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MODEL DEFENSE OF NEEDY PERSONS ACT

REED DICKERSON*

Recent decisions of the Supreme Court have expanded the duty of the states to provide counsel for defendants in criminal cases. The following statute seeks to set up a workable system of assuring the accused the assistance of counsel early in the proceedings against him and, if necessary, at no cost.

PREFATORY NOTE

The interest of the National Conference of Commissioners on Uniform State Laws in needy persons accused of crime existed long before the recent case of *Gideon v. Wainwright*.[1] In 1959, the Conference adopted a Model Defender Act based on careful study and close cooperation with the National Legal Aid and Defender Association, the Standing Committee on Legal Aid Work of the American Bar Association, and the Section on Criminal Law of the Association. The Special Committee that prepared that Model Act was then discharged.

Further study, made in the new light cast by recent Supreme Court decisions, suggested the advisability of re-evaluating the earlier work of the Conference. Accordingly, a Special Committee to Review the Model Defender Act was created by action of the Executive Committee at the 1963 Annual Meeting. The Model Defender Act of 1959 was withdrawn until an appropriate revision could be approved. An entirely new Model Act resulted.

In carrying out its functions, the Committee was guided by the views expressed by the Supreme Court in *Gideon*, in *Escobedo v. Illinois*,[2] in *Miranda v. Arizona*,[3] and in other cases. Through-

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1. 372 U.S. 335 (1963).
2. 378 U.S. 478 (1964).
3. 384 U.S. 436 (1966).

out, the objective was to assure fair treatment for the needy defendant within the bounds of what is administratively practicable.

In general terms, *Gideon v. Wainwright* gave the needy criminal defendant the same right to legal representation in a State court under the 14th amendment (whether "equal protection" or "due process") that the 6th amendment gives to criminal defendants in federal courts.[4] The minimum requirements of representation, therefore, are to be found not only in the express assurances made in *Gideon* itself but also in what the court had previously found to be required of federal proceedings under the 6th amendment.

According to the majority opinion, written by Mr. Justice Black, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[5] Representation is assured "unless the right is competently and intelligently waived" (citing *Johnson v. Zerbst,*[6] the first case to extend the right to counsel to needy persons). At the same time, in *Douglas v. California,*[7] the Court extended the needy person's right to counsel to include at least his first appeal.

As for the necessary expenses of defense other than the services of an attorney, the Supreme Court, in *Griffin v. Illinois*[8] and *Draper v. Washington,*[9] has already assured the needy defendant in a federal criminal case the right to a free transcript (or its equivalent) on appeal.

The criminal defendant's right to counsel covers every critical stage of the proceedings against him. It includes arraignment[10] and preliminary hearing.[11] In *Escobedo* the Supreme Court held that, under some circumstances at least, a person under arrest for murder has a constitutional right to the presence of counsel while the police interrogate him as a suspect.[12] Accordingly, it threw out a confession obtained while the counsel retained by the accused was excluded from the interrogation. On the basis of *Gideon* and *Escobedo,* it seemed likely that the

4. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the Assistance of Counsel for his defence."
5. 372 U.S. at 344.
6. 304 U.S. 458 (1938).
7. 372 U.S. 353 (1963).
8. 351 U.S. 12 (1956).
9. 372 U.S. 487 (1963).
10. Walton v. Arkansas, 371 U.S. 28 (1962).
11. White v. Maryland, 373 U.S. 59 (1963).
12. 378 U.S. at 492.

Supreme Court would extend the same protection to needy suspects.

In *Miranda* the Supreme Court held that once a person (in that case, a needy person) had been taken into custody by the police no confession, admission, or exculpatory statement made outside the presence of counsel could be used against him, unless, after being fully informed as to his rights, he had waived his right to counsel voluntarily, knowingly, and intelligently.[13]

From these cases, it has seemed clear that:

(1) the Supreme Court has extended to state cases the protections that it provides in federal cases;
(2) it has extended to needy persons the protections that it provides to persons of adequate means;
(3) it has made the right to counsel absolute and not dependent on particular circumstances or, except in some respects for petty offenses, on the nature of the crime;
(4) it is interested in the suspect from the moment he is taken into custody or comes into court to plead; and
(5) it is tending to extend its protection of needy persons to all aspects of an "adequate defense," including necessary facilities for investigation and trial.

