indian sovereignty, by extension from the trust property immunities, or on some federal instrumentality theory. *See* Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1263–66 (1971).

[47] *See, e.g.*, Tax Comm'n v. Texas Co., 336 U.S. 342 (1949); Thomas v. Gay, 169 U.S. 264 (1898).

[48] 79 Wash. 2d 607, 488 P.2d 281 (1971), *vacated and remanded per curiam*, 411 U.S. 451 (1973). On remand, the Supreme Court of Washington reiterated its previous holding on the merits. Tonasket v. State, 525 P.2d 744 (Wash. 1974).

[49] 411 U.S. 451 (1973). The case referred to is McClanahan v. Arizona State Tax Comm'n. 411 U.S. 164 (1973). *See* discussions in text accompanying notes 50–82 *supra*.

The questions raised by *Tonasket* are crucial and unavoidable. Yet the legislative history only partially answers them. There is only one reference to the scope of the taxing power in the debates over federal funding of state PL–280 jurisdiction. In an exchange between Congressperson Young and Chief Counsel Sellery for the B.I.A., during House hearings on PL–280, Young questioned the logic of the B.I.A.'s position that federal funding to PL–280 states was unadvisable because it would set the Indian apart from other state citizens. Young felt that the Indian already was set apart "[b]ecause for the most part he does not pay any taxes." When Counsel acknowledged that the difference existed, Young indicated his belief that this difference would persist under PL–280.[60] In the course of an extended dialogue on the existing tax immunity of Indians[61] neither Congressperson Young nor the B.I.A. Counsel mentioned the possibility that PL–280 would in any way alter the pre-existing tax burden on Indians. Here was a perfect opportunity to do so; for if the exemption for trust property was only an exemption from direct real and personal property taxes, numerous new taxing possibilities would be made available to the states under PL–280 to ease their financial burden.

It may be argued that the language of PL–280 itself suggests the extent of Indian tax immunity under the Act, particularly when the portion making state civil laws "of general application of private persons or property" enforceable against reservation Indians is read together with the language exempting Indian trust property from state taxation, encumbrances, and regulation inconsistent with federal laws. The former provision may be interpreted to encompass state tax laws other than those imposing direct property taxes, on the theory that an explicit exception for direct property taxes implies no exemption from other kinds of taxes.[62] Yet it may be possible to rely upon this same language to reach the opposite conclusion, that is, that there was no intention to repeal existing tax immunities designed to further precisely that goal of preserving the value of Indian property.

One decision by the Ninth Circuit, invalidating California's attempt to impose its inheritance tax on the succession to Indian trust property subsequent to PL–280, indicated a preference for the second alternative when it announced that PL–280 was designed to perpetuate existing Indian immunities from state law, not to create new ones or to destroy old ones.[63] A case which is more illuminating, although less directly on point, is *Squire v. Capoeman*,[64] in which the United States Supreme Court interpreted the Internal Revenue Code as not directing the taxation of proceeds from a sale of standing timber growing on trust land. The proceeds fell within the general definition of "income," and it was clear that Congress could tax the proceeds if it wanted to. Nevertheless, the Supreme Court implied an exemption, so that trust land could "serve the purpose of bringing [the Indian] finally to a state of competency and independence.[65] The Court agreed with the court below that "[t]o tax respondent under these circumstances would . . . be 'at least, a sorry breach of faith with these Indians.'"[66] While the significance of *Squire* might conceivably be limited to taxes which are equivalent to taxes on trust property, the case also supports the broader proposition that federal tax laws which may tend to undermine the statutory and treaty-based federal policy of preserving the value of trust land will not be interpreted to do so unless that is the clear intention of the law.[67] Given that Indian tax immunities have in many instances been implied from the federal trust undertaking, these immunities should not be abrogated except by express federal legislation.[68]

In the past Congress has been sufficiently explicit in eliminating Indian tax immunities. Statutes terminating the reservations of the Klamath, Ute, Western Oregon, Paiute, Wyandotte, Menominee, and Ponca Tribes, provide that after termination of the reservation and distribution of property, "such property and any income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians . . . ."[69] Similar explicitness does not characterize PL–280. There is only a general statement aplying state laws to the reservation, just as there was only a general definition of taxable income in *Squire*. Furthermore, the prohibition of state encumbrances in PL–280 suggests a congressional intent *not* to impose state tax laws which are generally enforced by liens against the taxpayer's property.[70] In the absence of a strong expression of congressional intent to increase state taxing power, the Indians' claims of entitlement to their pre-exihting tax immunities under PL–280 should prevail.

[60] Hearings Transcript I, *supra* note 22, at 9–12.
[61] *Id.*
[62] Note, *State Taxation on Indian Reservations*, 1966 UTAH L. REV. 132, 146.
[63] Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957).
[64] 351 U.S. 1 (1956).
[65] *Id.* at 10.
[66] *Id.*, *quoting* in part the lower court's opinion, 220 F.2d 349, 350 (9th Cir. 1955).
[67] The Supreme Court has said that Indian tax exemptions will not be established by implication if they relate to off-reservation activities. Mescalero Apache Tribes v. Jones, 411 U.S. 145 (1973). But states have jurisdiction over Indians' off-reservation activities absent congressional legislation to the contrary. The opposite presumption applies to on-reservation activities.
[68] This Article does not attempt to define the scope of these implied immunities. *See* Israel & Smithson, *Indian Taxation, Tribal Sovereignty, and Economic Development*, 49 N.D.L. REV. 267 (1973); Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261 (1971).

[69] 25 U.S.C. §§ 677p, 699, 749, 798, 898, 978 (1970); *cf. id.* § 564.
[70] *E.g.*, WASH. REV. CODE tit. 82 §§ 19.91.120, 82.32.030, 82.24.050 (Supp. 1951), the Washington cigarette tax provisions challenged in Tonasket v. Washington, 525 P.2d 744 (Wash. Sup. Ct. 1974).

CONCLUSION

Judicial doctrines allocating jurisdiction over reservation Indians have long suffered from complexity, contradiction, and ambiguity. In recent years, the Supreme Court has been inclined to disregard these doctrines in favor of a preemption analysis looking to federal statutes such as PL–280.[71] Not only does this trend reflect dissatisfaction with the complexity of the doctrines, it also reflects changes in federal Indian pilicy in the direction of increased respect for tirbal sovereignty. It is significant that the trend followed the 1968 Act's amendments requiring tribal consent and authorizing partial jurisdiction as well as limited retrocession. Once Congress established safeguards for Indian tribes over which states seek control, judicially-sanctioned state jurisdiction without such safeguards was difficult to justify. This preemption analysis should be utilized whenever reasonably applicable.[72]

Since recent United States Supreme Cocrt decisions have established that PL–280 is the funuel through which all state jurisdiction over reservation Indians must flow, controversies over its procedures and scope have taken on added significance. Social and economic development which have multiplied the activities on reservations subject to regulation by tribes or states have further enhanced the importance of PL–280. Thorough evaluation of the role tribal governments can and should play in relation to the federal government and states is needed, although beyond the scope of this Article. Nevertheless, it is fair to say that given current federal policy encouraging stronger tribal governments and increased federal efforts to mitigate the most offensive aspects of tribal autonomy within state boundaries,[73] PL–280 should be interpreted to limit state jurisdiction where that is consistent with the often ambiguous language and legislative history.

Furthermore, Congress should provide for retrocession of PL–280 jurisdiction at the Indians' instance. These two measures should ease much of the long-standing tension over PL–280, particularly if the federal government continues to assist tribes in fulfilling their jurisdictional responsibilities.

[71] *See* text accompanying notes 79–84 *supra*.
[72] When the Supreme Court of New Mexico recently asserted jurisdiction over reservation Indians served with process for causes of action arising off the reservation (State ex rel. Sec., Inc. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973)), the dissenting judges argued that New Mexico's failure to assume jurisdiction under PL–280 precluded judicial power under the circumstances. *Id.* at 631, 506 P.2d at 789 (*Montoya & Martinez, JJ.*, dissenting). Since PL–280 only grants state jurisdiction over civil actions arising on Indian reservations, it could be argued that the preemptive effects of PL–280 are irrelevant. Nevertheless, PL–280 also provides that state laws shall apply to Indian reservations as they apply elsewhere within the state. If state service of process laws are included within the meaning of this clause, then PL–280 may preempt the operation of those laws even where the underlying cause of action arose off the reservation. *But see* Fournier v. Reed, 11 N.W.2d 458 (1968), which approved service of state warrants on reservation Indians for crimes committed off the reservation despite failure to accept jurisdiction under PL–280.

On the other hand, the Supreme Court's new preemption approach does not require disavowal of the rules concerning civil and criminal jurisdiction of states over non-Indians on the reservation, since PL–280 does not purport to regulate assertion of jurisdiction over non-Indians. Taxation and regulation of non-Indian leasehold interests in trust land may be some of the few exceptions to this rule, given that Indian interests are so deeply affected by this jurisdiction.
[73] *See* note 85 & accompanying text *supra*.

COHN & MARKS,
Washington, D.C., May 9, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Law and Procedures, Committee on the Judiciary, Dirksen Senate Office Bldg., Washington, D.C.

DEAR SENATOR MCCLELLAN: The American Society of Newspaper Editors and the American Newspaper Publishers Association wish to supplement their previous comments filed with your Committee relative to S. 1, codifying and revising the United States Criminal Code. The undersigned is counsel for ASNE, which is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, includes the maintenance of "the dignity and rights of the profession," and the on-going responsibility to improve the manner is which the journalism profession carries out its responsibility in providing an unfettered and effective press in the service of the American people.

The American Newspaper Publishers Association, through its General Counsel, Arthur B. Hanson, concurs in these comments. ANPA is a non-profit corporation whose membership consists of more than 1,000 daily newspapers, representing over 90% of the total daily and Sunday newspaper circulation in the United States.

We oppose the adoption of Sections 1121–1125 of S. 1, which constitute in effect an "Official States Secrets Act." The inhibiting effect that these provisions would have on the activities of the press to report on National Defense activities causes us great concern.

For example, the broad language in Section 1121, which eliminates a specific intent as an element of the crime of espionage utilizes the language "to the prejudice of the safety or interest of the United States," makes us ask if it would be a violation of the law for a newspaper to report the story of the failure of a weapons system developed by the Pentagon? Would this be a use adverse to the interest of the United States?

Sections 1122, 1123, 1124 and 1125 are so broad and vague in description and definition as to raise a serious question of constitutionality for the violence that they do to due process of law and free speech and press.

For example, Section 1122 does not even require that there be a showing that the information was communicated to a foreign power so that both under Sections 1121 and 1122, if a newspaper printed a story which could easily be read by a foreign power and, under the wildest stretch of the imagination, a prosecutor deems such material to be prejudicial to the safety or interest of the United States, or to the advantage of a foreign power, the newspaper would stand guilty of a felony. These provisions must be read in light of the broad definition of "National Defense Information" that appears in Section 1128(f).

We submit that under the language of this Act, prosecutions could be instituted at will against the press in this country and the preservation of the First Amendment requires the deletion of or substantive amendment of Sections 1121 through 1125 and the definitions contained in Section 1128.

Section 1301 opens the door for possible press harassment by creating an offense by one "intentionally obstructs, embarrasses or perverts a government function by defrauding the government in any manner." Neither "government function" nor "defrauding" are defined.

Sections 1331, 1332 and 1333 raise a very serious question as to the right of a reporter to refuse to testify as to information given to him in confidence or as to the source of his information even where he is protected by a state shield statute.

Sections 1344, 1523, 1524, 1731 and 1733 would operate to impose government secrecy with the prospect of criminal prosecution that could work to destroy investigative reporting.

Section 1523, for example, makes it a felony for a person to read private correspondence "without the prior consent of the sender or the intended recipient." A reporter who is shown a letter by a party who is neither the sender nor the intended recipient is guilty of a felony.

We would join with those who have requested that Section 1744 be narrowed in its language so as to reach commercial offenses only.

Section 1358 provides that a person is guilty of an offense if he "improperly subjects another person to economic loss or injury to his business or profession; because of official action taken or a legal duty performed by a public servant or because of the status of a person as a public servant." We do not find a definition of the term "improperly," but it does raise the question as to whether or not the press could be prosecuted for writing a story or editorial criticizing a present or former public official who contends that it caused him economic loss or injury to his business or profession.

Again, we urge the Committee's careful consideration not only of the comments heretofore filed by ANPA and ASNE, but of those comments filed with the Committee by the National Newspaper Association, the Radio and Television News Directors Association, the Association of American Publishers and the Reporters Committee for Freedom of the Press. The serious First Amendment problems created by the existing language in S. 1 rquires the utmost and thorough considration of your Committee before steps are taken to adopt it into law.

Sincerely,

RICHARD M. SOHMIDT, Jr.

NATIONAL ASSOCIATION OF MANUFACTURERS,
Washington, D.C., February 6, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: Thank you for sending me the revised Committee Print of S. 1. As you know, NAM submitted a statement to your subcommittee expressing our thoughts regarding certain "business-related" portions of the previous S. 1 and S. 1400, and we are pleased that a couple of the problems which we foresaw at that tme appear to have been resolved. Certain key sections of the revised legislation still present some difficulties, however, and NAM, as representative of a large percentage of our country's industrial community, would like at this time to clarify our position with regard to these controversial sections.

First, I would like to state at this time that NAM understands the enormous task at which the subcommittee has been laboring, and we greatly appreciate these worthy efforts. NAM realizes the need for effective criminal sanctions for acts in violation of federal law committed by organizations as well as individuals. We also recognize the equally important need for adequate enforcement of federal violations. Thus, we agree totally with your overall aims and objectives. Our arguments here, then, are directed only to those sections of the Revised Code which we feel treat the business public inequitably.

Under 402, the "Corporate Liability" Section, an organization can be held criminally liable for the acts of an agent, despite the fact that said organization has in *good faith* sought to prevent unlawful conduct on the part of its agents, and apart from the fact that it may have followed all reasonabe procedures to comply with the law, and disavowed the illegal conduct. We feel that imposing criminal liability upon organizations under such circumstances is clearly unjust, particularly in crimes requiring "intent" (or "scienter"). It is our beliefe that an organization's sincere efforts to comply with the law should be recognized as a legitimate defense to criminal liability, except, of course, in those cases arising under "strict liability" statutes, where no intent is required to impose responsibility on either the organization or the individual.

Furthermore, we cannot agree with the committee's decision in section 404(b) to preclude as a defense for the organization that: "the person for whose conduct the defendant is criminally liable has been acquitted, has not been prosecuted or convicted, has been convicted for a different offense, was incompetent or responsible, or is immune from or otherwise not subject t prosecution." Such a rule would encourage juries to split their verdicts when they are sympathetic toward indviduals, preferring instead to find the large, "inanimate corporation criminally liable.

Section 2004, the "Sanction through Publicity" Section is a retrogressive rule. We do not need to employ humiliation as a punishment device—this method was discarded along with the "stocks" in the town square, and "tar-and-feathering". It is clear that we do not have to create new (in this case old) and different sanctions, but we need more prompt, energetic, and effective enforcement of present sanctions. Another fault with this proposed sanction is that it would apply unevenhandedly, i.e., those organizations relying heavily

on public relations will suffer the most, while others not so dependent on "goodwill" would be hurt only minimally. Finally, such a sanction is vague and fails to place limits on the length of time in which notice must be given, or the number of advertisements required etc. In sum, we are in favor of a public notice sanction only in very limited situations where a clear need is established, i.e., notifying purchasers of defective or unsafe products, and then careful consideration must be given to the most efficacious manner of accomplishing this.

Section 2103 gves the court discretion to require as a further condition of a sentence to probation, that the defendant, which could be a corporation, "refrain from engaging in a specified occupation, business, or profession for a period which does not exceed the terms of imprisonment which could be imposed * * *" This is quite a severe sanction, and it is manifestly unjust to apply it to business offenses. Such a provision could not only effectively deprive a person of a means of livelihood, but it would also raise a serious constitutional question of intrusion of the Federal Government into a state's professional licensing powers.

As a general observation, we wonder whether the technique employed in the drafting of legislation known as "incorporation by reference" is an effective one. If other statutes are to be included in a criminal code, we suggest laying them out in detail in the code itself, by specifying the exact language of the conduct which is declared criminal. The appropriate sections of the other laws may then be repealed.

We trust that our observations wil be of some help to you, and we sincerely hope you will consider these points. We find S. 1 has treated the business community inequitably because organizations will be found criminally liable and forced to pay much higher fines despite all the honest efforts they may undertake to prevent wrongdoing; they will be told, in an overly broad variety of instances, to refrain from doing business; they will be forced to embarrass themselves by public notice requirements which are vague, archaic, and humiliating.

Thank you for considering our views.

Very truly yours,

R. D. GODOWN.

WISCONSIN CIVIL LIBERTIES UNION,
Milwaukee, Wis., July 14, 1975.

HON. JOHN L. MCCLELLAN,
U.S. Senate, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, Washington, D.C.

DEAR SENATOR MCCLELLAN: Thank you very much for your letter of July 10 to Senator Proxmire, with the copy to me.

I was indeed mindful of the obligation to comment on the revision of Section 1103, the text of which you so kindly sent me. I have been engaged in some research on a matter close to Senator Proxmire's heart, however—the question of abolishing the Fairness Doctrine for radio and television broadcasters—and only now, having just sent off a 62-page paper to Senator Proxmire, am I free to prepare a short statement on Section 1103 as revised.

I send you only a three-page statement (enclosed.) I hope it is not too late for inclusion in the last volume of hearings.

Thank you very much for your efforts to ensure that my views are communicated to your colleagues.

Sincerely,

DAVID RANDALL LUCE,
Congressional Liaison.

STATEMENT ON SEDITION STATUTE, SEC. 1103 OF SENATE BILL S. 1, AS REVISED

(By David Randall Luce, Associate Professor of Philosophy, The University of Wisconsin-Milwaukee Congressional Liaison, Wisconsin Civil Liberties Union, Vice Chairperson, National Committee Against Repressive Legislation, 2914 N. Downer Avenue, Milwaukee, Wis., July 14, 1975)

I would like very much to up-date my earlier statement, "Comments on the Sedition Statue in the McClellan-Hruska Bill, S. 1," transmitted to the members

of the Senate Committee on the Judiciary in January of this year and appearing in the Congressional Record on March 12, 1975, at page E 1059.

The subject of that statement—Section 1103, "Instigating Overthrow or Destruction of Government," Senate bill S. 1—has now been revised in the following way:

(i) The phrase "as speedily as circumstances permit" is stricken from the description of the intent required as a part of the offense, in paragraph (a).

(ii) The addition of the phrase "imminent lawless" is added to paragraph (a)(1), so that the behavior constituting the offense is defined to be inciting others to engage in imminent lawless conduct that fits a certain description.

(iii) The phrase "then or at some future time" is stricken from the language of paragraph (a)(1), so that the offense is: inciting others to engage in imminent lawless conduct that would facilitate the forcible overthrow or destruction of the government.

(iv) A phrase is deleted from paragrph (a)(2), and a third paragraph (a)(3) is added to the definition of the offense, so that membership in an organization knowing it has a certain purpose—as opposed to membership in and of itself—constitutes the offense.

(v) The grading of the offense is changed, in paragraph (b), to allow that "knowing membership" is a Class D felony.

I submit that the indicated changes do very little to safeguard the political rights of American citizens; or—to say the same thing in different words—raise no difficulty for the government's ability to "get" the radical opposition.

The deletion of the phrase "as speedily as circumstances permit" makes it that much easier to pin the required revolution intent upon a person. A person now becomes liable if he dreams of some revolutionary project to be carried out by future generations many centuries hence.

The concept of "imminent lawless conduct" is beautiful. The authors of this change did not want to confine the offense to incitement of illegal conduct, or violent conduct, or conduct violative of one or more provisions of the criminal code—or they would have said so. Instead, they fastened onto the phrase "imminent lawless conduct"—meaning presumably (for the phrase is quite obscure) conduct that verges on the illegal, conduct that perhaps might be construed as illegal, conduct that is almost but not quite illegal. Or perhaps the reference is to conduct that is not yet illegal but is about to become illegal.

It might seem that the ordinary citizen receives some protection by the elimination of the phrase "then or at some future time." But note that the subjunctive mood of the verb is retained: it is conduct that would facilitate, etc., and not conduct that actually does facilitate. And there is no reference to the persons or the group for whom the conduct "would facilitate" violent overthrow. There is no requirement that such persons exist at all—no requirement that someone be actually engaged in overthrowing the government by violent means, or even planning to overthrow the government by violent means.

And the verb is still "to facilitate"—not "to cause," or "to bring about," or "to enhance the likelihood of," verbs which are much to specific to be helpful in a sedition statute. It remains as true of the revised Section 1103 as of the original, that incitement to conduct as diverse as opposing gun-control legislation or calling for an end to political surveillance renders one liable to fifteen years in prison and a $100,000 fine. The changes in paragraph (a)(1) do not tie the government's hands at all.

Neither do the changes in paragraph (a)(2) and the addition of (a)(3) offer any significant protection to the ordinary citizen. It is required, as a part of the offense, that the group have the proscribed incitement as a purpose; but it is not required that it be the group's sole purpose, or even a major purpose, or an important purpose. The requirement of "knowing" membership is only a slight impairment of the government's power to "get" its political enemies under the sedition statute; we know from recent history that a person can be put in jail for belonging to a group "knowing" that its purpose is X, even though he denies that its purpose is X, and all the members deny that its purpose is X, and the actual conduct of the group indicates opposition to X. All that is required is a certain repressive atmosphere.

I observe that nothing in Section 1103 prevents indicting and prosecuting a person for "conspiring" to commit the offense defined therein, or for "soliciting" someone else to commit the offense. It remains easy enough to get a person for his words.

Taking the standpoint of the ordinary citizen, as I must, I can perceive Section 1103 only as a monstrous engine of destruction aimed directly at the concept of the sovereignty of the people. S. 1 should never be allowed to pass the Committee on the Judiciary, let alone the Senate, containing such language. Strike Section and 1103 with the language of the Brown Commission's recommendation—the 1103 entirely; it serves no useful purpose. Alternatively, replace Sections 1102 Brown Commission's Section 1103, "Armed Insurrection."

OFFICE OF THE DISTRICT ATTORNEY, COUNTY OF WESTCHESTER,
White Plains, N.Y., June 25, 1975.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, Dirksen Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: I am writing to you in my capacity as Chairman of the Committee on Federal Legislation of the National District Attorneys Association. The Association, through its Board of Directors, has followed with keen and active interest the legislative development of the proposed codification of federal criminal laws as now embodied in S. 1, 94th Congress, "The Criminal Justice Reform Act of 1975".

Our interest and study began with the Brown Commission draft in 1971. The Association, representing some 6,000 state and local prosecutors throughout the United States, was primarily and deeply concerned with provisions defining jurisdiction in early drafts of the legislation which in our judgment constituted unreasonable and excessive expansion of federal enforcement powers. Traditionally and constitutionally enforcement of criminal statutes has been the function and primary responsibility of state and local governments. Federal enforcement jurisdiction was limited to those areas where federal authority to act was clear, either from a constitutional or territorial basis. Nevertheless, the "Brown Commission" draft contained provisions for such jurisdictional encroachments as discretionary constraint in exercise of concurrent jurisdiction, "piggy-back" jurisdiction and prohibition of multiple prosecutions.

In response to objections raised by state and local authorities these provisions were modified. The National District Attorneys Association was among those interested groups which submitted opinions and testimony in this regard. Ancillary jurisdiction has been limited substantially in S. 1 of 1975. We find the jurisdictional provisions generally to be reasonable, support Chapter 2, S. 1 in principle and oppose any further revisions which would incorporate the objectionable jurisdictional provisions of the "Brown Commission" Bill or otherwise expand federal jurisdiction. We point out here our objection to preemptive jurisdiction in the case of election law violations where both state and federal interests are involved [Sec. 205(b)]. Provision should be made for concurrent jurisdiction with preemptive federal jurisdiction only on order of the Attorney General of the United States along the lines of Sec. 205(c).

In addition to definitions of jurisdiction state and local prosecutors were also concerned with substantive law definitions which, because of federal impact, might trigger and eventually bring about undesirable amendments to state penal statutes. Here again we note with satisfaction that modifications were made to tighten up and render more precise certain provisions which were cause for concern. This is true, for example, with Chapter 3, Sections 301–303 of S. 1 relating to culpable states of mind.

The defense of insanity was another area of some concern. We note with particular approval the present language of Section 522 of S. 1 dealing with the insanity defense. It is hoped that this new approach will have beneficial impact on insanity defense statutes in all the states. Abolition of insanity as a separate defense, except to the extent that a defendant's mental disease or defect precludes a finding of culpable state of mind is an important conceptual breakthrough in this always troublesome area of the law.

A Sub-Committee memorandum accurately observed that the approach of Section 522 is to place under criminal sanction persons who would have been found not guilty by reason of insanity under the previously endorsed American Law Institute test. In an era when the concept of civil commitment is crumbling in the face of constitutional attacks and its efficacy is seriously questioned, the Section 522 approach insures that a sentencing judge has the option of imposing

jail sentences in appropriate cases. The National District Attorneys Association strongly supports this measure and recommends against any action to restore the "right or wrong" test of the ALI which was adopted in the Brown Commission draft.

The majority of prosecutors note with approval the adoption in S. 1 of authorization for imposition of the death sentence in the Class A felonies of murder, treason, sabotage and espionage. A clear statement of support for these provisions by the Congress of the United States will profoundly influence state legislatures and the courts in restoration of the death penalty as an appropriate constitutional punishment and a deterrent to violent crime. We support this provision as a national statement of public policy on the death sentence.

In summary, the National District Attorneys Association, with comments noted, supports in principle S. 1, 94th Congress and recommends its enactment. This draft, a product of years of legislative effort and study, in our judgment represents, on the whole, a sound basis for codification of federal penal statutes. Its jurisdictional provisions now appear to define reasonable and workable standards under which both federal and local prosecutors can carry out their respective functions effectively and without significant conflict. The enactment of this legislation will have great beneficial impact on those states which penal law require review, revision and codification and on law enforcement generally.

In making this recommendation for adoption of the measure the National District Attorneys Association congratulates the Chairman, members of the Sub-Committee and staff who contributed to this great legislative undertaking. The Association also wishes to express its appreciation for the generous readiness on the part of all concerned to hear and fully and fairly consider opinions and recommendations from all responsible sources.

Sincerely yours,

CARL A. VERGARI,
District Attorney of Westchester County,
Chairman, Committee on Federal Legislation,
National District Attorneys Association.

The American Economic Review, Vol. 65, No. 3, June 1975

The Deterrent Effect of Capital Punishment: A Question of Life and Death

By ISAAC EHRLICH*

Debate over the justness and efficacy of capital punishment may be almost as old as the death penalty itself. Not surprisingly, and as is generally recognized by contemporary writers on this topic, the philosophical and moral arguments for and against the death penalty have remained remarkably unchanged over time (see Thorsten Sellin (1959, p. 17), and (H. A. Bedau, pp. 120–214). Due in part to its essentially objective nature, one outstanding issue has, however, become the subject of increased attention in recent years and has played a central role in shaping the case against the death penalty. That issue is the deterrent effect of capital punishment, a reexamination of which, in both theory and practice, is the object of this paper.

The multifaceted opposition to capital punishment relies partly upon ethical and aesthetic considerations. It arises also from recognition of the risks of errors of justice inherent in a legal system, errors occasionally aggravated by political, cultural, and personal corruption under certain social regimes. Such errors, of course, are irreversible upon application of this form of punishment. But the question of deterrence is separable from subjective preferences among alternative penal modes and can be studied independently of any such preferences. Of course, the verification or estimation of the magnitude of the deterrent effect of the death penalty—the determination of the expected tradeoff between the execution of a murderer and the lives of potential victims it may help save—can, in turn, influence evaluation of its overall desirability as a social instrument even if that evaluation is largely subjective.

Recent applications of economic theory have presented some analytical considerations and empirical evidence that support the notion that offenders respond to incentives and, in particular, that punishment and law enforcement deter the commission of specific crimes. Curiously, two of the most effective opponents of capital punishment, Beccaria in the 18th century and Sellin in recent years, have never to my knowledge questioned analytically the validity of the deterrent effect of punishment in general. Beccaria even recognizes explicitly the probable existence of such a general effect. What has been questioned by these scholars is the existence of a *differential* deterrent effect of the death penalty over and above its most common practical alternative, life imprisonment (see Beccaria, pp. 115–17). Sellin has presented extensive statistical data that he and others have interpreted to imply, by and large, the absence of such an effect (see Sellin (1959, 1967)).

Whether, in fact, the death penalty constitutes a more severe punishment than

* University of Chicago and National Bureau of Economic Research. I have benefitted from comments and suggestions from Gary Becker, Harold Demsetz, Lawrence Fisher, John Gould, Richard Posner, George Stigler, and Arnold Zellner. I am particularly indebted to Randall Mark for useful assistance and suggestions and to Walter Vandaele and Dan Galai for helpful computational assistance and suggestions. This paper is a reduced version of a more complete and detailed draft (see the author 1973b). Financial support for this study was provided by a grant to the NBER from the National Science Foundation, but the paper is not an official NBER publication since it has not been reviewed by the board of directors.

life imprisonment for the average potential offender cannot be settled on purely logical grounds, although crime control legislation, ancient and modern, clearly answers this question affirmatively. Observation that convicted offenders almost universally seek and welcome the commutation of a death sentence to life imprisonment is consistent with the intuitive ranking of the death penalty as the harshest of all punishments. Still, one may argue that the differential deterrent effect of capital punishment on the incentive to commit murder may be offset by the added incentive it may create for those who actually commit this crime to eliminate policemen and witnesses who can bring about their apprehension and subsequent conviction and execution.

The existence of the differential deterrent effect of capital punishment is ultimately an empirical matter. It cannot, however, be studied effectively without thorough consideration of related theoretical issues. The crucial empirical question concerns the kind of statistical test to devise in order to accept or reject the relevant null hypothesis. Since the inquiry concerns a hypothetical deterrent effect, the null hypothesis should be constructed in a form that permits testing of the relevant set of behavioral relations implied by a general theory of deterrence. That includes the deterrent effects of law enforcement activities in general. Moreover, even if a negative effect of capital punishment on the rate of murder is established through systematic empirical research, there still remains the question of the existence of a *pure* deterrent effect distinct from a potential preventive or incapacitating effect associated with this form of punishment. An effect of the second type might be expected since execution eliminates categorically the possibility of recidivism.

Contrary to previous observations, this investigation, although by no means definitive, does indicate the existence of a pure deterrent effect of capital punishment. In fact, the empirical analysis suggests that on the average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933–67 in the United States. Two related arguments are offered in this context of which only the second will be elaborated in this paper. First, it may be argued that the statistical methods used by Sellin and others to infer the nonexistence of the deterrent effect of capital punishment do not provide an acceptable test of such an effect and consequently do not warrant such inferences. Second, it is argued that the application of the economic approach to criminality and the identification of relevant determinants of murder and their empirical counterparts permit a more systematic test of the existence of a differential deterrent effect of capital punishment. The theoretical approach, emphasizing the interaction between offense and defense—the supply of and the (negative) social demand for murder—is developed in Section I. Section II is devoted to the empirical implementation of the model. Some implications of the empirical evidence are then presented and discussed in Section III.

I. An Economic Approach to Murder and Defense Against Murder

A. *Factors Influencing Acts of Murder and Other Crimes Against Persons*

The basic propositions underlying the approach to murder and other crimes against the person are 1) that these crimes are committed largely as a result of hate, jealousy, and other interpersonal conflicts involving pecuniary and nonpecuniary motives or as a by-product of crimes against property; and 2) that the propensity to perpetrate such crimes is in-

fluenced by the prospective gains and losses associated with their commission. The abhorrent, cruel, and occasionally pathological nature of murder notwithstanding, available evidence is at least not inconsistent with these basic propositions. Victimization data reveal that most murders, as well as other crimes against the person, occur within the family or among relatives, friends, and other persons previously known to one another, and are not committed as a rule by strangers on the street (see President's Commission on Law Enforcement and Administration of Justice (*PCL*), pp. 14, 15, 81, and 82). Indeed, hate and other interdependencies in utility across persons as well as malevolent and benevolent exchanges would seem more likely to develop among groups that exercise relatively close and frequent social contact than among groups that exercise little or no contact. There is no reason a priori to expect that persons who hate or love others are less responsive to changes in costs and gains associated with activities they may wish to pursue than persons indifferent toward the well-being of others.

More formally, assume that person o's utility from a consumption prospect C_o, depends upon his own consumption c_o, and consumption activities involving other persons c_j, $j=1, \ldots n$, or

$$(1) \qquad U_o(C_o) = U_o(c_o, c_j)$$

where the sign of $\partial U_o/\partial c_j$ indicates the direction in which o's utility is affected by consumption activities pursued by others. The key feature of this consumption model involving interdependent preferences[1] is that it provides a framework for analyzing positive or negative transfers of resources by one person (here identified with person o) that modify the levels of consumption enjoyed by others while simultaneously determining his own consumption level. Such modifications are constrained generally by the pertinent transfer production functions, by the endowments of resources possessed by person o and other relevant persons, and by potential awards and penalties that are conditional upon o's benevolent or malevolent actions with varying degrees of uncertainty.[2]

This framework can be applied to analysis of the incentive to commit murder and other crimes against the person by explicitly incorporating into the model the uncertainties associated with the prospective punishments for crime. Specifically, murder can be considered a deliberate action intended by an offender o to inflict severe harm on a victim v by setting c_v equal to, say, zero. The offender undergoes some direct costs of planning and executing the crime, and bears the risk of incurring detrimental losses in states of the world involving apprehension, conviction, and punishment.[3] Assuming the offender

[1] For a more complete discussion of this model, see Harold Hochman and James Rodgers, and Gary Becker (1974).

[2] It might be argued that although the wish to harm other persons cannot be rejected on economic grounds, nonetheless the execution of such desires (as opposed to benevolent actions) must be considered irrational in the sense of violation of Pareto optimality conditions. If there were no bargaining, transfer, or enforcement costs associated with mutually acceptable and enforceable contracts between a potential offender o and his potential victim v, and if v's wealth constraint were not binding, then it would always be optimal for v to offer compensation to o for not committing a crime against him and for o to seek such compensation or extortion. The reason is that a reduction in v's consumption level is thus achieved by o without incurring the direct costs of committing a crime and the prospective cost of legal sanctions. Indeed, there exists some range of compensations that would increase both o's and v's utilities relative to their expected utilities if crime is committed by o against v. Many crimes against persons, and some cases of property crimes as well, may occasionally be avoided by such arrangements; successful extortions involving kidnapping or hijacking constitute obvious examples. Yet in many situations compensations may be too costly to pursue or to enforce, just as fully effective private or public protection against murder may be too costly to provide. The incidence of murder must then be expected on purely economic grounds.

[3] The case in which crime is committed in pursuit of material gains has been analyzed explicitly by the author (1973a). Note that the victim's level of consumption need not directly enter the offender's utility function in this case.