The approach of the new Model Act is not to define the exact limits of the right to an adequate defense, but to provide that, whatever the Supreme Court says it consists of for persons of adequate means, the needy person is entitled to the same protection and that, to the extent that he is unable to pay for it, he is entitled to have it paid for by the state.

Also, there has been no attempt in it to codify the other aspects of a constitutionally adequate criminal procedure. For instance, the act says nothing about the suspect's right to remain silent, or his right to bail. It is confined to equipping the needy person with necessary defensive facilities. Lest anyone read a negative implication into this limited coverage, section 16 has been included to prevent one from arising. As a model, rather than uniform, act it is designed for the typical state and seeks only as much uniformity as is consistent with local conditions. Matters most likely to vary from state to state are in brackets.

In its particulars, the Model Act follows, for the most part, the recommendations resulting from three thorough studies, one by a special committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender

13. 384 U.S. at 478-79.

Association;[14] one by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice;[15] and one by Lee Silverstein for the American Bar Foundation.[16] The act also meets the specific standards respectively promulgated by the special committee of the Association of the Bar of the City of New York,[17] the National Legal Aid and Defender Association,[18] and the Special Committee on Defense of Indigent Persons Accused of Crime of the American Bar Association,[19] all as approved by the House of Delegates of the American Bar Association.[20] Consideration was also given to the Criminal Justice Act of 1964[21] and to the tentative proposals of the American Law Institute respecting pre-arraignment procedure.[22]

MODEL DEFENSE OF NEEDY PERSONS ACT

SECTION 1. [*Definitions.*]

In this Act, the term:

(1) "detain" means to have in custody or otherwise deprive of freedom of action;

(2) "expenses," when used with reference to representation under this Act, includes the expenses of investigation, other preparation and trial;

(3) "needy person" means a person who at the time his need is determined is unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of representation;

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14. ASS'N. OF THE BAR OF THE CITY OF NEW YORK & NAT'L. LEGAL AID AND DEFENDER ASS'N., EQUAL JUSTICE FOR THE ACCUSED (1959).

15. U.S. ATT'Y. GEN., REPORT OF THE COMM. ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963). Although directed to the federal courts, this report is similarly pertinent to state courts.

16. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS — A PRELIMINARY SUMMARY (1964).

17. ASS'N. OF THE BAR OF THE CITY OF NEW YORK & NAT'L. LEGAL AID & DEFENDER ASS'N., EQUAL JUSTICE FOR THE ACCUSED 56. See also forthcoming ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, COMM. ON THE PROSECUTION AND DEFENSE FUNCTIONS REP., app. A [hereinafter cited as ABA PROJECT].

18. ABA, GUIDELINES FOR ADEQUATE DEFENSE SYSTEMS 8 (1964). See also ABA PROJECT, *op. cit. supra* note 17, app. B.

19. ABA, SPECIAL COMM. ON DEFENSE OF INDIGENT PERSONS ACCUSED OF CRIME JOINTLY WITH STANDING COMM. ON LEGAL AID WORK REP., 88 A.B.A. REP. 225 (1963). See also ABA PROJECT, *op. cit. supra* note 17, app. C.

20. ABA, 1963 HOUSE OF DELEGATES PROCEEDINGS, 88 A.B.A. REP. 109-10 (1963). See also ABA PROJECT, *op. cit. supra* note 17, apps. A-C.

21. 78 Stat. 552, 18 U.S.C. § 3006A (1964).

22. ALI, Model Code of Pre-Arraignment Procedure (Tent. Draft No. 1, 1966).

(4) "serious crime" includes:

(i) a felony;

(ii) a misdemeanor or offense any penalty for which includes the possibility of confinement [for 6 months or more] or a fine of $[500] or more; and

(iii) an act that, but for the age of the person involved, would otherwise be a serious crime.

COMMENT: The term "detain" is defined in terms, drawn from *Miranda v. Arizona*,[23] that make it clear that the act in this respect is co-extensive with the Constitutional requirements respecting the kind of situation in which the needy person is entitled to be represented by counsel.

The term "expenses" is given a partial ("includes") rather than an exhaustive ("means") definition because it is necessary only to make clear that preparation and trial are an integral part of adequate representation.

The term "needy person" is defined to make clear that partial need and supervening need are also included. "Undue hardship," not being susceptible to precise definition, is left to the sound judgment of the court. Minor hardship is no reason for providing relief; unreasonable hardship is. The term "indigent" is not used, because it would suggest that only a destitute person was entitled to free counsel or services.

The term "serious crime" is defined along the lines of Mr. Justice Harlan's concurrence in *Gideon*,[24] which left open the question whether counsel was required in the case of petty offenses. The Criminal Justice Act of 1964 excepts "petty offenses,"[25] which are defined by federal statute as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both."[26] Although *Miranda v. Arizona* recognizes no exception for petty offenses, that case did not deal with the broad right to counsel but only with the conditions precedent to the admissibility of a confession, admission, or exculpatory statement.

Although the standards approved by the House of Delegates of the American Bar Association[27] recommend that confinement for any period be considered "serious," a bracketed limitation to confinements "for 6 months or more" is included because of the differences in opinion as to whether protection should be extended to what the Criminal Justice Act of 1964 treats as a petty crime. The Supreme Court has not yet clarified the matter. In the meantime, it is believed that, if a time limitation is used to define the minimum confinement necessary to constitute a "serious crime," a period longer than 6 months would clearly be excessive.

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23. 384 U.S. at 477.
24. 372 U.S. at 351 (Mr. Justice Harlan, J. concurring).
25. 78 Stat. 552, 18 U.S.C. § 3006A(b) (1964).
26. 62 Stat. 684 (1948), 18 U.S.C. § 1 (1964).
27. *Supra* note 20.

Through the use of the word "includes," the term "serious crime" is given a partial definition to provide judicial flexibility in any case where the court believes that special circumstances make the crime serious in fact even though the legal penalties do not meet the specific criteria of this clause.

SECTION 2. [*Right to Representation, Services, and Facilities.*]

(a) A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

(1) to be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation).

The attorney, services and facilities, and court costs shall be provided at public expense to the extent that the person, at the time the court detemines need, is unable to provide for their payment without undue hardship.

(b) A needy person who is entitled to be represented by an attorney under subsection (a) is entitled:

(1) to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation or parole;

(2) to be represented in any appeal; and

(3) to be represented in any other post-conviction proceeding that the attorney or the needy person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.

(c) A needy person's right to a benefit under subsection (a) or (b) is not affected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

COMMENT: This section defines the right to representation generally. Although *Miranda v. Arizona* defined only the earliest time when the presence of counsel became a condition precedent to the admissibility of a

confession, admission, or exculpatory statement, that time being the moment the suspect is taken into custody, it is believed that this occasion also represents the time the right to counsel will be held generally to attach.

If the accused is formally charged before he is taken into custody, the right to counsel is assured even though no confession, admission, or exculpatory statement has been made. Counsel is necessary, for example, if the accused wishes to plead guilty.[28] Arraignment is a critical stage because some defenses and pleas in abatement would be waived unless asserted at that point.[29] There is a strong consensus among judges, prosecutors, and defense counsel that appointment of counsel at the earliest possible stage is the most critical aspect of providing valuable and effective representation.

The section does not undertake to spell out all the circumstances in which a criminal defendant is entitled to counsel. It provides only that, whenever a man of adequate means is legally entitled to counsel, the needy person is likewise entitled to counsel. "Legally entitled" is intended to mean "under the law," whether constitution, statute, regulation, or ordinance.

The section also makes clear that the criminal defendant is entitled to all the necessary elements of adequate representation.

The section provides that relief is to be given only to the extent of the need; under section 4(c) the accused must contribute as much as he reasonably can. It also allows for relief in the case of supervening need or change of mind about a previous waiver.