TABLE 1

Event	State s	Probabilities π_s	Consumption Prospect C_s
Apprehension — conviction of murder	execution	$(Pa)(Pc\|a)(Pe\|c)$	C_a: $(c_o=0;\ c_v=0)$
Apprehension — conviction of murder	imprisonment for murder	$(Pa)(Pc\|a)(1-Pe\|c)$	C_c: $(c_o=c;\ c_v=0)$
Apprehension — conviction of a lesser offense or acquittal	other punishment	$Pa(1-Pc\|a)$	C_b: $(c_o=b;\ c_v=0)$
No Apprehension	no punishment	$1-Pa$	C_a: $(c_o=a;\ c_v=0)$

behaves as if to maximize expected utility, a necessary and sufficient condition for murder to occur is that o's expected utility from crime exceeds his expected utility from an alternative (second best) action:

$$(2) \quad U^*_{om}(C^m_o \mid c_v = 0) \equiv \sum_{s=a}^{S} \pi_s U_o(C_{os}) > U^*_{oi}(C^i_o \mid c_v = c^i_v),$$

where $s=a, \ldots, S$ denote a set of mutually exclusive and jointly exhaustive states of the world including all the possible outcomes of murder; c_{os} denote the offender's consumption levels, net of potential punishments and other losses, that are contingent upon these states; π_s denote his subjective evaluation of the probabilities of these states; and C^m_o and C^i_o denote, respectively, his consumption prospect in the event he commits murder or takes an alternative action.

To illustrate the behavioral implications of the model via a simple yet sufficiently general example, assume the existence of just four states of the world associated with the prospect of murder as summarized in Table 1. In Table 1, Pa denotes the probability of the event of apprehension and $1-Pa$ denotes its complement—the probability of escaping apprehension; $Pc|a$ denotes the conditional probability of conviction of murder given apprehension, and $1-Pc|a$ denotes its complement—the probability of conviction of a lesser offense (including acquittal); finally, $Pe|c$ and $1-Pe|c$ denote, respectively, the conditional probabilities of execution and of other punishments given conviction of murder. The (subjective) probabilities of the set of states introduced in Table 1 are equal by definition to the relevant products of conditional probabilities of sequential events that lead to this more final set of states. The last column in Table 1 lists the consumption levels that are contingent upon the occurrence of these states. Economic intuition suggests that the relevant consumption levels can be ranked according to the severity of punishment imposed on the offender; that is, $C_a > C_b > C_c > C_d$.

In the preceding discussion the incidence of murder has been viewed to be motivated by hate. As hinted earlier in the discussion, however, murder could also be a by-product, or more generally, a complement of other crimes against persons and property. Since the set of states of the world underlying the outcomes of these other crimes also includes punishment for murder, the decision to commit these would also be influenced by factors determining the probability distribution of outcomes considered in Table 1. In turn, the incidence of murder would be influ-

enced by factors directly responsible for related crimes. In general, behavioral implications concerning the effect of various opportunities on the incidence of murder ought to be analyzed within a framework that includes related crimes as well. For methodological simplicity and because data exigencies rule out a comprehensive empirical implementation of such a framework, the following discussion emphasizes the effect of factors directly related to murder and the direct effect on murder of general economic factors like income and unemployment. In practice, however, the effect of these latter factors on murder may be due largely to their systematic effects on particular crimes against property.

1. *The Effects of Probability and Severity of Punishment*

An immediate implication of the model that is independent of the specific motives and circumstances leading to an act of murder is that an increase in the probability or severity of various punishments for murder decreases, relative to the expected utility from an alternative independent activity, the expected utility from murder or from activities that may result in murder. These implications have been discussed at length elsewhere (see the author (1970, 1973a)) but the somewhat more detailed formulation of the model adopted in this paper makes it possible to derive more specific predictions concerning the relative magnitudes of the deterrent effects of apprehension, conviction, and execution that expose the theory to a sharper empirical test. Specifically, given the ranking of the consumption levels in states of the world involving execution, imprisonment, other punishment, and no punishment for murder, as assumed in the preceding illustration, and given the level of the probabilities of apprehension and the conditional probabilities of conviction and execution, it can be shown that the partial elasticities of the expected utility from crime with respect to these probabilities can be ranked in a descending order as follows:

$$\epsilon_{Pa} > \epsilon_{Pc|a} > \epsilon_{Pe|c} \tag{3}$$

where $\epsilon_P = -\partial \ln U^*/\partial \ln P$ for $P = Pa$, $Pc|a$, $Pe|c$.[4] The interesting implication of condition (3) is that the more general the event leading to the undesirable consequences of crime, the greater the deterrent effect associated with its probability: a 1 percent increase in the (subjective) probability of apprehension Pa, given the values of the conditional probabilities $Pc|a$ and $Pe|c$, reduces the expected utility from murder more than a 1 percent increase in the conditional (subjective) probability of conviction of murder $Pc|a$ (as long as $Pc|a<1$), essentially because an increase in Pa increases the overall, i.e., unconditional, probabilities of three undesirable states of the world: execution, other punishment for murder, and punishment for a lesser offense, whereas an increase in $Pc|a$ raises the unconditional probability of the former two states only. A fortiori, a 1 percent increase in $Pc|a$ is expected to have a greater deterrent effect

[4] Differentiating equation (2) with respect to Pa, $Pc|a$, and $Pe|c$, using the contingent outcomes of murder as illustrated in Table 1, it can easily be demonstrated that:

$$\epsilon_{Pa} = -\frac{\partial U^*_{om}}{\partial Pa}\frac{Pa}{U^*_o} = \frac{1}{U^*_o}\{Pa(1-Pc|a)\cdot[U(C_a)-U(C_b)]+PaPc|a(1-Pe|c)\cdot[U(C_a)-U(C_c)]+PaPc|aPe|c\cdot[U(C_a)-U(C_d)]\}>0$$

$$\epsilon_{Pc|a} = -\frac{\partial U^*_{om}}{\partial Pc|a}\frac{Pc|a}{U^*_o} = \frac{1}{U^*_o}\{PaPc|a(1-Pe|c)\cdot[U(C_b)-U(C_c)]+PaPc|aPe|c\cdot[U(C_b)-U(C_d)]\}>0$$

$$\epsilon_{Pe|c} = -\frac{\partial U^*_{om}}{\partial Pe|c}\frac{Pc|c}{U^*_o} = \frac{1}{U^*_o}\{PaPc|aPe|c\cdot[U(C_c)-U(C_d)]\}>0$$

Clearly, $\epsilon_{Pa}>\epsilon_{Pc|a}>\epsilon_{Pe|c}>0$.

than a 1 percent increase in $Pe|c$ as long as $Pe|c$ is less than unity. If there exists a positive monotonic relation between an average person's subjective evaluations of Pa, $Pc|a$, and $Pe|c$ and the objective values of these variables, and between an average person's expected utility from crime and the actual crime rate in the population, equation (3) would then amount to a testable theorem regarding the partial elasticities of the murder rate in a given period with respect to objective measures of Pa, $Pc|a$, and $Pe|c$. On the basis of this analysis, it can be predicted that while the execution of guilty murderers deters acts of murder, *ceteris paribus*, the apprehension and conviction of guilty murderers is likely to have an even larger deterrent effect.

Analogous to the effects of the probabilities of various punishments for murder, an increase in the severity of these punishments, their probabilities held constant, is generally expected to decrease the expected utility from murder and so to discourage its commission. Due to lack of space, other implications concerning the effect of severity as well as probability of punishment on the elasticities ϵ_{Pa}, $\epsilon_{Pc|a}$, and $\epsilon_{Pe|c}$ are omitted here. For a more complete analysis, see the author (1973b).

2. *Effects of Employment Opportunities, Income, and Demographic Variables*

The model developed in this section suggests that the incentive to commit murder or other crimes that may result in murder in general would depend on permanent income (or wealth), the relevant opportunities to extract related material gains as well as on direct opportunities for malevolent actions, including the direct costs involved in effecting the production of malevolent transfers. The means for a direct implementation of the effect of these latter opportunities are not readily available (see, however, the discussion in fn. 14). In contrast, variations in legitimate and illegitimate earning and income opportunities may be approximated by movements in the rate of unemployment and of labor force participation, U and L, respectively, and in the level and distribution of permanent income Y_p in the population.

The relevance of the latter set of variables has been discussed in detail elsewhere (see the author (1973a)), particularly in connection with crimes against property, some of which involve murder. However, the level and distribution of income within a community may also exert a direct influence on the incentive to commit murder because of their impact on the individual demand for malevolent actions. In addition, although the decision to commit murder is presumably derived from considerations related to lifetime utility maximization, the timing of murder may be affected by variations in the opportunity cost of time throughout the life cycle, because the typical punishment for murder involves a finite imprisonment term. Thus, to the extent that earning opportunities are imperfectly controlled in an empirical investigation, it may be important to investigate the independent effects of variations in demographic variables, such as the age and racial composition of the population, A and NW, respectively. Controlling for variations in age composition may also be important because of the differential treatment of young offenders under the law.

B. *Defense Against Murder*

1. *Factors Determining Optimal Law Enforcement Activity*

Following the approach used by Becker (1968), I shall attempt to derive implications concerning law enforcement activity against murder on the assumption that law enforcement agencies behave as if

they seek to maximize a social welfare function by minimization of the per capita loss from murder. Losses accrue from three main elements: harm to victims net of gains to offenders; the direct costs of law enforcement by police and courts; and the net social costs associated with penalties. The behavior of enforcement agencies is assumed to be in accordance with the general implications of the deterrent theory of law enforcement.

The main elements of the social loss function can be summarized by:

$$(4)\quad L = D(q) + C(q, Pc) + \gamma_1 Pc\ Pe|c\ qd + \gamma_2 Pc(1 - Pe|c)qm$$

The term $D(q)$ represents the net social damage resulting from the death of victims and other related losses, where $q \equiv Q/N$ denotes the rate of murder in the population. The term $C(q, Pc)$ represents the total cost of apprehending, indicting, prosecuting, and convicting offenders. The aggregate output of these law enforcement activities can be summarized by the fraction of all murders that are "cleared" by the conviction of their alleged perpetrators (assuming a fixed proportional relation between the number of murders and their perpetrators). This fraction θ may be viewed as an objective indicator of the probability that a perpetrator of murder will be convicted of his crime, $Pc = Pa(Pc|a)$ with one qualification: since the overall probability of error of justice, π—that of apprehending and convicting an innocent person—is greater than nil, the true probability of conviction $0 < Pc < 1$ will be systematically lower than θ. However, to abstract the analysis from a separate determination of the optimal value of ϵ, it is henceforth assumed that Pc and θ are proportionally related, so that C can be defined as a direct function of Pc.[5] The rate of murder q is introduced as a separate determinant of C because of the argument and evidence that the costs of producing a given value of θ are higher for higher levels of q. The larger is q, the larger the number of suspects that must be apprehended, charged, and convicted in order to achieve a given value of θ. Both D and C are assumed to be monotonically increasing, continuously differentiable, and concave functions in each of their respective arguments.

The third and fourth terms in equation (4) represent the per capita social costs of punishing guilty and innocent convicts through execution and imprisonment (or other penalties), respectively. The variables d and m denote the private costs to victims and their families from execution and imprisonment, and the multipliers γ_1 and γ_2 indicate the presence of additional costs or gains to the rest of society from administering and otherwise bearing the respective penalties of execution and imprisonment that are imposed on guilty and innocent convicts.[6] For methodological convenience, the costs of execution and imprisonment can be combined, and equation (4) can be rewritten as:

$$(5)\quad L = D(q) + C(q, Pc) + \gamma_1 Pcfq$$

where $f = (Pe|c)d + \gamma_2(1 - Pe|c)m/\gamma_1$ is a measure of the average social cost of punishment for murder.

Equation (5) identifies the unconditional probability of conviction Pc, and the expected social cost of punishment f, as the main control variables underlying law enforcement activity. Given the harshness of the method of execution, the length of imprisonment terms, and other factors determining d and m (changes in these factors occur slowly in practice) the magnitude of f is largely a function of the conditional probability of execution $Pe|c$. The values of $0 < Pc < 1$ and $0 < Pe|c < 1$ that locally minimize equation (5) must then satisfy the following pair of equilibrium conditions:

$$(6)\quad \left[D_q + C_q + C_p \frac{1}{q_p} + \gamma_1 Pcf(1 - Ep)\right] q_p = 0$$

$$(7)\quad [D_q + C_q + \gamma_1 Pcf(1 - Ef)] q_f f_e = 0$$

where

$$Ep \equiv -\frac{\partial Pc}{\partial q}\frac{q}{Pc} \equiv \frac{1}{\varepsilon_{Pc}}$$

$$Ef \equiv -\frac{\partial f}{\partial q}\frac{q}{f} \equiv \frac{1}{\varepsilon_f}$$

$$f_e \equiv \frac{\partial f}{\partial Pe|c} = \left(d - \frac{\gamma_2}{\gamma_1} m\right)$$

and the subscripts p, f, and e associated with the variables C and q denote the partial derivatives of the latter with respect to Pc, f, and $Pe|c$, respectively. The product $\gamma_1 f_e$ indicates the difference between the social costs of execution and imprisonment.

In equation (7) the term $-(D_q + C_q)q_f f_e$ represents part of the marginal revenue from execution: the value of the lives of potential victims saved, and the reduced costs of apprehending and convicting offenders due to the differential deterrent effect of execution on the frequency of murder. The term $\gamma_1 Pcf(1 - Ef)q_f f_e$ represents the net marginal social cost of execution: the value to society of the life of a person executed at a given probability of legal error, plus all the various costs of effecting his execution (including mandatory appeals) net of imprisonment costs thereby "saved." Because in equilibrium, the two must be equated, the optimal value of $Pe|c$ need not be unity—capital punishment may not always be imposed even when it is legal—and would depend on the relative magnitude of the relevant costs and gains. A similar interpretation applies to equation (6).

Inspection of the equilibrium conditions given by equations (6) and (7) reveals a number of interesting implications. First, it may be noted that if an increase in $Pe|c$ unambiguously raises the social cost of punishment for murder, that is, if $\gamma_1 f_e = \gamma_1 d - \gamma_2 m > 0$, then in equilibrium, the deterrent effect associated with capital punishment must be less than unity, or $\varepsilon_{Pe|c} < \varepsilon_f < 1$.[7] Put differently, executions must only decrease the rate of murders in the population but not the rate of persons executed, for otherwise the marginal cost of execution would be negative and a corner solu-

[5] Pc and θ would be proportionally related if the number of arrests of innocent and guilty persons were proportionally related and if the probability of legal error remained constant as more resources were spent on enforcement activity through arrests and prosecutions. Alternatively, it might be argued that Pc and θ are highly (positively) correlated because of the well-known proposition that at any given level of evidence presented in court in reference to the defendant's guilt or innocence, the probability of legal or type I error, α (that of convicting the innocent), is negatively related to the probability of type II error, β (that of acquitting the guilty). Hence α might be negatively correlated with $Pc|ch \equiv 1 - \beta$ where $Pc|ch$ denotes the conditional probability that a guilty offender will be convicted once he is charged. However, the assumption that Pc and θ, or $Pc|ch$ and α, are mutually dependent is made mainly for methodological convenience without affecting the basic implications of the following analysis. More generally, the direct costs of law enforcement activity C may be specified as a function including Pc and the unconditional probability of legal error ϵ as independent arguments so that optimal values of these probabilities may be determined separately via appropriate expenditures.

[6] More specifically, $\gamma_1 = b_1 + \lambda\beta_1$ and $\gamma_2 = b_2 + \lambda\beta_2$, where λ is a coefficient relating Pc to the fraction of murders cleared by convicting innocent persons π and b and β indicate the respective net social costs from punishing guilty and innocent convicts through execution, denoted by the subscript 1, or imprisonment, denoted by the subscript 2. The conditional probability of execution given conviction is implicitly assumed to be equal for all convicts.

[7] By definition,

$$\varepsilon_{Pe|c} \equiv -(\partial q/\partial Pe|c)(Pe|c/q) \equiv \varepsilon_f(\partial f/\partial Pe|c)(Pe|c/f) \equiv \varepsilon_f \varepsilon_{f_e}.$$

Clearly,

$$\varepsilon_{f_e} = Pe|c[d - (\gamma_2/\gamma_1)m]/\{(\gamma_2/\gamma_1)m + Pe|c[d - (\gamma_2/\gamma_1)m]\}$$

is lower than unity if $[d - (\gamma_2/\gamma_1)m] > 0$. Under this condition, and the assumption that $\gamma_1 > 0$, $\varepsilon_{Pe|c} < \varepsilon_f < 1$.

tion would be achieved at $Pe|c=1$. However, equation (7) does not have the same implications regarding the value of ε_{Pc}. More specifically, equation (6) shows that the marginal costs of conviction include the marginal costs of apprehending and convicting offenders, in addition to the marginal costs of punishing those convicted. Therefore, the overall marginal revenue from convictions must also be higher than that from executions. Indeed, by combining equations (6) and (7), it can readily be shown that in equilibrium, $\varepsilon_{Pc} > \varepsilon_f > \varepsilon_{Pc|c}$;[8] that is, the deterrent effect associated with Pc must exceed the differential deterrent effect associated with $Pe|c$. This proposition is essentially the same as that derived regarding the response of offenders to changes in Pc and $Pe|c$ (see equation (3)). The compatibility of the implications of optimal offense and defense under the assumption that both offenders and law enforcement agencies regard execution to be more costly than imprisonment insures the stability of equilibrium with respect to both activities. It also provides the basis for a sharp empirical test of the theory.