The words "at the time the court determines need" are included in subsection (a) to take care of the case where there is a significant change in the defendant's financial condition between the time he receives legal assistance and his first appearance in court (*i.e.,* when need is determined under section 4). If he is not needy when he receives assistance but is needy at the time of determination, there is no point in requiring him to pay what he is then unable to pay. (If he later becomes able to pay, he can be required to do so under section 8(a)). Conversely, if he is needy when he receives assistance but can pay at the time of determination, he should be required to pay. (If he does not pay then, he will have to pay later under section 8(b)). The same analysis applies where the change in financial condition is one only of degree.

Clause (1) of subsection (b) follows the theme of *Gideon v. Wainwright*: the needy accused has rights of representation co-extensive with those of a person with adequate means.

Clause (2) makes clear that the right to counsel on appeal is absolute. This complies with *Douglas v. California.*

Clause (3) provides that the right to counsel in any other post-conviction proceeding attaches unless it is found to be frivolous. It also spells out what constitutes frivolity.

28. White v. Maryland, 373 U.S. 59 (1963).
29. Hamilton v. Alabama, 368 U.S. 52 (1961).

SECTION 3. [*Notice and Provision of Representation.*]

(a) If a person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court upon formal charge, as the case may be, shall:

(1) clearly inform him of the right of a needy person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the public defender, non-profit organization, or trial court concerned, as the case may be, that he is not so represented.

As used in this subsection, the term "commencement of detention" includes the taking into custody of a probationer or parolee.

(b) Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

(c) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the public defender, notify the non-profit organization, or assign an attorney, as the case may be.

(d) Upon notification or assignment under this section, the public defender, non-profit organization, or assigned attorney, as the case may be, shall represent the person with respect to whom the notification or assignment is made.

(e) Information given to a person under this section is effective only if:

(1) it is in writing or otherwise recorded;

(2) he records his acknowledgment of receipt and time of receipt, or, if he refuses to make this acknowledgment, the person giving the information records that he gave the information and that the person informed refused so to acknowledge it; and

(3) the material so recorded under clauses (1) and (2) is filed with the court next concerned.

COMMENT: One of the most critical elements in the adequate protection of a needy accused is adequate notice of his legal rights respecting counsel and representation. The section attempts to insure that adequate information will be given him at the earliest possible moment and at each critical stage thereafter.

When the accused does not have an attorney, the section sets the wheels in motion for representation by providing for notification of the operating defender agency, which is required to act upon receiving notice.

Before the accused's first appearance in court, the right to representation does not depend on a finding that the accused is a "needy person". It is enough that he does not have an attorney. At this stage, time is a critical factor. Equally important, the determination of need is best made by a judge. It should not be made by the police or by a defender. Determination by the police would impose on them an unnecessary and undesirable burden. It would also risk undesirable delay at a stage when time may be of the essence.

If it is later found that the accused was not a needy person, he may be required to pay under section 4(c) or under section 8(a).

SECTION 4. [*Determination of Financial Need.*]

(a) The determination of whether a person covered by Section 2 is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under Section 8, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

(b) In determining whether a person is a needy person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person, subject to the penalties for perjury, shall certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

(c) To the extent that a person covered by Section 2 is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order him to provide for their payment.

COMMENT: For reasons given under section 3, the determination of need is left to the cognizant court. This does not create a gap in needed protection, because under section 3(d) the right to an attorney arises as soon as the defender is notified or assigned.

A special provision on bail is inserted in subsection (b) because in some jurisdictions the ability to post bond has been held to negate eligibility for counsel at public expense. Such a position fails to recognize that bail may have been provided as an accommodation by someone not legally obligated to provide counsel to the accused.

To reduce the incidence of misrepresentation, the alleged needy person is required by subsection (b) to certify, subject to the penalties for perjury, such facts as the court considers appropriate under the circumstances. This process need not be elaborate if the need is fairly evident, as, for example, where the accused is already on public relief.

SECTION 5. [*Competence to Defend.*]

No person may be given the primary responsibility of representing a needy person unless he is authorized to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime. Competence shall be determined by the court at the first court proceeding after the giving of primary responsibility.