2. *The Interdependencies Among the Murder Rate and the Probabilities of Conviction and Execution*[9]

Any exogenous factor causing a decrease in the severity of punishment for murder via a decrease in $Pe|c$ can be shown to increase the value of Pc because it tends to decrease the marginal costs of conviction and increase its marginal revenue. More specifically, given the values of d and m, an increase in social aversion toward capital punishment or in the costs of the related due process, measured by γ_1, can be shown to produce a decline in the optimal value of $Pe|c$ and a simultaneous increase in the optimal value of Pc. This analysis is consistent with an argument often made regarding the greater reluctance of courts or juries to convict defendants charged with murder when the risk of their subsequent execution is perceived to be undesirably high. Conviction and execution thus can be considered substitutes in response to changes in the shadow price of each. Indeed, the empirical investigation reveals that at least over the period between 1933 and 1969, in which the estimated annual fraction of convicts executed for murder in the United States, denoted by PXQ_1, fell from roughly 8 percent to nil, the national clearance ratios of reported murders, denoted by P^0a, and the fraction of persons charged with murder who were convicted of murder, denoted by $P^0c|a$, on the whole, moved in an opposite direction. The zero order correlation coefficient between PXQ_1, and P^0a is found to be -0.028, while that between PXQ_1 and $P^0c|a$ is found to be -0.19. (In principle, the product $P^0aP^0c|a$ approximates the value of Pc.) The general implication of this analysis is that the simple correlation between estimates of the murder rate and the conditional probabilities of execution cannot be accepted as an indicator of the true differential deterrent effect of capital punishment, because the simple correlation is likely to confound the offsetting effects of opposite changes in Pc and possibly also in the probability and severity of alternative punishments for murder.

Just as convictions and executions are expected to be substitutes with respect to changes in the shadow cost of each activity, they can be expected to be complementary with respect to changes in the severity of damages from crime, essentially because such changes increase the marginal revenues from both activities. Since an

[8] By like reasoning and some simplifying assumptions, it can also be shown that in equilibrium, $\varepsilon_{Pa} > \varepsilon_{Pc|a} > \varepsilon_{Pc|c}$.

[9] Proofs to the theorems discussed in this section can be developed through an appropriate differentiation of equations (6) and (7) with respect to the relevant variables.

exogenous increase in the rate of murder is expected to increase the marginal social damage D_q, and, indirectly, the marginal costs of apprehension and conviction C_q, it is expected to induce an increase in the optimal values of both Pc and $Pe|c$. This analysis demonstrates the simultaneous relations between offense and defense and suggests that the deterrent effects of conviction and execution must be identified empirically through appropriate simultaneous equation estimation techniques.

II. New Evidence on the Deterrent Effect of Capital Punishment

A. *The Econometric Model*

In the empirical investigation an attempt is made to test the main behavioral implications of the theoretical model. The econometric model of crime and law enforcement activity devised by the author (1973a) is applied to aggregate crime statistics relating to the United States for the period 1933–69. The model treats estimates of the murder rate and the conditional probabilities of apprehension, conviction, and execution as jointly determined by a system of simultaneous equations. Since data limitations rule out an efficient estimation of structural equations relating to law enforcement activities or private defense against murder, the following discussion focusses on a supply-of-murders function actually estimated in this study.

1. *The Murder Supply Function*

It is assumed that the structural equations explaining the endogenous variables of the model are of a Cobb-Douglas variety in the arithmetic means of all the relevant variables. The murder supply function is specified as follows.

$$(8)\quad \left(\frac{Q}{N}\right) = CPa^{\alpha_1}Pc|a^{\alpha_2}Pe|c^{\alpha_3}U^{\beta_1}L^{\beta_2}Y_p^{\beta_3}A^{\beta_4}\exp(v_1)$$

where C is a constant term and v_1 is a disturbance term assumed to be subject to a first-order serial correlation. The regression equation thus can be written as:

$$(9)\quad y_1 = Y_1A_1' + X_1B_1' + v_1$$

where

$$(10)\quad v_1 = \rho v_{1,-1} + e_1$$

The variables y_1, Y_1, and X_1 denote, respectively, the natural logarithms of the dependent variable, other endogenous variables, and all the exogenous variables entering equation (8); ρ denotes the coefficient of serial correlation, and the subscript -1 denotes one-period lagged values of a variable. The coefficient vectors A_1' and B_1' have been estimated jointly with ρ and the standard error of e_1, σ_{e_1}, via a nonlinear three-round estimation procedure proposed by Ray Fair.

2. *Variables Used*

The dependent variable of interest (Q/N) is the true rate of capital murders in the population in a given year. The statistic actually used, $(Q/N)^0$, is the number of murders and nonnegligent manslaughters reported by the police per 1,000 civilian population as computed from data reported by the FBI *Uniform Crime Report* (*UCR*)[10] and the Bureau of the Census. This statistic can serve as an efficient estimator of the true Q/N if the two were related by:

$$(11)\quad \left(\frac{Q}{N}\right) = k\left(\frac{Q}{N}\right)^0 \exp\mu$$

where k indicates the ratio of the true number of capital murders committed in a given year relative to all murders reported to the police, and μ denotes random

[10] I am indebted to the Uniform Crime Reporting Section of the FBI for making available their revised annual estimates of the total number of murders and other index crimes in the United States during the period 1933–65.

errors of reporting or identifying murders. It should be noted, however, that the fraction of capital murders among all murders may have been subject to a systematic trend over time. Indeed, the theory developed in Section IA suggests that the decrease in the tendency to apply the death penalty in the United States over time may have led to an increase in the fraction of capital murders among all murders. More important, the number of reported murders may have decreased systematically over time because of the decrease in the fraction of all attempted murders resulting in the death of the victims due to the continuous improvement in medical technology. To account for such possible trends, the term k in equation (11) can be defined as $k=\delta \exp(\lambda T)$, where δ and λ are constant terms and T denotes chronological time. Upon substitution of $(Q/N)^0$ for (Q/N) in equation (8), the inverse values of δ and μ would be subsumed under the constant term C and the stochastic variable v, respectively, and $\exp(-\lambda T)$ would emerge as an additional explanatory variable. Thus, the natural value of T is introduced in equation (9) as an independent exogenous variable.[11]

The matrix of endogenous variables associated with Y_1 in equation (9) includes the conditional probabilities that guilty offenders be apprehended, convicted, and executed for murder. These probabilities have been approximated by computing objective measures of the relevant fractions of offenders who are apprehended, convicted, and executed. The following paragraphs contain a brief discussion of these measures.

Pa is measured by the national "clearance rates" as reported by the FBI *UCR*, which are estimates of the percentage of all murders cleared by the arrest of a suspect. It is denoted by P^0a. The conditional probability $Pc|a$ is identically equal to $Pch|a \cdot Pc|ch$—the product of the conditional probabilities that a person who committed murder be charged once arrested, and that he be convicted once charged. Statistical exigencies preclude the estimation of a complete series of $Pch|a$, but $Pc|ch$ is estimated by the fraction of all persons charged with murder who were convicted of murder in a given year as reported by the FBI *UCR*. This fraction, denoted by $P^0c|a$, may serve as an efficient estimator of the overall true probability $Pc|a$, provided that $Pch|a$ were either constant over time, or proportionally related to the probability of arrest Pa.

The actual measures of $Pe|c$ consist of alternative estimates of the expected fractions of persons convicted of murder in a given year who were subsequently executed, $P^0e|c$. Because no complete statistics on the disposition of murder convicts by type of punishment are available, however, $P^0e|c$ has been estimated indirectly by matching annual time-series data on convictions and executions. Over most of the period considered in this investigation (up to 1962), executions appear to lag convictions by 12 to 16 months on the average. An objective measure of $P^0e|c$ in year t, therefore, may be the ratio of the number of persons executed in year t+1 to the number convicted in year t or $PXQ_1=E_{t+1}/C_t$.[12] It must be pointed out, however, that the number of persons executed in year t+1, and hence PXQ_1, is, of course, unknown in year t and must be forecast by potential offenders. Even if expectations with respect to PXQ_1 were unbiased on the average, the actual magnitude of PXQ_1 is likely to deviate randomly from its expected value in year t. The effect of such random noise would be to bias the regression coefficient associated with PXQ_1 toward zero. I have therefore constructed four alternative forecasts of the desired variable: $PXQ_{1-1}=E_t/C_{t-1}$; $PXQ_2=E_t/C_t$; $TXQ_1=$ the systematic part of PXQ_1 computed via a linear distributed lag regression of PXQ_1 on three of its consecutively lagged values; and $PDL_1=$ the systematic part of PXQ_1 computed via a second degree polynomial distributed lag function relating PXQ_1 and four of its consecutively lagged values. The advantage of using these alternative estimates of the expected $P^0e|c$ is that all being based on past data, they may be treated largely as predetermined rather than as endogenous variables. Alternatively, PXQ_1 is treated as an endogenous variable along with P^0a and $P^0c|a$, and its systematic part is computed via the reduced form regression equation (see Table 3).

Two difficulties associated with the use of the proposed estimates of $P^0e|c$ as measures of the true conditional probability of execution warrant special attention. First, it may be argued that the fraction of convicts executed for murder may represent only the fraction of those convicted of *capital* murders among all murder convicts. Variations in PXQ_1 or in other related estimates might then be entirely unrelated to the probability that a convict liable to be punished by the death penalty will be actually executed, and the expected elasticity of the murder rate with respect to these estimates might be nil. However, the significant downward trend in PXQ_1 between 1933 and 1967 suggests, especially during the 1960's, that it may serve as a useful indicator of the relative variations in the true $Pe|c$. Second, it should be noted that the relative variation in the reported national murder rate relates to the United States as a whole, whereas the measures of $P^0e|c$ relate to only a subset of states which retained and actually enforced capital punishment throughout the period considered. Thus, the empirical estimates of the elasticities of the national murder rate with respect to $P^0e|c$ may, on this ground, be expected to understate the true elasticities of the murder rate in retentionist states only.

The matrix of exogenous variables associated with X_1 in equation (9) includes annual census estimates of the labor force participation rate of the civilian population 16 years and over (calculated by excluding the armed forces from the total noninstitutional population) L; the unemployment rate of the civilian labor force U; Milton Friedman's estimate of real per capita permanent income (extended through 1969)[13] Y_p; the percentage of residential population in the age group 14–25, A; and chronological time T. Other exogenous variables assumed to be associated with the complete simultaneous equation model of murder and law enforcement X_2 are one-year lagged estimates of real expenditure on police per capita $XPOL_{-1}$ and annual estimates of real expenditure by local, state, and federal governments per capita $XGOV$. Real expenditures are computed by deflating *Survey of Current Business* estimates of current expenditures by the implicit price deflator for all governments. In addition, X_2 includes the size of the total residential population in the United States N, and the percent of nonwhites in

[11] Another important reason for introducing chronological time as an exogenous variable in equation (8) is to account for a possible time trend in missing variables, in particular, the average length of imprisonment for both capital and noncapital murders for which no complete time-series is available. Scattered evidence shows rising trends in the median value of prison terms served by all murder convicts over a large part of the period considered in this investigation, but this increase may have been largely technical. With executions being imposed less frequently over time, the frequency of life imprisonment sentences for murder convicts may have risen accordingly, thus increasing the mean or median time spent in prisons by these convicts.

[12] Execution figures are based on *National Prisons Statistics Bulletin* (*NPS*) statistics. Conviction figures are derived by $C_t=Q_t^0P^0a_tP^0c|a_t$. Statistics on the time elapsed between sentencing and execution can be found in *NPS* numbers 20 and 45.

[13] I am indebted to Edi Karni for making available to me his updated calculations of the permanent income variable.

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residential population NW. The reason for including NW in the list of variables subsumed under X_2 is discussed below in Section IIB. A list of all the variables used in the regression analysis is given in Table 2.

B. *The Empirical Findings*

An interesting finding which poses a challenge to the validity of the analysis in Section I is that over the period 1933–69, the simple correlation between the reported murder rate and estimates of the objective risk of execution given conviction of murder is positive in sign. For example, the simple correlation coefficients between $(Q/N)^0$ and PXQ_1, PXQ_{1-1}, and PXQ_2 are found to be 0.140, 0.096, and 0.083, respectively. However, the results change substantively and are found to be in accordance with the theoretical predictions and statistically meaningful when the full econometric framework developed in the preceding section is implemented against the relevant data. Despite the numerous limitations inherent in the empirical counterparts of the desired theoretical constructs, the regression results reported in Tables 3 and 4 uniformly exhibit a significant negative elasticity of the murder rate with respect to each alternative measure of the probability of execution. More importantly, the regression results also corroborate the specific theoretical predictions regarding the effects of apprehension, conviction, unemployment, and labor force participation.

Table 3 shows that the estimated elasticity of the murder rate with respect to the conditional probability of execution is

TABLE 2—VARIABLES USED IN THE REGRESSION ANALYSIS, ANNUAL OBSERVATIONS 1933–69

	Variable	Mean (Natural Logarithms)	Standard Deviation	Arithmetic Mean
y_1	$(Q/N)^0$ = Crime rate: offenses known per 1,000 civilian population.	−2.857	0.156	0.058
Y_1	P^0a = Probability of arrest: percent of offenses cleared.	4.997	0.038	89.835
	$P^0c\|a$ = Conditional probability of conviction: percent of those charged who were convicted of murder.[a]	3.741	0.175	42.733
	$P^0e\|c$ = Conditional probability of execution; PXQ_t = the number of executions for murder in the year t+1 as a percent of the total number of convictions in year t.[b]	0.176	1.749	2.590
X_1	L = Labor force participation: fraction of the civilian population in the labor force.	−0.546	0.030	0.579
	U = Unemployment rate: percent of the civilian labor force unemployed.	1.743	0.728	7.532
	A = Fraction of residential population in the age group 14–24.	−1.740	0.118	0.177
	Y_p = Friedman's estimate of (real) permanent income per capita in dollars.	6.868	0.338	1012.35
	T = Chronological time (years): 31–37.	2.685	0.867	19.00
X_2	NW = Fraction of nonwhites in residential population.	−2.212	0.063	0.110
	N = Civilian population in 1,000s.	11.944	0.161	155,353
	$XGOV$ = Per capita (real) expenditures (excluding national defense) of all governments in million dollars.	−7.661	0.501	.000532
	$XPOL_{-1}$ = Per capita (real) expenditures on police in dollars lagged one one year.[a]	2.114	0.306	8.638

[a] The figures for $P^0c|a$ (1933–35) and $XPOL$ (all the odd years 1933–51) were interpolated via an auxiliary regression analysis.

[b] The actual number of executions 1968, 1969, and 1970 was zero. However, the numbers were assumed equal to 1 in each of these years in constructing the value of PXQ_t in 1967–69.

TABLE 3—MODIFIED FIRST DIFFERENCES OF MURDER RATES (IN NATURAL LOGARITHMS) REGRESSED AGAINST CORRESPONDING MODIFIED FIRST DIFFERENCES OF SELECTED VARIABLES SET I (1933–69)

($\hat{\beta}/S_{\hat{\beta}}$ in parentheses)

Effective Period	$\hat{\rho}(CORC)$		Alternative $\Delta^* P^0e\|c$								
		C			Δ^*PXQ_t	Δ^*PXQ_2	Δ^*PXQ_{t-1}	Δ^*L	Δ^*A	Δ^*Y_p	Δ^*U	Δ^*T
D.W. Statistic	$\hat{\sigma}_e$	(Constant)	$\Delta^*\hat{P}^0a$	$\Delta^*\hat{P}^0c\|a$								
1. 1935–69	0.257	−3.176	−1.553	−0.455	−0.039			−1.336	0.630	1.481	0.067	−0.047
1.84	0.052	(−0.78)	(−1.99)	(−3.58)	(−1.59)			(−1.36)	(2.10)	(4.23)	(2.00)	(−4.60)
2. 1935–69	0.135	−4.190	−1.182	−0.386		−0.068		−1.277	0.481	1.318	0.062	−0.047
1.82	0.042	(−1.25)	(−1.83)	(−3.85)		(−3.69)		(−1.59)	(2.19)	(4.86)	(2.38)	(−6.61)
3. 1935–69	0.077	−4.419	−1.203	−0.374			−0.065	−1.405	0.512	1.355	0.068	−0.047
1.81	0.045	(−1.25)	(−1.78)	(−3.59)			(−3.29)	(−1.63)	(2.26)	(4.88)	(2.55)	(−6.54)
					Δ^*TXQ_t	Δ^*PDL_t	$\Delta^*\hat{P}XQ_t$					
4. 1937–69	0.291	−2.447	−1.461	−0.487	−0.049			−1.393	0.524	1.295	0.063	−0.044
2.00	0.046	(−0.61)	(−2.03)	(−3.38)	(−2.26)			(−1.58)	(1.94)	(3.90)	(2.09)	(−4.93)
5. 1939–69	−0.207	6.868	−2.225	−0.850		−0.062		−0.457	0.059	0.580	0.014	−0.032
2.15	0.050	(1.39)	(−3.04)	(−4.124)		(−3.82)		(−0.50)	(0.23)	(1.70)	(0.43)	(−4.09)
6. 1935–69	0.208	−3.503	−1.512	−0.424			−0.059	−1.368	0.485	1.455	0.064	−0.050
1.86	0.051	(−0.85)	(−1.94)	(−3.38)			(−1.73)	(−1.38)	(1.42)	(4.25)	(1.93)	(−4.87)

Note: All variables except T are in natural logarithms. The definitions of these variables are given in Table 2. The term Δ^*X denotes the linear operation $X-\hat{P}X_{-1}$. The value of $\hat{\rho}$ is estimated via the Cochrane-Orcutt iterative procedure (*CORC*). The term $\hat{\sigma}_e$ is defined in Section IIA1. The terms $\Delta^*\hat{P}a$ and $\Delta^*\hat{P}c|a$ in equations 1–5 are computed via a reduced form regression equation including: C(onstant), Q/N_{-1}, Pa_{-1}, $Pc|a_{-1}$, $P^0e|c$, L, A, Y_p, U, T, $P^0c|a_{-1}$, L_{-1}, A_{-1}, Y_{p-1}, U_{-1}, $XPOL_t$, $XGOV$, NW, N. The terms $\Delta^*\hat{P}a$, $\Delta^*\hat{P}c|a$, and $\Delta^*\hat{P}XQ_t$ in equation 6 are computed via the same reduced form with $PXQ_t(P^0e|c)$ excluded.