COMMENT: It is clear from the cases that, where the accused is entitled to be represented by counsel, he is entitled to be represented by competent counsel. "Competent counsel" does not mean the best counsel, but only counsel meeting the minimum requirements of an adequate representation in a criminal case. The attorney must be a member of the bar with some background in criminal law, but he need not be an expert. Although a law student is believed not to meet the minimum qualifications for handling serious crimes, he is not precluded from assisting qualified counsel in the case of a serious crime. Nor is he precluded from having the primary responsibility for handling a non-serious criminal case, which is not covered by this act. An assigned counsel system should be based on a roster of experienced trial advocates.

Persons "authorized to practice law in this state" include not only persons who are licensed by the state but persons licensed by other states who by court order or otherwise are authorized to practice in the state.

As with the determination of need, determination of competence is left to the cognizant court.

SECTION 6. [*Substitute Defender.*]

At any stage, including appeal or other post-conviction proceeding, the court concerned may for good cause assign a substitute attorney. The substitute attorney has the same functions with respect to the needy person as the attorney for whom he is substituted. If the substitute attorney is not in the office of the

public defender nor in a non-profit organization serving under this Act, the court shall prescribe reasonable compensation for him and approve the expenses necessarily incurred by him in the defense of the needy person.

COMMENT: This section is largely self-explanatory. Regardless of which plan the county selects under section 10, each substitution is to be by court assignment. This system will protect the defendant while remaining flexible enough to meet any need to substitute, regardless of source.

SECTION 7. [*Waiver.*]

A person who has been appropriately informed under Section 3 may waive in writing, or by other record, any right provided by this Act, if the court concerned, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education, and familiarity with English, and the complexity of the crime involved.

COMMENT: Although the right to waive a right is well recognized, it is important that a waiver of so basic a right as the right to counsel be recognized as valid only where it is clear that the accused knows the significance and consequences of his act. Hence the requirement that the waiver be done voluntarily, competently and intelligently.[30]

To make sure that an adequate foundation for a waiver is laid, the act requires that the accused be adequately informed of his rights respecting representation. The requirement that it be written or otherwise recorded not only provides evidence of the act but makes clear that the mere absence of a request for counsel, or a plea of guilty, cannot be construed as a waiver.[31]

The phrase "and if the waiver is otherwise according to law" is included because some states have adopted additional safeguards.

The last sentence is intended to make more uniform the widely varying waiver practices among the states.

SECTION 8. [*Recovery from Defendant.*]

(a) The [county] attorney may, on behalf of the [county], recover payment or reimbursement, as the case may be, from

30. Miranda v. Arizona, 384 U.S. at 478-79.

31. *See* Doughty v. Maxwell, 372 U.S. 781 (1963); William v. Kaiser, 323 U.S. 471 (1945).

each person who has received legal assistance or another benefit under this Act:

(1) to which he was not entitled;

(2) with respect to which he was not a needy person when he received it; or

(3) with respect to which he has failed to make the certification required by Section 4 (b);

and for which he refuses to pay or reimburse. Suit must be brought within 6 years after the date on which the aid was received.

(b) The [county] attorney, on behalf of the [county], may recover payment or reimbursement, as the case may be, from each person, other than a person covered by subsection (a), who has received legal assistance under this Act and who, on the date on which suit is brought, is financially able to pay or reimburse the county for it according to the standards of ability to pay applicable under Sections 1 (3), and 2 (a), and 4 (b), but refuses to do so. Suit must be brought within 3 years after the date on which the benefit was received.

(c) Amounts recovered under this section shall be paid into the [county] general fund, except that so far as they represent money provided by the state under Section 12, they shall be paid into the [general fund] of the state.

COMMENT: A recapture provision is included as subsection (a) for three purposes: (1) to discourage misrepresentation; (2) to provide for repayment where legal services were provided, under section 3(d), to a person who, upon subsequent court determination, is found not to have been a needy person; and (3) to avoid unnecessary costs to the county or state.