lowest in absolute magnitude when the objective measure of $Pe|c$, PXQ_t, is treated in the regression analysis as if it were a perfectly forecast and strictly exogenous variable. The algebraic value of the elasticity associated with PXQ_t is −0.039 with upper and lower 95 percent confidence limits (calculated from the normal distribution) of 0.008 and −0.086. The corresponding elasticities associated with the alternative measures of $Pe|c$, PXQ_{t-1}, PXQ_2, TXQ_t, $\hat{P}XQ_t$, and PDL_t

TABLE 4—MODIFIED FIRST DIFFERENCES OF MURDER RATES (IN NATURAL LOGARITHMS) REGRESSED AGAINST CORRESPONDING MODIFIED FIRST DIFFERENCES OF SELECTED VARIABLES SET II: ALTERNATIVE TIME PERIODS AND OTHER TESTS

($\hat{\beta}/S_{\hat{\beta}}$ in parentheses)

Effective Period	$\hat{\rho}(CORC)$				$\Delta^*P^0e\|c$						War Years Dummy	
		C			Δ^*PXQ_{t-1}	Δ^*TXQ_t	Δ^*L	Δ^*A	Δ^*Y_p	Δ^*U	(1942–45)	Δ^*T
D.W. Statistic	$\hat{\sigma}_e$	(Constant)	$\Delta^*\hat{P}^0a$	$\Delta^*\hat{P}^0c\|a$								
1. 1935–69[a]	0.059	−4.060	−1.247	−0.345	−0.066		−1.314	0.450	1.318	0.068		−0.046
1.80	0.044	(−1.00)	(−1.56)	(−3.07)	(−3.33)		(−1.49)	(2.20)	(4.81)	(2.60)		(−6.54)
2. 1937–69[a]	0.287	−2.568	−1.435	−0.474		−0.049	−1.388	0.526	1.289	0.063		−0.044
1.99	0.046	(−0.61)	(−1.87)	(−3.22)		(−2.31)	(−1.57)	(1.94)	(3.91)	(2.10)		(−4.96)
3. 1936–69[b]	—	−3.608	−1.385	−0.345		−0.064	−1.218	0.482	1.348	0.068		−0.047
1.49	0.046	(−1.03)	(−2.12)	(−3.25)		(−3.52)	(−1.40)	(2.13)	(4.94)	(2.59)		(−6.69)
4. 1935–69	0.061	−4.882	−1.172	−0.383	−0.069		−1.487	0.477	1.393	0.077	0.018	−0.048
1.84	0.046	(−1.32)	(−1.73)	(−3.20)	(−3.22)		(−1.61)	(1.89)	(4.30)	(1.95)	(0.31)	(−5.76)
5. 1937–69	0.250	−2.086	−1.634	−0.508		−0.055	−1.444	0.406	1.334	0.077	0.035	−0.045
2.08	0.048	(−0.51)	(−2.16)	(−2.83)		(−2.36)	(−1.51)	(1.23)	(3.73)	(1.80)	(0.50)	(−4.72)
6. 1941–69	−0.164	3.025	−1.744	−0.714	−0.074		−1.008	0.141	0.734	0.028		−0.036
2.21	0.048	(0.57)	(−2.21)	(−3.70)	(−3.70)		(−1.04)	(0.56)	(2.06)	(0.91)		(−4.40)
7. 1941–69	−0.029	3.752	−1.947	−0.723		−0.066	−0.962	0.152	0.771	0.0311		−0.036
2.13	0.048	(0.68)	(−2.38)	(−3.69)		(−3.34)	(−0.99)	(0.55)	(2.00)	(0.96)		(−4.13)
8. 1933–66	−0.001	−5.678	−0.504	−0.265	0.055		−2.111	0.283	0.922	0.036		−0.036
1.90	0.033	(−2.21)	(−1.10)	(−3.49)	(−3.72)		(−3.18)	(1.65)	(4.16)	(1.74)		(−6.30)
9. 1939–66	0.016	−2.601	−0.946	−0.360		−0.051	−1.766	0.212	0.780	0.027		−0.033
1.96	0.037	(−0.598)	(−1.38)	(−1.984)		(−3.23)	(−2.254)	(1.03)	(2.920)	(1.11)		(−4.99)

Note: same references as in Table 3 but the reduced form used to compute $\Delta^*\hat{P}^0a$ and $\Delta^*\hat{P}^0c|a$ does not include N.

[a] Same as equations 3 and 4 in Table 3 with the missing data pertaining to $XPOL_{-1}$ interpolated via a smoothing procedure.

[b] Same as equation 4 in Table 3 with $\hat{\rho}$ assumed to be zero (level regression).

vary between −0.049 and −0.068 with upper and lower 90 percent confidence limits ranging between −0.01 and −0.10. These results have been anticipated by the analysis of Section IIA2 where it was suggested that the regression coefficient associated with PXQ_1 is likely to be biased toward zero due to the effect of random forecasting errors. In addition, since the analysis of optimal social defense against murder suggests that an exogenous change in (Q/N) may change the socially optimal value of $Pe|c$ in the same direction, the coefficient associated with PXQ_1 may be biased toward a positive value because of a potentially positive correlation between (Q/N) and the unsystematic part of PXQ_1. This simultaneous equation bias is expected to be eliminated when the systematic part of PXQ_1 is estimated via the reduced form regression equation $(\hat{P}XQ_1)$. It is noteworthy that the estimated elasticities of $(Q/N)^0$ with respect to alternative measures of $Pe|c$ are found generally low in absolute magnitude. This, perhaps, is the principal reason why previous studies into the effect of capital punishment on murder using simple correlation techniques and rough measures of the conditional risk of execution have failed to identify a systematic association between murder and the risk of execution.

The regression results regarding the effects of P^0a, $P^0c|a$, and $P^0e|c$ constitute perhaps the strongest findings of the empirical investigation. Not only do the signs of the elasticities associated with these variables conform to the general theoretical expectations, but their ranking, too, is consistent with the predictions in Section I. Table 3 shows that the elasticities associated with P^0a range between −1.0 and −1.5, whereas the elasticities associated with $P^0c|a$ in the various regression equations range between −0.4 and −0.5. And, as indicated in the preceding paragraph, the elasticities associated with $P^0e|c$ are lowest in absolute magnitude. Consistent with predictions and evidence presented in Section IB regarding a negative association between $P^0e|c$ on the one hand and P^0a and $P^0c|a$ on the other, introduction of the latter variables in the regression equation is found to be particularly useful in isolating the (negative) deterrent impact of estimates of $P^0e|c$. Of similar importance is the introduction of the time trend T.

The estimated values of the elasticities associated with the unemployment rate U, labor force participation L, and permanent income Y_p in Table 3 are not inconsistent with the theoretical expectations discussed in Section IA. Of particular interest is that the effects of equal percentage changes in $P^0e|c$ and U are found to be nearly alike in absolute magnitude. Because murder is often a by-product of crimes involving material gains, the positive effect of U on $(Q/N)^0$ may be attributed in part to the effect of the reduction in legitimate earning opportunities on the incentive to commit such crimes. Indeed, preliminary time-series regression results show that the elasticities of robbery and burglary rates with respect to the unemployment rate are even larger in magnitude than the corresponding elasticities of the murder rate. These results conform more closely to theoretical expectations than do the results in a cross-state regression analysis (see the author (1973a)). The reason, presumably, is that due to their higher correlation with cyclical variations in the demand for labor, changes in U over time measure the variations in both involuntary unemployment and the duration of such unemployment more effectively than do variations in U across states at a given point in time. The estimated negative effect of variations in the labor force participation rate on the murder rate can be explained along similar lines. Theoretically, variations in L are

likely to reflect opposing income and substitution effects of changes in market earning opportunities. However, with measures of both permanent income Y_p, and the rate of unemployment introduced in the regression equation as independent explanatory variables, changes in L may reflect a pure substitution effect of changes in legitimate earning opportunities on the incentive to commit crimes both against persons and property.[14] Finally, the positive association between Y_p and $(Q/N)^0$ need not imply a positive income elasticity of demand for hate and malice since changes in the *level* of the personal distribution of income may be strongly correlated with payoffs on crimes against property. If legitimate employment opportunities are effectively accounted for by U and by L, changes in Y_p may be highly correlated with similar changes in the incidence of crimes against property. Such a partial correlation is indeed observed across states and in a time-series regression analysis of crimes against property now in progress.

The positive effect of variations in the percentage of the population in the age group 15–24, A, on the murder rate is consistent with the cross-state evidence concerning the correlation between these variables. A possible explanation for this finding was already offered in Section IIA2. Additional analysis, not reported herein, indicated that the effect of the percentage of nonwhites in the population NW becomes statistically insignificant when the time trend T is introduced as an independent explanatory variable in the regression equation. Consequently, this variable is excluded from the regressions estimating the supply of murders function. This result stands in sharp contrast to the ostensibly positive effect of NW on the murder rate across states. I have argued elsewhere in this context that the apparently higher participation rate of nonwhites in all criminal activities may result largely from the relatively poor legitimate employment opportunities available to them (see the author (1973a)). Since, over time, variations in these opportunities may be effectively accounted for by the variations in U and L, the estimated independent effect of NW may indeed be nil. The negative partial effect of T on $(Q/N)^0$ reported in Tables 3 and 4 is not inconsistent with the predictions advanced in Section IIA2.

The regression results are found to be robust with respect to the functional form of the regression equation. In addition, estimating the regression equations by introducing the levels of the relevant variables rather than their modified first differences (that is, assuming no serial correlation in the error terms) artificially reduces the standard errors of the regression coefficients as would be expected on purely statistical grounds (see Table 4, equation (3)). The results are further insensitive as to the specific estimates of expenditures on police used in the reduced form regression equation. The data for this variable are not available for all the odd years between 1933 and 1951 and the missing statistics were interpolated either via a reduced form regression analysis ($XPOL$) or a simple smoothing procedure. The results are virtually identical (compare equations (1) and (2) in Table 4 with equations (3) and (4) in Table 3). The introduction of a dummy variable

[14] A possible explanation for the significant negative association between labor force participation and particularly crimes against the person is that interpersonal frictions and social interactions leading to acts of malice occur mostly in the nonmarket or home sector rather than at work. An increase in the total time spent in the nonmarket sector (a reduction in L) might then generate a positive scale effect on the incidence of murder. This *ad hoc* hypothesis is nevertheless supported by FBI *UCR* evidence on the seasonal pattern of murder. This crime rate peaks twice a year: around the holiday season (December) and around the summer vacation season (July–August) in which relatively more time is spent out of work. It is also supported by evidence that the frequency of murders on weekends is significantly higher than on weekdays (see William Graves, p. 327).

distinguishing the World War II years (1942–45) from other years in the sample has no discernible effect on the regression results, while the effect of the dummy variable itself appears to be statistically insignificant.

Of more importance, the qualitative results reported in Table 3 are for the most part insensitive to changes in the specific interval of time investigated in the regression analysis, as indicated by the results reported in Table 4. However, the absolute magnitudes of some of the estimated elasticities, especially those associated with P^0a, $P^0c|a$, $P^0e|c$, U, and L do change when estimated from different subperiods. Finally, the time-series estimates of the supply-of-murders function appear quite consistent with independent estimates derived through a cross-state regression analysis using data from 1960. A detailed discussion of related issues is included in the author (1973b).

III. Some Implications

A. *The Apparent Effect of Capital Punishment: Deterrence or Incapacitation?*

It has already been hinted in the introduction to this paper that an apparent negative effect of execution on the murder rate may merely reflect the relative preventive or incapacitating impact of the death penalty which eliminates the possibility of recidivism on the part of those executed. An estimation of the differential preventive effect of execution relative to imprisonment for capital murder has been attempted in this study through an application of a general model of the preventive effect of imprisonment developed in the author (1973a). In this application of the model, execution is identified with an imprisonment term Te, which is equal to the life expectancy of an average offender imprisoned for murder. The differential preventive impact of execution is estimated by taking account of the alternative average sentence served by those imprisoned for capital murder Tm, the fractions of potential murders executed and imprisoned, and the rate of population growth.

Derivation of the expected partial elasticity of the murder rate with respect to the fraction of convicts executed, $\sigma_{P^0e|c}$, is omitted here for lack of space. I shall point out only that estimates of $\sigma_{P^0e|c}$ derived on the basis of the extremely unrealistic assumption that any potential murderer at large (outside prison) commits one murder each and every year and for values of Te and Tm estimated at 40, and between 10 and 16 years, respectively, vary between 0.020 and 0.037 (see the author (1973b)). These estimates, therefore, do not account for the full magnitudes of the absolute values of the elasticities of the murder rate with respect to estimates of the fraction of convicts executed that are reported in Tables 3 and 4. Moreover, according to the model of law enforcement involving only preventive effects, the partial elasticity of the murder rate with respect to the fraction of those apprehended for muder P^0a is expected to be identical to the corresponding elasticity with respect to the fraction of those apprehended and charged with murder who were convicted of this crime, $P^0c|a$. The reason, essentially, is that equal percentage changes in either P^0a or $P^0c|a$ have the same effect on the fractions of offenders who are incapacitated through incarceration or execution, and thus should have virtually equivalent preventive effects on the murder rate. This prediction is ostensibly at odds with the significant positive difference between empirical estimates of the murder rate with respect to P^0a and $P^0c|a$. In contrast, the latter findings are consistent with implications of the deterrent theory of law enforcement (see equation (3)). In light of these observations one cannot reject the hypothesis that

punishment in general, and execution in particular, exert a unique deterrent effect on potential murderers.

B. *Tentative Estimates of the Tradeoff Between Executions and Murders*

The regression results concerning the partial elasticities of the reported murder rate with respect to various measures of the expected risk of execution given conviction in different subperiods $\hat{\alpha}_3$, can be restated in terms of expected tradeoffs between the execution of an offender and the lives of potential victims that might thereby be saved. For illustration, consider the regression coefficients associated with $\hat{P}XQ_t$ and PXQ_{t-1} in equations (6) and (3) of Table 3. These coefficients, -0.06 and -0.065, respectively, may be considered consistent estimates of the average elasticity of the national murder rate, $(Q/N)^0$, with respect to the objective conditional risk of execution, $P^0e|c=(E/C)^0$, over the period 1935–69. Evaluated at the mean values of murders and executions over that period, $\bar{Q}=8{,}965$ and $\bar{E}=75$, the marginal tradeoffs, $\Delta Q/\Delta E=\hat{\alpha}_3\bar{Q}/\bar{E}$, are found to be 7 and 8, respectively. Put differently, an additional execution per year over the period in question may have resulted, on average, in 7 or 8 fewer murders. The weakness inherent in these predicted magnitudes is that they may be subject to relatively large prediction errors. More reliable point estimates of the expected tradeoffs should be computed at the mean values of all the explanatory variables entering the regression equation (hence, also the mean value of the dependent variable) because the confidence interval of the predicted value of the dependent variable is there minimized. The mean values of the dependent variable and the explanatory variable used to calculate the value of $\hat{\alpha}_3$ in equation (3) of Table 3 are found to be nearly identical with the actual values of these two variables in 1966 and 1959, respectively. The corresponding values of murders and executions in these two years were $Q(1966)=10{,}920$ and $E(1959)=41$; the marginal tradeoffs between executions and murders based on the latter magnitudes and the elasticity $\hat{\alpha}_3=-0.065$ are found to be 1 to 17.

It should be emphasized that the expected tradeoffs computed in the preceding illustration mainly serve a methodological purpose since their validity is conditional upon that of the entire set of assumptions underlying the econometric investigation. In addition, it should be pointed out that the 90 percent confidence intervals of the elasticities used in the preceding illustrations vary approximately between 0 and -0.10 implying that the corresponding confidence intervals of the expected tradeoffs in the last illustration range between limits of 0 and 24. As the above illustrations indicate, however, although the estimated elasticities $\hat{\alpha}_3$ reported in Tables 3 and 4 are low in absolute magnitude, the tradeoffs between executions and murders implied by these elasticities are not negligible, especially when evaluated at relatively low levels of executions and relatively high levels of murder.[15]

Finally, it should be emphasized that the tradeoffs discussed in the preceding illustrations were based upon the partial

[15] A decrease in the number of executions in 1960 from 44 to 2 (the actual number of executions in 1967), which implies a decline of 95 percent in the value of $Pe|c$ in that year, would have increased the murder rate that same year by about 6.2 percent from 0.05 to 0.053 per 1,000 population if the true value of α_3 were equal to 0.065. The implied increase in the actual number of murders in 1960 would have been from 9,000 to 9,558. For comparison, note that the actual murder rate in 1967 was 0.06 per 1,000 population and the number of murders was 12,100. The values of other explanatory variables associated with the supply of murders function were, of course, quite different in these two years. By this tentative and rough calculation, the decline in $Pe|c$ alone might have accounted for about 25 percent of the increase in the murder rate between 1960 and 1967.

elasticity of $(Q/N)^0$ with respect to measures of $P^0e|c$ and thus, implicitly, on the assumption that the values of all other variables affecting the murder rate are held constant as the probability of execution varies. In practice, however, the values of the endogenous variables Pa and $Pc|a$ may not be perfectly controllable. The theoretical analysis in Section IB suggests that exogenous shifts in the optimal values of $Pe|c$ may generate offsetting changes in the optimal values of Pa and $Pc|a$. Indeed, consistent estimates of the elasticities of the reported murder rates with respect to alternative measures of $P^0e|c$ that were derived through a reduced form regression analysis using as explanatory variables only the exogenous and predetermined variables included in the supply of offenses function and other structural equations (X_1 and X_2 in Table 2) are found to be generally lower than the elasticities reported in Table 3.[16] The actual tradeoffs between executions and murders thus depend partly upon the ability of law enforcement agencies to control simultaneously the values of all the parameters characterizing law enforcement activity.