Clause (2) covers the special case where a person with adequate means but without an attorney was provided with an attorney, but for some reason was not required to pay for his services at the time the court made its determination of need under section 2(a). Clause (1) is inadequate for this purpose because before his first appearance in court an accused who does not have an attorney is entitled to one under section 3(d), whether he can pay or not.

A reimbursement provision is included as subsection (b) to avoid unnecessary costs to the county or state, where within a reasonable time the dependent becomes able to pay.

Statutes of limitation of 6 years and 3 years, respectively, are included.

SECTION 9. [*Choice of Local Program.*]

(a) The [appropriate legislative authority] of each [county] shall provide for the representation of needy persons who with respect to serious crimes are subject to proceedings in the [county], or are detained in the [county] by law enforcement officers. They shall provide this representation by:

(1) establishing and maintaining an office of public defender;

(2) arranging with an appropriate non-profit organization to provide attorneys;

(3) arranging with the courts of criminal jurisdiction in the [county] to assign attorneys on an equitable basis through a systematic, coordinated plan and, if the [county] has a population of more than [400,000] according to the most recent decennial census, under the guidance of an administrator; or

(4) adopting a combination of these alternatives.

Until the [appropriate legislative authority] elects an alternative, it shall be considered as having elected alternative (3).

(b) If it elects to arrange with a non-profit organization to provide attorneys, the [appropriate legislative authority] of a [county] may join with one or more other [counties] in arranging with such an organization.

(c) If it elects to establish and maintain an office of public defender, and if the [appropriate legislative authorities] and [county courts of general jurisdiction] concerned respectively agree on qualifications, term of office, compensation, support, and appointment under Section 10(a), the [appropriate legislative authority] of a [county] may join with the [appropriate legislative authorities] of one or more other [counties] to establish and maintain a joint office of public defender. In that case, the participating [counties] shall be treated for the purposes of this Act as if they were one [county].

(d) If the [appropriate legislative authority] of a [county] elects to arrange with the courts of criminal jurisdiction in the [county] to assign attorneys, a court of the [county] may provide for advance assignment of attorneys, subject to later approval by it, to facilitate representation in matters arising before appearance in court.

COMMENT: The section reflects the unanimous agreement among those who have studied the subject that no single kind of administrative system for providing attorneys is best adapted to all localities. Accordingly, the local governmental unit is authorized to provide for representation by (1) a public defender system, which is well adapted to the more heavily populated areas; (2) a legal aid or other private non-profit group; (3) a program of court-assigned attorneys, which is well adapted to the more lightly populated areas; or (4) any combination of these. The section also authorizes a group of local units to join in a combined program suitable to their common needs. This would permit, for example, two counties that could not otherwise support a full-time public defender to have one.

If the local unit of government selects a court-assigned attorney system, the persons administering it are required to spread the responsibility equitably among the available eligible attorneys and to adopt a coordinated system. This is intended to avoid the haphazard and inequitable aspects of many existing programs.

In areas with large populations it has been found desirable to operate a court-assignment system under the guidance of an administrator. Subsection (a)(3) so requires.

Lest the purposes of the act be defeated through a failure of the local unit to act, it provides that, until an alternative is elected, a court-assignment system is in effect.

Subsection (d) is included to help adapt the usual court-assigned attorney system to the need to provide counsel during police interrogation before appearance in court.

SECTION 10. [*Compensation, Expenses, Term of Office, and Appointment.*]

(a) If the [appropriate legislative authority] of a [county] elects to establish and maintain an office of public defender, the [appropriate legislative authority] shall:

(1) prescribe the qualifications of the public defender, his term of office (which may not be less than 6 years), and his rate of annual compensation (which may not be less than $............. a year and not proportionately less than that of the [county prosecutor]); and

(2) provide for the establishment, maintenance, and support of his office.

The [county court of general criminal jurisdiction] shall appoint the public defender from a panel of not more than 5 and not fewer than 3 persons (if that many are available) designated by a committee of lawyers appointed by the senior judge of that [county] court, or from the candidates making the 3 or less

highest scores on an appropriate merit-system examination. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime. During his incumbency, the public defender may not engage in the practice of criminal law other than in the discharge of the duties of his office.