IV. Conclusions

This paper has attempted to present a systematic analysis of the relation between capital punishment and the crime of murder. The analysis rests on the presumption that offenders respond to incentives. Not all those who commit murder may respond to incentives. But for the theory to be useful in explaining aggregate behavior, it is sufficient that at least some so behave.

[16] The elasticities associated with PXQ_1, PXQ_2, TXQ_1, and PDL_1 in this modified reduced form regression analysis relating to the period 1934–69 are found equal to −0.0269 (−0.83), −0.0672 (−2.29), −0.0114 (−1.99), and −0.052 (−5.81), respectively, where the numbers in parentheses are the ratios of the coefficients to their standard errors.

Previous investigations, notably those by Sellin, have developed evidence used to unequivocally deny the existence of any deterrent or preventive effects of capital punishment. This evidence stems by and large from what amounts to informal tests of the sign of the simple correlation between the legal status of the death penalty and the murder rate across states and over time in a few states. Studies performing these tests have not considered systematically the actual enforcement of the death penalty, which may be a far more important factor affecting offenders' behavior than the legal status of the penalty. Moreover, these studies have generally ignored other parameters characterizing law enforcement activity against murder, such as the probability of apprehension and the conditional probability of conviction, which appear to be systematically related to the probability of punishment by execution. In addition, the direction of the causal relationship between the rate of murder and the probabilities of apprehension, conviction, and execution is not obvious, since a high murder rate may generate an upward adjustment in the levels of these probabilities in accordance with optimal law enforcement. Thus the sign of the simple correlation between the murder rate and the legal status, or even the effective use of capital punishment, cannot provide conclusive evidence for or against the existence of a deterrent effect.

The basic strategy I have attempted to follow in formulating an adequate analytic procedure has been to develop a simple economic model of murder and defense against murder, to derive on the basis of this model a set of specific behavioral implications that could be tested against available data, and, accordingly, to test those implications statistically. The theoretical analysis provided sharp predictions concerning the signs and the relative magnitudes of the elasticities of the murder rate with respect to the probability of apprehension and the conditional probabilities of conviction and execution for murder. It suggested also the existence of a systematic relation between employment and earning opportunities and the frequency of murder and other related crimes. Although in principle the negative effect of capital punishment on the incentive to commit murder may be partly offset, for example, by an added incentive to eliminate witnesses, the results of the empirical investigation are not inconsistent with the hypothesis that, on balance, capital punishment reduces the murder rate. But even more significant is the finding that the ranking of the elasticities of the murder rate with respect to Pa, $Pc|a$, and $Pe|c$ conforms to the specific theoretical predictions. The murder rate is also found negatively related to the labor force participation rate and positively to the rate of unemployment. None of these results is compatible with a hypothesis that offenders do not respond to incentives. In particular, the results concerning the effects of the estimates of the probabilities of apprehension, conviction, and execution are not consistent with the hypothesis that execution or imprisonment decrease the rate of murder only by incapacitating or preventing apprehended offenders from committing further crimes.

These observations do not imply that the empirical investigation has proved the existence of the deterrent or preventive effect of capital punishment. The results may be biased by the absence of data on the severity of alternative punishments for murder, by the use of national rather than state statistics, and by other imperfections. At the same time it is not obvious whether the net effect of all these shortcomings necessarily exaggerates the regression results in favor of the theorized results. In view of the new evidence presented here, one cannot reject the hypothesis that law enforcement activities in general and executions in particular do exert a deterrent effect on acts of murder. Strong inferences to the contrary drawn from earlier investigations appear to have been premature.

Even if one accepts the results concerning the partial effect of the conditional probability of execution on the murder rate as valid, these results do not imply that capital punishment is necessarily a desirable form of punishment. Specifically, whether the current level of application of capital punishment is optimal cannot be determined independently of the question of whether the levels of alternative punishments for murder are optimal. For example, one could argue on the basis of the model developed in Section IA that if the severity of punishments by means other than execution had been greater in recent years, the apparent elasticity of the murder rate with respect to the conditional probability of punishment by execution would have been lower, thereby making capital punishment ostensibly less efficient in deterring or preventing murders. Again, this observation need not imply that the effective period of incarceration imposed on convicted capital offenders should be raised. Given the validity of the analysis pursued above, incarceration or execution are not exhaustive alternatives for effectively defending against murders.[17] Indeed, these conventional punishments may be considered imperfect means of deter-

[17] Ironically, the argument that capital punishment should be abolished because it has no deterrent effect on offenders might serve to justify the use of capital punishment as an ultimate means of prevention of crime, since the risk of recidivism that cannot be deterred by the threat of punishment is not eliminated entirely even inside prison walls. In contrast, since the results of this investigation support the notion that execution exerts a pure deterrent effect on offenders, they can be used to suggest that other punishments, even those which do not have any preventive effect, can in principle serve as substitutes.

rence relative to monetary fines and other related compensations because the high "price" they exact from convicted offenders is not transferrable to the rest of society. Moreover, the results of the empirical investigation indicate that the rate of murder and other related crimes may also be reduced through increased employment and earning opportunities. The range of effective methods for defense against murder thus extends beyond conventional means of law enforcement and crime prevention. There is no unambiguous method for determining whether capital punishment should be utilized as a legal means of punishment without considering at the same time the optimal values of all other choice variables that can affect the level of capital crimes.

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AMERICAN BAR ASSOCIATION

SECRETARY
Herbert D. Sledd
300-308 W. Short Street
Lexington, KY 40507

1155 EAST 60TH ST., CHICAGO, ILLINOIS 60637 TELEPHONE (312) 947-4016

September 5, 1975

Honorable John L. McClellan
Chairman, Subcommittee on Criminal
Laws and Procedures
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

RE: Federal Criminal Code
Revision - #101

Dear Mr. Chairman:

At the meeting of the House of Delegates of the American Bar Association held August 11-13, 1975 the attached resolution was adopted upon recommendation of the Section of Criminal Justice.

This resolution is being transmitted for your information and whatever action you may deem appropriate.

Please do not hesitate to let us know if you need any further information or have any questions, or whether we can be of any assistance.

Sincerely yours,

Herbert D. Sledd

Herbert D. Sledd

HDS/jfr
Attachment

cc: Ben R. Miller, Esquire

AMERICAN BAR ASSOCIATION - HOUSE OF DELEGATES

SECTION OF CRIMINAL JUSTICE

RESOLUTION 101

August, 1975

BE IT RESOLVED, Upon the recommendation of the Section of Criminal Justice following three years of study by the Committee on Reform of Federal Criminal Laws of all the sections of the 1971 Report of National Commission on Reform of Federal Criminal Laws (cited herein as "Brown Commission"), and of H.R. 333, 94th Congress, 1st Session (which incorporated the Brown Commission draft without substantial change); of the corresponding sections of S. 1 and S. 1400, 93rd Congress, 1st Session (both based upon the Brown Commission draft); and of the general provisions, and the principles of the federal jurisdiction, criminal liability, sentence, probation and parole in S. 1 and its identical counterpart, H.R. 3907, 94th Congress, 1st Session (cited herein as "S. 1"), that the American Bar Association endorses in principle the provisions of S. 1 and its counterpart H.R. 3907, now pending in the 94th Congress, 1st Session, as a desirable basis for the reform of the federal criminal laws; noting, however, that the Commission on Correctional Facilities and Services urges the particular importance of amendments to reflect the general principles set out in Recommendations 26, 29, 31 and 32 in Appendix A hereto and the relevant sections of the ABA Standards Relating to the Administration of Criminal Justice;

BE IT FURTHER RESOLVED, That any such legislation should conform to the general principles set out in Appendix A attached hereto and to the relevant sections of the ABA Standards Relating to the Administration of Criminal Justice;

BE IT FURTHER RESOLVED, That the President of the Association or his designee be authorized to appear before the appropriate committees and subcommittees of Congress to present the views of the Association with regard to the above matters, to submit written statements in support of such views, and to testify with regard thereto; and

BE IT FURTHER RESOLVED, That the Commission on Correctional Facilities and Services and interested Sections and Committees be authorized to appear before the appropriate committees and subcommittees of Congress to present their views (so far as relevant to their respective concerns) with regard to any provisions of bills now or hereafter filed in Congress to revise the substantive criminal laws of the United States, which are not governed by the general

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principles set forth in the above resolutions of this House or by the ABA Standards Relating to the Administration of Criminal Justice, to submit written statements in support of such views, and to testify with regard thereto; provided, that such appearances, statements and testimony shall be subject to all the terms and conditions set forth in the vote of the House of Delegates in August, 1973, with regard to such appearances.

APPENDIX A

The Section of Criminal Justice makes the following Recommendations to the House of Delegates as to general principles, and the relevant sections of the ABA Standards Relating to the Administration of Criminal Justice, to which any legislation for the reform of the federal criminal laws should conform, and as to the provisions of S. 1, of H.R. 3907, and of the Brown Commission Report incorporated in H.R. 333 which conform thereto and, therefore, should be supported by the Association.

The "Comment" following each of the Recommendations is for explanatory purposes only, and is not a part of the Recommendation which the House is asked to adopt.

References to "S. 1" are to the 1975 Senate bill, and apply equally to H.R. 3907. References to "Brown Commission" are to the 1971 report of the National Commission on Reform of Federal Criminal Laws, and apply equally to H.R. 333. References to "ABA Standards" are to the ABA Standards Relating to the Administration of Criminal Justice, approved by the ABA House of Delegates during the years 1967-1973. These Standards (contained in 18 volumes, of which volume 18 brings together all the Standards, without their Commentary) represent official Association policy. Any substantial change proposed for the Standards must be referred to the ABA Special Committee on Administration of Criminal Justice.

(1) Recommendation as to general statement of purposes. A general statement of the purposes intended to be served by the federal criminal law (now lacking in Title 18 of the U. S. Code) should be enacted. The formulations of such purposes in § 101 of S. 1 and in § 102 of Brown Commission, though differing somewhat, are equally satisfactory, and the Association should support either formulation.

Comment. There can be little doubt of the need for reform of the present system of federal criminal laws. As American society has grown large, diverse and complex, the Federal Government has taken on an increasingly important role in the regulation of national affairs. The exercise of federal power to police social conduct has expanded as well, but on a "hit or miss" basis, resulting in a jurisprudence that is at times contradictory and uncertain, and at times even irrational.

Thus, the present system of federal criminal law falls short of fulfilling some of the purposes which a rational and enlightened criminal law should serve. Conduct is proscribed when it should not be, or is not proscribed when it should be; similar acts are punished with irrationally different sanctions; and the system fails to give clear and adequate notice of what conduct is proscribed and what conduct is permitted.

A general statement of the purpose of the proposed revision of the federal criminal law will be a useful guide to the courts and other officials who must interpret its provisions. Both § 101 of S. 1 and § 102 of Brown Commission include in their statements the definition, and notice (or fair warning), of conduct that undefensibly (or unjustifiably and inexcusably) "causes or threatens harm to those individual or public interests for which federal protection is appropriate." They both seek to provide the sanctions for such conduct needed to assure just (or merited) punishment, deter such conduct, protect the public by such confinement as may be necessary of persons who engage in such conduct, and promote their rehabilitation. They both (in somewhat different formulations) seek to establish a system of fair and expeditious procedures which should safeguard conduct that is without guilt from criminal condemnation and impose appropriate sanctions for persons found guilty. The Association should support either formulation.

(2) Recommendation as to proof of the bases of federal jurisdiction. The Association opposes all proposed federal legislation which would diminish the fact-finding authority of a jury in a criminal case by vesting that authority in the judge. The fact of federal jurisdiction should be determined by the jury (as under present law) and not by the judge (as proposed by S. 1 in its Rule 25.1(b) of the Federal Rules of Criminal Procedure). The jurisdictional provisions of S. 1 are in other respects a considerable improvement over the corresponding provisions in §§ 201-219 of Brown Commission, and the undue expansion of "ancillary jurisdiction" in § 201(b) of Brown Commission has been greatly limited in S. 1. The definitions of the several jurisdictional bases should be removed from the definitions of the substantive crimes, where they are now found in Title 18. They should be put into a separate chapter of general application. The Association supports §§ 201-204 of S. 1 to this effect, with three amendments. Paragraph (b) of Rule 25.1 of the Federal Rules (found at page 346 of S. 1) should be stricken. The provisions of § 205(b) for total preemptive federal jurisdiction over certain offenses relating to federal elections should be modified to provide for such preemptive federal jurisdiction only upon order of the Attorney General of the United States and until federal action is ordered by him to be terminated, as is done in the case of an offense against United States official under § 205(c). The scope of existing law as to extra-territorial jurisdiction over anti-trust offenses should not be changed, and § 1764 should be amended to clarify this point.

Comment. Our only serious reservation here is to oppose the provisions of S. 1 which would make the fact of jurisdiction determined by the judge, and not by the jury, as is now the case. We oppose all proposed federal legislation

which would diminish the fact-finding authority of a jury in a criminal case by vesting that authority in the judge. The right of trial by jury in criminal cases should be preserved in the form it now exists.

We support the intent of S. 1 not to change the scope of existing law as to extra-territorial jurisdiction over antitrust offenses. We further approve the concept embodied in S. 1 that would permit conduct occurring wholly outside the United States, which constituted a conspiracy or attempt to commit an offense within the United States, to be prosecuted by the United States, even though no act in furtherance thereof occurred within the territorial United States.

We believe the absolute preemption of state prosecutions for some violations of state election laws, created by the Federal Campaign Act Amendments of 1974, and in some other federal election laws, as found in § 205(b) of S. 1, is an unwise limitation upon the states.

(3) Recommendation as to culpability. A few well-defined states of mind should be applied to all crimes in Title I8. The Association supports §§ 301-303 of S. 1 which define the four basic elements -- intent, knowledge, recklessness and (in negligent homicide only) negligence with reasonable precision, and are much better in this respect than the definitions in § 302 of Brown Commission.

Comment. Chapter 3 of S. 1 in §§ 301-303 provides a well-written and logical formulation of the culpable states of mind applicable throughout the proposed Code. This chapter is structurally important, breaking out generally-applicable mental elements and supplying uniform definitions. Although we have recommended in (2) above that the fact of jurisdiction should be determined by the jury, we approve the provisions of § 303(d)(2) of S. 1, which do not require proof of state of mind with respect to any matter that is solely a basis for federal jurisdiction, for venue, or for grading.

The four basic culpable states of mind, intent, knowledge, recklessness and negligence, have been well-chosen and reasonably defined. S. 1 eliminates the use of the more generalized term, "willfully," and thus represents a simplification of Brown Commission § 302. S. 1 specifies the minimum mental element (if any) which must be shown with respect to the conduct, circumstances, and results which are elements of an offense, thus tying together mental states and elements of offenses with more precision than the Brown Commission sections. In this respect also, § 303(b) of S. 1 adopts the approach of S. 1400 of 1973, making recklessness the state of mind required for elements for which culpability is not specified in a description of the offense. (This is preferable to the approach taken in original S. 1 of 1973, which used negligence instead. Negligence is used in S. 1 as a basis for liability only three times, as a basis for homicide in § 1603, and to negate defenses in §§ 531(b)(2) and 544(b).)

On balance §§ 301-303 of S. 1 represent a marked improvement over the approach of Brown Commission, and are much to be preferred.

(4) Recommendation as to accessories. One who aids another to commit a crime should be liable for the full penalty for the crime only if he intended that the offense be committed. The Association supports §§ 401 and 1002 of Brown Commission (which provide a lower penalty for knowingly providing substantial assistance to a person intentionally committing a crime). These sections reject the doctrine of Pinkerton v. United States, 328 U.S. 640, 1946, that a conspirator is liable for any offense committed by another conspirator which is a reasonably foreseeable result of the conspiracy. They should be amended to provide, as does Model Penal Code § 204(4), that an accomplice is liable for the full penalty if he acted with the kind of culpability, if any, with respect to a result unintended by him, which is sufficient for the commission of the offense. The Association accordingly does not support the provisions of § 401 of S. 1, to the extent that they are inconsistent with the above general principles.

Comment. Section 401 of S. 1 does not appear to allow for a defense under United States v. Falcone, 109 F2d 579 (2d Cir.), aff'd 311 U.S. 205 (1940), if that case is understood to require a so-called "stake in the venture." Section 401 rather purports to follow the rule that one may be convicted of full accessory liability if he acts with awareness or consciousness that he is promoting or facilitating a crime, even if he does not desire or intend that the crime be committed. See e.g., Direct Sales Co. v. United States, 319 U.S. 703 (1943). We support §§ 401 and 1002 of Brown Commission, which provide a lower penalty for knowingly providing substantial assistance to a person intentionally committing a crime, than for one who actually intended that the offense be committed when he assisted the other person.

Section 401(b) of S. 1 embodies the rule of Pinkerton v. United States, 328 U.S. 640 (1946), as it has been applied by the courts for nearly thirty years. While some formulations would omit the substance of section 401(b)(3), the accepted judicial statement of the rule is that a conspirator is liable for substantive offenses committed by another conspirator, if the offense was committed in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiracy.

The Pinkerton rule represents a form of vicarious criminal liability that, in essence, imposes liability for negligence. In the form of the rule adopted by § 401(b) of S. 1, a person is liable for a co-conspirator's crime which was "reasonably foreseeable"; or, stated another way, the person is criminally liable if he should have known, when he agreed to become a part of the conspiracy, that there was a risk that the collateral offense would be committed. This is clearly negligence liability, and should be imposed only if there is strong justification.

We do not support the Pinkerton rule, which is needed only to punish a conspirator who never agreed to, aided, or participated in, the commission of the collateral offense. It goes too far, and does not easily admit of rational application.

Under § 401(1) of Brown Commission if A holds B's coat while assisting B in assaulting C, A is liable for the assault on C. If C dies as a result of the affray, B might be liable for a negligent homicide. It is not clear in such a case, however, that A would be equally guilty of the negligent homicide since he might not have "knowingly" aided or abetted the commission of the negligent homicide. If his mental state, however, was not less than that found sufficient to hold B liable, there is no reason not to find A equally liable for the negligent homicide.

The Model Penal Code, § 2.04(4), 1962, solved this problem by the inclusion of the following paragraph in its provision for accomplice liability:

> "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."

We recommend that a similar provision be added to § 401 of Brown Commission in order to reach this equitable result.

(5) Recommendation as to liability of an organization. Where liability of an organization is based upon conduct of an agent within the scope of his employment or authority, it should be an affirmative defense that the agent's conduct was not intended to benefit the organization. The Association supports § 402 of S. 1, with an amendment to this effect, regarding that section as a much better statement of the liability of an organization for conduct of an agent than the much more complicated provisions in § 402 of the Brown Commission.

Comment. We recommend the clear and simple statement in § 402 of S. 1 as to the liability of an organization for the conduct of an agent occurring "in the performance of matters within the scope of the agent's employment or within the scope of the agent's actual implied or apparent authority," with an amendment to allow the organization an affirmative defense that the agent's conduct was not intended to benefit the organization -- in other words, that he was "on a frolic of his own". The other bases of liability -- ratification, adoption, and omission of a specific duty of conduct -- should also be supported. Section 401 (as thus amended) is much to be preferred to the complicated provisions of § 402 of Brown Commission, which also seriously limit the organization's liability for felonies committed on its behalf by its agents. We see no reason why an organization should not be liable (as it is under present law) for any crime, even including homicide, committed on its behalf under the circumstances set out in § 402 of S. 1.

(6) Recommendation as to selective inclusion of bars and defenses. No attempt should be made in any revision of Title 18 to set forth all the bars and defenses to prosecution, and certain of them (such as consent, use of force by persons with parental or similar responsibilities, etc.) should be left to judicial development. The Association, therefore, supports § 501 of S. 1,

which so provides. Section 601 of Brown Commission has no similar provision, although its comment points out that such a provision may be desirable.

Comment. We approve § 501 of S. 1, which states the principle that the bars and defenses enumerated in Chapter 5 of the proposed Code are exclusive, only to the extent that competing views as to those subjects dealt with are rejected. General defenses not included in Chapter 5 are still available under the proposed Code, but are left to judicial development. This is important because such major defenses as consent, while not included in Chapter 5, remain available in appropriate cases.

(7) Recommendation as to statute of limitations. A general statute of limitations of 5 years for felonies (except murder) and misdemeanors, and one year for infractions, should be adopted. The period should not start to run for continuing offenses involving conspiracy until the occurrence of the most recent conduct to effect any objective of the conspiracy (which under § 1002 of S. 1 must have been agreed to by the conspirators). It should be suspended while the defendant is absent from the United States or has no reasonably ascertainable place of abode or work within the United States, only if his absence impeded the government's investigation of the case. It should be extended for 60 days after dismissal of a complaint, indictment or information for insufficiency, etc., and (if an appeal is taken by the prosecution) after final decision on the appeal. The Association supports § 511 of S. 1, with amendments to § 511(f) and (g) to conform to the above recommendation. Section 701 of Brown Commission is inconsistent in several respects with the above general principles, and is not supported.

Comment. Under § 511(d) (2) (A) of S. 1, the applicable statute of limitations is extended by measures to conceal the conspiracy only if they constitute affirmative conduct to effect an objective; that is, the concealment must have been agreed to by the conspirators. Section 1002 defines "objective" as, inter alia, "any measure for concealing, or obstructing justice in relation to, any aspect of the conspiracy" which has been agreed to by the conspirators. This definition applies only to the term "[a]s used in . . . section [1002]." It is patent, however, that the term "objective of the conspiracy" in § 511(d) (2) (A) is intended to pick up the meaning of "objective" under § 1002. Thus, the period of limitations would be extended only in the situation where the conspirators have agreed, and in fact undertake affirmative conduct, to conceal the conspiracy, and with this construction, we approve the provisions in S. 1 on this matter.

But the provision in § 511(g) of S. 1 suspending the period of limitation "while the person who committed or who is criminally liable for an offense is absent from the United States or has no reasonably ascertainable place of abode or work within the United States" should apply only if the unavailability of the defendant impeded the government's investigation of the case. Where this is not true, the government can and should stop the period from running by commencing prosecution by filing a complaint, an indictment or information.

The six months allowed by § 511(f) of S. 1 is too long a period in which to permit the government to file a new complaint, indictment, or information after an earlier complaint, indictment, or information has been dismissed. There may be instances in which several months or more may go by without a grand jury being convened in a given judicial district; under Rule 6(a) of the Federal Rules of Criminal Procedure, however, a grand jury may be summoned at any time that the public interest so requires. Consequently, we recommend that § 511(f) be amended to provide for the commencement of a new prosecution within 60 days of the dismissal instead of six months. In instances in which an appeal is taken from the dismissal, however, the time should be computed from the date of the final order on appeal and not from the date of original dismissal.

(8) Recommendation as to immaturity. A person less than 16 years old at the time of commission of any offense should be tried as a juvenile delinquent, unless he waives that privilege. There should also be appropriate provisions by which a person between the ages of 16 and 18 at the time of commission of an offense may be tried as an adult if he waives the privilege of being tried as a juvenile delinquent, or (if charged with a serious felony) the court after a hearing on motion of the Attorney General determines that "in the interests of justice the juvenile should be treated as an adult." The Association supports § 512 of S. 1, with an amendment to bar prosecution of a person less than 16 even for murder. Section 501 of the Brown Commission would reduce the critical age from 16 (as under present law and in § 512 of S. 1) to 15 years for serious crimes against persons, and is not supported.

Comment. Section 512 of S. 1 would bar the prosecution of a juvenile as an adult for any offense except murder, committed by a person less than 16 years old at the time of the commission of the offense, unless he waives that privilege. We believe that a murder prosecution as an adult should also be barred, as the extreme penalties for this crime should not be imposed on persons less than 16 years old at the time of the offense. The other provisions in §§ 3601-3606 of S. 1 dealing with juveniles should be studied in depth, as recommended in (40) below, before they are substituted for the present provisions of the Federal Youth Corrections Act.

(9) Recommendation as to mistake of fact or law. A person who, as a result of ignorance or mistake of fact or law lacks the state of mind required as an element of the offense charged, should have a defense to prosecution. The Association supports § 521 of S. 1 to this effect.

Comment. We approve § 521 of S. 1, which is an accurate restatement of existing law on the subject. Under this section ignorance or mistake of fact or law can be a defense only if it negates the state of mind required as an element of the offense. The defense could not be asserted in a Watergate-type situation.

(10) Recommendation as to insanity. The defense of insanity should not be limited to cases where the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged, as provided in § 522 of S. 1. Section 503 of the Brown Commission adopts the American Law Institute defense, and this section is supported in principle.

Comment. We do not approve of § 522 of S. 1, which involves a new approach to the defense of insanity. It would abolish the present defense, except to the extent that the defendant's mental disease or defect negated a necessary state of mind. We would instead recommend support in principle of § 503 of Brown Commission which adopts the American Law Institute definition of the defense in § 4.01 of the Model Penal Code. This definition has also been widely adopted in the U.S. Courts of Appeal. The exact formulation of this defense varies somewhat in various jurisdictions, and we do not believe its formulation in § 503 is necessarily the only formulation the Association should support.

(11) Recommendation as to duress. Duress from a clear threat of imminent and inescapable death or serious bodily injury should be an affirmative defense to all offenses except murder. The Association supports § 531 of S. 1 to this effect. Section 610 of the Brown Commission is generally similar, but because it would allow such duress as a defense even to murder, and would allow duress from any force or threat of force as a defense to a misdemeanor, it is not supported.

Comment. We approve § 531 of S. 1, which generally conforms with existing law. Section 610 of Brown Commission is generally similar, but has some differences which we do not approve.

(12) Recommendation as to entrapment. Unlawful entrapment by a federal public servant as a defense should be codified in Title 18 in terms of the present law, as stated most recently by the majority of the Supreme Court in U.S. v. Russell, 411 U.S. 423 (1972). The Association supports § 551 of S. 1, which follows the Russell decision by allowing the defense only where "the defendant was not predisposed to commit the offense charged and did so solely as a result of active inducement by a federal public servant acting in his official capacity or by a person active as an agent of such a public servant or of a federal agency." Section 702 of the Brown Commission would allow an affirmative defense whenever a law enforcement agent (whether state or federal) "induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense," and is not supported.

Comment. We approve the approach of § 551 of S. 1, adhering to the majority position in the Russell case. We believe that defenses arising to constitutional magnitude (e.g., that the activity of the government investigators constituted denial of due process), if any exist, would still be available to a defendant.

Since § 702 of Brown Commission adopts the minority position in the case, we do not approve it. The defense under existing law appears to work reasonably well, and we see no reason for extending it beyond its boundaries under present law.

(13) Recommendation as to attempt. No person should be guilty of a criminal attempt unless his intentional conduct in fact amounts to more than mere preparation for, and indicates his intent to complete, the commission of the crime and the accomplishment of any result required therefor. An attempt should be an offense of the same class as the offense attempted, except in the most serious felonies, and it should not be a defense to a prosecution for an attempt that the crime attempted was in fact committed. The Association supports § 1001 of S. 1, with the minor amendments necessary to conform to the above principles. Section 1001 of the Brown Commission has a more limited definition of an attempt, and is not supported.

Comment. We approve § 1001 of S. 1 with two amendments. First, with regard to the state of mind required for the offense of criminal attempt, § 1001 of Brown Commission and § 1001 of S. 1 are substantially identical, and both the Brown Commission and the Senate Judiciary Committee intended that the culpability requirement include a purpose to commit the crime. See Working Papers Volume I at 355; Committee Print Volume II at 167-168. The draft language is meant to avoid the possibility of conviction for a reckless or negligent "attempt." Committee Print Volume II at 168. The Special Committee of the New York Bar Association felt, however, that the Brown Commission draft failed to carry through this meaning, and this criticism applies equally to S. 1. See The New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws at 24-25.

The specific problem with regard to § 1001(a) of S. 1 is, that the language requiring specific intent as to the conduct does not likewise require a similar state of mind as to the result of the conduct in question. As the Special Committee of the New York Bar hypothesized, it is conceivable that this language can be read to make reckless endangerment, for example, an "attempt" to commit manslaughter. This possibility should be excluded by amendment.

The second important objection to the draft of § 1001 of S. 1 and of Brown Commission is that it fails to state explicitly that successful completion of the offense does not bar conviction of the attempt. The Brown Commission considered the issue, but expected that it would be dealt with by a general provision of the proposed code. Working Papers Volume I at 367. Since no such general provision has been included in the proposed code, we recommend that the Association support an amendment of § 1001 of S. 1 by redesignating § 1001(c) as "Defenses Precluded," designating the extant paragraph of § 1001(c) as "(1)", and adding the following:

> "(2) It is not a defense or bar to prosecution or conviction under this section that the crime was in fact committed."

(14) Recommendation on conspiracy. A person who agrees with one or more other persons to engage in conduct, the performance of which would in fact constitute one or more crimes, should be guilty of conspiracy if he or another conspirator engages in conduct with intent to effect any objective of the conspiracy. Conspiracy should be an offense of the class next below that of the most serious crime that was an objective of the conspiracy, but no defendant should receive consecutive sentences for two offenses where one of them consisted only of a conspiracy, attempt or solicitation to commit the other. The Association supports the general formulations in both § 1002 of S. 1, and § 1004 of the Brown Commission, with amendments to conform them to the above principles.

Comment. The definitions of the crime in both § 1002 of S. 1 and § 1004 of Brown Commission should be amended. Since a conspiracy prosecution may be based on an agreement, plus any conduct (no matter how far removed from the completion of the offense) with intent to effect one of its objectives, conspiracy should be an offense of the class below that of the most serious crime that was an objective of the conspiracy. (Section 1004 of Brown Commission does this for most crimes, but not for offenses below Class A where the attempt came "dangerously close to the commission of the crime.") Section 1004 of S. 1 should also be amended to provide, as does § 3204(b) of Brown Commission, that multiple sentences may not be imposed where one offense consists only of a conspiracy, attempt or solicitation to commit the other.

There appears to be a misprint in § 1002(a) of S. 1, which would be corrected if the words "in fact" where moved forward to provide: "a person is guilty of an offense if he agrees with one or more persons to engage in conduct, the performance of which would in fact constitute a crime or crimes, and he or one of such persons engages in any conduct with intent to effect any objective of the agreement."

(15) Recommendation as to solicitation. Solicitation of another to commit a crime should be an offense of the class next below that of the crime solicited. It is not clear from § 1003(a) of S. 1 whether the defendant must know that the conduct he has solicited was criminal. It should be an affirmative defense that he did not know that such conduct was criminal. The Association supports § 1003 of S. 1, with an amendment to this effect to § 1003(b).

Comment. Section 1003(a) of S. 1 creates the offense of soliciting another person to commit a crime "with intent that another person engage in conduct constituting a crime." We believe this section should be amended, to make it an affirmative defense that the person so soliciting commission of the crime did not know that the conduct he was soliciting was a crime.

(16) Recommendation as to obstructing a government function by defrauding the government. There should be a substantive offense covering obstructing, impairing or perverting a federal government function by defrauding the government in any manner. This would supplement the existing provisions of 18 U.S.C. § 371 covering conspiracy to "defraud the United States or any agency thereof," which would be merged into the general conspiracy statute. The Association supports § 1301 of S. 1 to this effect.

Comment. Intentionally obstructing, impairing or perverting a federal government function by defrauding the government in any manner is made a Class D felony (not over 7 years) by § 1301 of S. 1. This provision fills in a gap in existing law and allows prosecution for the substantive offense, whereas the current statute, 18 U.S.C. § 371, provides for punishment only for a conspiracy to do so, even if a substantive offense has been committed. Section 1301 also extends the reach of the law to include individual as well as group action; we find no reason why this should not be done. The addition of § 1301 to the proposed code results in a more logical and rational statement of the law, and should be supported. There is no similar provision in Brown Commission.

(17) Recommendation as to bail jumping. The offense of bail jumping should be an offense of the same class (except for the death penalty) as the offense for which the defendant was charged and released. The Association supports the provisions in both § 1312 of S. 1 and § 1305 of Brown Commission, with amendments to their grading provisions to conform them to the above principle.

Comment. Unless there are serious penalties for the offense of bail jumping, many defendants will find the temptation to delay prosecution until witnesses disappear,etc., irresistible.

(18) Recommendation as to perjury and other false statements. Proof of the falsity of a material statement for perjury or of any statement for false swearing should not have to be made by any particular number of witnesses or any particular kind of evidence, and in a prosecution for making an unsworn material false statement orally or in writing in a government matter, intention, knowledge or recklessness should be required with regard to every element of the crime. The Association supports §§ 1341, 1343, and 1345 of S. 1, with amendments to § 1343 which first, would strike the words "in fact" from line 25 in paragraph (a) (1), thus requiring some degree of culpability as to the existence of "a matter that is a government matter," and second, would eliminate the penalty in subparagraph (a) (1) (A) for making an oral material statement that is false in a government matter. Sections 1351-55 of Brown Commission are much like the provisions of S. 1 in many respects, but they do not abolish the so-called "two-witness rule," and are, therefore, not supported. The attention of the Congress is called to the omission from § 1343(a) (1) (B) of the penalty now provided in 18 U.S.C. § 1505 for failure to produce all the documents called for in an anti-trust civil investigative demand.

Comment. We approve the provisions of §§ 1341 and 1342 of S. 1 on perjury and false swearing, which by § 1345(b) (1) provide that proof of the falsity of a statement "need not be made by any particular number of witnesses or by documentary, direct or any other particular kind of evidence." We believe that since these crimes, like all others, must be proved beyond a reasonable doubt, they should not be subject to additional proof requirements. The present so-called "two-witness rule" has often been criticized, and is fraught with exceptions. We see no necessity for carrying it over into the proposed Code.

As presently drafted, § 1343(a) (1) of S. 1 creates a risk that a person might be subjected to criminal liability for deliberately or recklessly making a false oral statement in a situation in which he did not know and had no basis for believing that the statement was made in the context of a governmental matter. We recommend that the phrase "in fact" be deleted from § 1343(a) (1) so that criminal liability could not be imposed for the making of a false statement without proof that the declarant was at least reckless as to whether or not he was making the statement in the context of a governmental matter, and that the penalty in subparagraph (a) (1) (A) of § 1343 for making an unsworn oral material statement that is false in a government matter be stricken.

It is not clear that § 1343 would continue existing law providing for the imposition of criminal penalties for failure to comply with a civil investigative demand ("CID") of the antitrust division of the Department of Justice without a showing of the materiality of the item or items omitted. We recommend, therefore, that Congress consider an amendment to § 1343 to provide for a criminal liability for the failure to comply with a CID without a showing of materiality. We do not approve §§ 1351-1355 of Brown Commission which do not abolish the "two-witness rule," and have a narrower coverage of false statements than does S. 1, with the proposed amendments.