(b) If the [appropriate legislative authority] of a [county] elects to arrange with a non-profit organization to provide defenders, the [county] shall reimburse the organization for such direct expenses as the courts respectively concerned have determined to be necessary in the representation of needy persons under this Act.

(c) If a court assigns an attorney to represent a needy person, it shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. The county shall pay the attorney the amounts so prescribed.

(d) An attorney under subsection (b) or (c) shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations. [However, he may be compensated at a rate no higher than $15 an hour for time spent in court and no higher than $10 an hour for time spent out of court, subject in each case to a maximum total fee of $500 in case of a felony and $300 in any other case, unless the court concerned finds that special circumstances warrant a higher total fee.]

COMMENT: Where the local unit of government elects to establish an office of public defender, this section attempts to insure that the incumbent will have adequate tenure and be paid as much as the local prosecutor. (The word "proportionately" is used because the public defender may be on a full-time basis while the public prosecutor is on a part-time basis.) A term of office of less than 6 years would provide insufficient security to attract career personnel and insufficient opportunity for breadth and depth of experience. Two alternative methods of selection, each designed to increase the chances of attracting high quality professional defenders, are provided. If a merit-system examination is considered undesirable, appointment from a panel selected by representatives of the bar is available as an alternative.

Although a full-time public defender is usually desirable, it is not always feasible to provide one. Accordingly, the prohibition against practicing law on the side is limited to the practice of criminal law.

For court-appointed attorneys, a liberal maximum fee is desirable to allow the court some flexibility in reflecting the variations in complexity among differing cases. An overriding maximum assures the public that its resources are not being distributed too liberally. Although the specific figures named in the act were drawn from the Criminal Justice Act of 1964,[32] they are only suggested. Local conditions may make other figures more appropriate.

If a legal aid or defender organization has been selected, any possibility of exorbitant legal fees can be dealt with through the court's power, under subsection (d), to determine the necessary direct expenses for which the organization is entitled to be reimbursed.

SECTION 11. [*Personnel and Facilities.*]

(a) If an office of public defender has been established, the public defender may employ, in the manner and at the compensation prescribed by the [appropriate legislative authority], as many assistant public defenders, clerks, investigators, stenographers, and other persons as the [appropriate legislative authority] considers necessary for carrying out his responsibilities under this Act. A person employed under this section serves at the pleasure of the public defender, unless his position is under a civil service system in which he may be removed only for cause.

(b) If an office of public defender has been established, the [appropriate legislative authority] shall:

(1) provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in the jail) necessary for carrying out the public defender's responsibilities under this Act; or

(2) grant the public defender an allowance in place of those facilities.

(c) A defending attorney is entitled to use the same state facilities for the evaluation of evidence as are available to the [county prosecutor]. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the [county].

COMMENT: Subsections (a) and (b) are intended to make sure that a public defender is adequately equipped to meet his responsibilities under the act. Consistently with the state's civil service system, he should have full control of his personnel.

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32. 78 Stat. 553, 18 U.S.C. § 3006A(d) (1964).

Subsection (c) is intended to equalize, so far as possible, the facilities available to the prosecutor and the defender, regardless of the defender system under which the local unit of government is operating.

SECTION 12. [*Financing of Local Program.*]

(a) The [appropriate legislative authority] of each [county] shall annually appropriate enough money to administer the program of representation that it has elected under Section 9. If in any fiscal year the payments made by the [county] under Section 10 are greater than .... per cent of its annual budget, the state shall reimburse the [county] for the amount of the excess out of the [general fund] of the state.

(b) If the [appropriate legislative authority] of a [county] elects to establish and maintain an office of public defender, the [county] may accept private contributions toward the support of his office.

COMMENT: Subsection (a) provides for the local financing of the existing defender program, with provision for state underwriting of the excess in situations where the aggregate financial burden on the particular governmental unit becomes disproportionately large.

Subsection (b) is intended to ease the financial burden of maintaining an office of public defender.