(19) Recommendation as to mail and other fraudulent schemes. The existing mail, wire, radio and television fraud provisions of 18 U.S.C. §§ 1341 and 1343 should be broadened to include so-called "pyramid sales schemes" where the number of participants expands geometrically, to the inevitable detriment of those joining in their later stages. The Association supports § 1734 of S. 1 to this effect, with a minor clarifying amendment added to the definition of "compensation" in § 1734(b) (1) to provide: "but the term does not include payments based on sales at retail to ultimate consumers."

Comment. We believe that existing law should be broadened to proscribe so-called "pyramid sales schemes," as is done in § 1734 of S. 1. It is the sale of the right to recruit others into the operation, with the prospect of profit to be derived therefrom, that makes the multi-level sales scheme inherently harmful. The harm results because it is mathematically impossible for everyone who is recruited into the program to recoup his investment and make a profit by recruiting others; when the saturation point is reached, those at the last level, or the bottom of the "pyramid," are left holding the bag. In essence, the pyramid sales scheme is nothing more than the hoary device of the chain letter tied, in some manner, to the sale of an otherwise undistinguished product.

Since the "compensation" which the defendant must receive from a proscribed "pyramid sales scheme" ought not to include payments based on sales at retail to ultimate consumers, we recommend that the definition of "compensation" be clarified by the addition of language such as the following in § 1734(b) (1):

"'Compensation' includes payment based on a sale or distribution made to a person who is a participant in a pyramid sales scheme or who, upon such payment, obtains the right to become a participant, but the term does not include payments based on sales at retail to ultimate consumers; . . ."

There are no similar provisions in Brown Commission to prohibit pyramid sales schemes.

(20) Recommendation on obscenity. The Association supports the provisions in § 1842 of S. 1 providing for the federal crime of disseminating obscene material to a person in a manner affording no immediately effective opportunity to avoid exposure to such material or to a minor, within the special jurisdiction of the U.S. (federal enclaves, unorganized territories, etc.), with the penalty lowered from a Class E felony (3 years and/or $100,000) to a Class A misdemeanor (one year and/or $10,000). But paragraphs (a) (2), (b) (1) and (e) (2) and (3) of § 1842 proscribing commercial dissemination of obscene material, and extending federal jurisdiction to include cases where the U.S. mail or a facility in interstate of foreign commerce was used, or the material was transported across a state or U.S. boundary, should be stricken, since in other respects the control of obscenity should be left to the states, except to the extent that federal enforcement in the "special territorial jurisdiction of the United States" (real property under its exclusive or concurrent jurisdiction, its unorganized territories and possessions, Indian country, etc.) would remain under provisions of the Assimilative Crimes Act found in § 1863 of S. 1 and in § 209 of Brown Commission. The Association does not support § 1851 of Brown Commission, which seeks to preserve for the federal government a role in suppressing commercial trafficking in obscene material in all the states.

Comment. Both § 1842 of S. 1 and § 1851 of Brown Commission prohibit commercial dissemination of obscene material within the special maritime and territorial jurisdiction of the United States, by the use of the mails, or in interstate or foreign commerce. Section 1842 of S. 1 defines "obscene material" in the language of the most recent Supreme Court test enunciated in Miller v. California, 413 U.S. 15 (1973); there is no definition of the term in Brown Commission.

We do not support the control of the commercial dissemination of obscene material by the federal government, believing that this is a matter best left to state and local law. We have therefore recommended that federal prosecution be limited to prohibiting dissemination of such material to any person in a manner affording no immediately effective opportunity to avoid exposure to such material, or to a minor (defined in § 1842(b) (3) as "an unmarried person less than seventeen years old") in federal enclaves and territories, with a lesser penalty, and to enforcement therein of state and local laws and or ordinances under the Assimilative Crimes Act.

(21) Recommendation on prostitution. The control of prostitution should also be left to the states, with federal enforcement only under Assimilative Crimes Act provisions. The Association, therefore, does not support either § 1843 of S. 1 (which covers conducting a prostitution business involving interstate commerce, etc.) or §§ 1841-1849 of Brown Commission (which cover promoting and facilitating prostitution, as well as prostitution itself, within the "special maritime and territorial jurisdiction of the United States," and within a reasonable distance of any military installation as the Secretary of Defense shall determine to be needful.)

Comment. We recommend deletion of § 1843 and §§ 1841-49 of Brown Commission, in order to leave the control of prostitution to the states, with federal enforcement only under the Assimilative Crimes Act. The possibility for abuse is always built into statutes of this nature because of the wide latitude given to police officers to deter the proscribed conduct. Any abuse usually comes from the enforcers, not the legislature. It is a necessary evil because government relies on people to enforce its laws and because people generally have insisted on proscribing this type of conduct. The statute should come into operation only when the individual's interests and expressions, judged in the light of all relevant factors, are minuscule compared to a particular public interest in preventing that expression of conduct at that time and place. This judgment can best be left to the state and city authorities.

(22) Recommendation on disorderly conduct. The Association supports all of the provisions in § 1861 of S. 1 making disorderly conduct "with intent to alarm, harass or annoy another person or in reckless disregard of the fact that another person is thereby alarmed, harassed or annoyed" an infraction, except that paragraph (a) (6) dealing with solicitation of a sexual act in a public place should be stricken. The control of such solicitation should be left to the states, with federal enforcement only under Assimilative Crimes Act provisions. The Association does not support §§ 1843(b) and 1861 (1) (f) of Brown Commission, which (with some differences from § 1861(a) (6) of S. 1) would create a preemptive federal offense of such solicitation, with the same federal jurisdiction as in §§ 1841-49 of Brown Commission, discussed in (23) above, on prostitution.

Comment. We believe that the definition and control of solicitation of a sexual act in federal enclaves should also be left to state and local law, with federal enforcement only under the Assimilative Crimes Act.

(23) Recommendation on public safety orders. One who disobeys the order of a public servant to move, disperse or refrain from specified activity in a particular place should be guilty of an infraction (not over 5 days imprisonment or $1,000 fine) if the order is, in fact, lawful and reasonably designed to protect persons and property. The Association supports § 1862 to this effect.

Comment. Section 1862 of S. 1 defines as an infraction (up to 5 days in prison and/or $1,000 fine) conduct which has three elements: (1) the knowing disobedience of an order of a public servant to move, disperse, or refrain from specified activity in a particular place, (2) if the person at least recklessly disregards the probability that the person giving the order is a public servant, and (3) if the order is, in fact, lawful and reasonably designed to protect persons or property. The provision is designed to enable law enforcement officers to quell potential breaches of peace, and in order to have general applicability, must be written with a broad scope. The inclusion of the third element of the offense appears to preclude the arbitrary or unconstitutional application of § 1862. The requirement that the order be lawful means, in the first instance, that the public servant must be authorized to give the order. See Committee Print Volume III at page 864. Further, the requirement that the order be in fact lawful should preclude its use with respect to constitutionally-protected activity, such as peaceful picketing. Since a public official cannot lawfully compel a citizen to refrain from constitutionally-protected activity, it would be a defense to prosecution under § 1862 that the defendant was engaged in such activity. We therefore approve § 1862 as not being unconstitutionally vague or restrictive. There is no similar provision in Brown Commission.

(24) Recommendation as to crimes in federal enclaves. Where there is no specific federal crime, the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, should be retained as to conduct constituting an offense created by state or local law. But the maximum penalty for any such crime should not exceed the lesser of a Class A misdemeanor (one year or $10,000 fine or both) or the maximum authorized by the state or local law. The Association supports § 209 of Brown Commission to this effect. Section 1863 of S. 1 would authorize the maximum term of imprisonment and fine authorized by the state or local law, and is, therefore, not supported.

Comment. Section 1863 of S. 1, following the present Assimilative Crimes Act, authorizes terms of imprisonment in excess of one year for assimilated offenses in federal enclaves. As all the major crimes within these enclaves are already proscribed in S. 1, we recommend that the grading of the uncovered assimilated crimes be limited to no more than a Class A misdemeanor (not over 1 year and/or $10,000 fine). This is the approach taken in § 209 of Brown Commission, which we approve on this matter.

(25) Recommendation as to crimes for which probation is excluded. ABA Standards for Probation 1.1(a) provides that the legislature should authorize the sentencing court in every case to impose a sentence of probation; exceptions to this principle "are not favored and, if made, should be limited to the most serious offenses." The Association supports the provision of § 2101(a) of S. 1 denying probation to a defendant convicted of a Class A felony; there appear to be only five of these, all carrying imprisonment for "the duration of defendant's life, or any period of time," and/or fine not over $100,000. The Association also supports § 1823(a) (1) of S. 1,

denying probation to one using a firearm or a destructive device during the commission of a crime, believing this to be a most serious crime at the present time. But the provisions of § 1811 of S. 1 denying probation to a person convicted of trafficking in or importing an opiate, or possessing four ounces or more of an opiate, are not supported, since this crime as defined in § 1811 does not appear to be one of the most serious crimes.

Comment. What are "the most serious offenses" in which the sentencing court may be authorized to deny probation under ABA Standards for Probation § 1.1(a) inevitably involves an element of subjective judgment, and may vary from time to time. The only crime for which probation may be denied in S. 1, which appears to us not to be of sufficient seriousness to warrant such denial, is the crime defined in § 1811 of trafficking or importing an opiate (as therein defined), or possessing four ounces or more of such an opiate.

(26) Recommendation as to presumption for probation. ABA Standards for Probation § 1.3(a) provides: "Probation should be the sentence unless the sentencing court finds that: (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed." The Association supports § 3101(a) of Brown Commission to this effect. Section 2102 of S. 1 does not have any such presumption in favor of probation, and is not supported.

Comment. ABA Standards for Sentencing § 2.5(c) indicates that a sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Sections 1.2 and 1.3(a) of the ABA Standards for Probation further express the Standards' preference for imposing probation in lieu of a sentence of confinement. Consequently, we approve § 3101(a) of Brown Commission, which conforms to these Standards, rather than the non-conforming provisions of § 2102 of S. 1.

(27) Recommendation as to procedures. ABA Standards for Probation §§ 5.1-5.4, provide appropriate procedures for the revocation of probation, including grounds for arrest, notice, and hearing. Neither § 2105 of S. 1 nor § 3103(4) of Brown Commission contain any such procedural safeguards, and neither section is supported.

Comment. Section 2105 of S. 1 authorizes the court to modify or enlarge the conditions of probation or revoke probation, but does not spell out any details as to how the probation revocation should proceed. On the other hand, §§ 3835-3836 detail with great particularity the procedures to be followed in parole revocation. We recommend that the detailed standards on the revocation of probation contained in §§ 5.1-5.4 of the ABA Standards for Probation be embodied in S. 1. Section 3103 (4) of Brown Commission should have a similar amendment.

(28) Recommendation as to fines. ABA Standards for Sentencing § 2.7(a) provides that except for corporations, imposition of a fine should not be authorized for a felony "unless the defendant has gained money or property through the commission of the offense." Sections 2201 and 2202(a) of S. 1, and §§ 3301-3302 of Brown Commission lack this limitation, and accordingly are not approved.

Comment. Sections 2201 and 2202(a) of S. 1 and §§ 3301-3302 of Brown Commission should not be approved, unless amended to comply with the requirement of ABA Standards for Sentencing § 2.7(a).

(29) Recommendation as to maximum terms of imprisonment. ABA Standards for Sentencing § 3.1(d) provides that "for most offenses ... the maximum authorized prison term ought not to exceed ten years except in unusual cases and normally should not exceed five years," with sentences of twenty-five years or longer "reserved for particularly serious offenses or ... for certain particularly dangerous offenders." Section 2.5(b) (i) would allow such special terms for particularly dangerous offenders and the professional criminal only if "accompanied by a substantial and general reduction of the terms available for most offenders." The Association supports the provisions for extended prison terms for these offenders in § 2302(b) of S. 1, with an amendment to § 2301(b) to lower the authorized prison terms, (as required by the ABA Standards) by reducing the number of Class A, B and C felonies carrying maximum prison terms of life (or any period of time), 30 and 15 years respectively, and of Class D felonies carrying a maximum prison term of 7 years. With these amendments, the Association supports §§ 2301 and 2302 of S. 1, believing that the provisions of §§ 2301(d) and 2302(c) authorizing the court by affirmative action to impose limited terms of parole ineligibility substantially conform to the requirements of ABA Standards for Sentencing § 3.2. The procedures for imposing such a term of parole ineligibility in § 2302(c) do not in all respects conform to ABA Standards 3.2, since they leave it to the court to decide whether to waive a pre-sentence report under § 2002(c), or require an examination of the defendant's mental, emotional and physical condition under Rule 32 of Federal Rules of Criminal Procedure and § 2002(c); they do not direct the court first to consider whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term; and they allow the court to impose such a sentence of parole ineligibility under § 2302(c) on the basis of some factors other than "after a finding that confinement for a minimum term is necessary in order to protect the public from further criminal conduct by the defendant." But these differences are not regarded as sufficiently substantial to bar support of §§ 2301 and 2302 of S. 1, with the above amendments.

Comment. With amendments lowering the authorized prison terms in § 230[illegible] (b) of S. 1 so that they would not exceed 10 years except in unusual cases,

and normally should not exceed 5 years, we support the extended prison terms for particularly dangerous offenders and professional criminals in § 2302(b) of S. 1, believing that they substantially conform to the requirements of §§ 2.5(b) and 3.1 of the ABA Standards for Sentencing. As noted in our Recommendation (31) above, there are some differences with regard to procedures for imposing limited terms of parole ineligibility, but we believe that these purely procedural differences should not bar support of §§ 2301 and 2302 of S. 1, with the proposed amendments.

(30) Recommendation as to additional parole term and contingent prison term on parole revocation. A parole term (proportionate to the maximum prison term for each class of crime) should also be added to each prison sentence. The Association supports § 2303(a) of S. 1 authorizing such a separate term of parole on release, amended to provide such a proportionate parole term on release, in place of the five-year maximum provided in § 3834(b). The Association also supports the contingent additional term of imprisonment of 1 year for a felony and 90 days for a Class A misdemeanor, to be served upon parole revocation, if the balance remaining unserved of the original prison term is less than those periods, provided in § 2303(b) of S. 1.

Comment. We believe a parole term after release should be served by every prisoner, even if he has served the full term of his original sentence, in order to help in his transition from prison to the community. If such an additional parole term is to be meaningful, some additional imprisonment must be provided upon parole revocation. Since these contingent terms are provided in the law in force at the time of the commission of the offense, we see no constitutional problems in these provisions. With an amendment to make the length of the additional parole term proportionate to the maximum prison term imposable for each class of crime, we approve § 2303(a) and (b) of S. 1.

(31) Recommendation as to consecutive sentences. ABA Standards for Sentencing § 3.4 provides that "consecutive sentences are rarely appropriate," and contains detailed procedural safeguards before they can be imposed. While § 3204 of the Brown Commission comes closer to meeting these requirements than § 2304 of S. 1, neither section is in full conformity with the ABA Standards on this matter, and neither section is supported.

Comment. Section 2304 of S. 1 and § 3204 of Brown Commission both need to be amended, to conform to the policy embodied in the ABA Standards, which contain important procedural requirements for the imposition of consecutive sentences, and serious limitations upon their aggregate length. See also our Recommendation (16), which would proscribe consecutive or multiple sentences where one offense consists only of a conspiracy, attempt or solicitation to commit the other.

(32) Recommendation as to good time allowance. The present provisions for reduction of prison terms for good behavior while in prison should be retained.

They contribute to orderly prison administration, and can substantially reduce long sentences. As neither S. 1 nor Brown Commission contain any such provisions, their omission is not supported.

Comment. For reasons not made clear to us, neither S. 1 nor Brown Commission have any provisions for reduction of prison terms for good behavior in prison. We are not prepared to approve these omissions, on the basis of any facts known to us.

(33) Recommendation as to the death penalty. The Association takes no action either to support or to oppose the provisions for the death penalty for murder in §§ 2401, 2403, 3726, and 3841-42 of S. 1 and §§ 3601-4 of Brown Commission, since there are cases before the Supreme Court involving the constitutionality of the death penalty, and of procedures for its imposition. Until the opinions in these cases are studied, it is not possible to forecast what issues will remain for consideration.

Comment. Until there has been time to study the decisions of the Supreme Court in the 1974-75 term on the constitutionality of the death penalty and of procedures for its imposition, we are not prepared to recommend action by the House of Delegates either to support or to oppose the provisions for the death penalty in §§ 2401-2403, 3726 and 3841-42 of S. 1 and §§ 3601-4 of Brown Commission.

(34) Recommendation as to arrest of probationers. ABA Standards for Probation, § 5.2(b), provides: "Probation officers should not be authorized to arrest probationers." Section 3016 of S. 1 permits arrest of a probationer by an officer of the Federal Probation Service, and Brown Commission appears to have no provision on the matter. Neither draft is supported on this matter.

Comment. We believe the effectiveness of probation officers in their personal relationship with probationers will be increased if they are not given the power to arrest for violation of the terms of probation.

(35) Recommendation on pretrial release. Pretrial release provisions should be enacted which conform to ABA Standards for Pretrial Release. Sections 3502-3504 of S. 1, which restate the present law on this subject, lack the ABA Standards provisions in §§ 1.2(c) and 5.1 making the posting of monetary bail the course of last resort; in § 5.4 prohibiting the use of compensated sureties; in § 5.6 relating to conditions of release; in § 5.8 on revocation of release after commission of a serious crime while awaiting trial; in § 5.10 on accelerated trial for detained defendants; and in § 5.11 on prejudice at trial or sentence based on pretrial detention. The Brown Commission has no such provisions. Neither draft is supported on this matter. Note, however, that while §§ 3502-04 of S. 1 make no provision for forfeiture of monetary bail and its collection, the matter is dealt with at page 362 of S. 1 in Rule 46(e) of the Federal Rules of Criminal Procedure, which are reenacted in S. 1.