SECTION 13. [*Allocation of Expenses.*]

(a) Subject to Section 12, any direct expense, including the cost of a transcript [or bystander's bill of exceptions or other substitute for a transcript] that is necessarily incurred in representing a needy person under this Act, is a [county] charge against the [county] on behalf of which the service is performed.

(b) If 2 or more [counties] jointly establish an office of public defender, the expenses not otherwise allocable among the participating [counties] under subsection (a) shall be allocated, unless the [counties] otherwise agree, on the basis of population according to the most recent decennial census.

COMMENT: Subsection (a), in recognizing that the necessary expenses of defense are not confined to the personal services of an attorney, takes its cue from *Griffin v. Illinois*,[33] and *Draper v. Washington*.[34] These

33. 351 U.S. 12 (1956).
34. 372 U.S. 487 (1963).

cases assure the needy defendant the right to a free transcript (or its equivalent) on appeal. A few states use a bystander's bill of exceptions or other substitute for a transcript.[35]

Subsection (b) allocates expenses between counties on the basis of their respective abilities to pay. An alternative approach would be to allocate them on the basis of the respective number of cases handled. Even this index would tend to follow the distribution of population.

SECTION 14. [*Records and Reports.*]

(a) A defending attorney shall keep appropriate records respecting each needy person whom he represents under this Act.

(b) The public defender, non-profit organization, or person administering a court-assigned defender plan, as the case may be, shall submit an annual report to the [appropriate legislative authority] showing the number of persons represented under this Act, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in carrying out the responsibilities imposed by this Act. A copy of the report shall also be submitted to each court having criminal jurisdiction in the [counties] that the program serves.

COMMENT: The sound administration of any defender plan depends on keeping adequate records and reports.

SECTION 15. [*Representation in State and Federal Courts.*]

This Act applies only to representation in the courts of this state, except that it does not prohibit a defending attorney from representing a needy person in a Federal court of the United States, if:

(1) the matter arises out of or is related to an action pending or recently pending in a court of criminal jurisdiction of the state; or

(2) representation is under a plan of the United States District Court as required by the Criminal Justice Act of 1964 (18 U.S.C. 3006A) and is approved by the [appropriate legislative authority].

COMMENT: In view of the establishment in the Criminal Justice Act of 1964 of a defender program for the Federal courts, it seems desira-

35. *E.g.*, ILL. APP. CT. (CRIM.)R. 2 (intermediate appellate review only); KY. R. CRIM. P. 12.63 (in forma pauperis), 12.70 (bystander's bill), & 12.72 (agreed statement); TEX. CODE CRIM. PROC. art. 40.09 (1966).

ble that a unified defender system be permitted to operate in both state and Federal courts if the arrangement meets the approval of both the Federal court and the local legislative authority.[36] Such a program is believed to be economically expedient and practically sound.

The term "defending attorney" is believed to be broad enough to include a public defender under section 9(a)(1).

SECTION 16. [*Protections not Exclusive.*]

The protections provided by this Act do not exclude any protection or sanction that the law otherwise provides.

COMMENT: The section is included to preclude any negative implication that might otherwise arise by reason of the fact that the act does not deal with rights of the accused other than those involved in providing adequate representation and the other elements of an adequate defense. No inference, for example, is to be drawn from the fact that the act says nothing about the accused's right to remain silent or his right to bail.

SECTION 17. [*Severability.*]

If a provision, or an application of a provision, of this Act is held invalid, the valid provisions and applications that can be given effect without the invalid provision or application are intended to be in effect. To this end, the provisions of this Act are severable.

SECTION 18. [*Repeal.*]

The following acts and parts of acts are repealed:

(1)
(2)
(3)

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36. Currently several defender offices, including those in New York, Philadelphia, Cleveland, and Kansas City, are operating in both court systems.

EAVESDROPPING AND ELECTRONIC SURVEILLANCE: AN APPROACH FOR A STATE LEGISLATURE

JAMES B. SWIRE*

New electronic devices make the balance achieved between the right of privacy and the need for thorough police investigation harder to maintain. In a proposed statute the author seeks an accommodation of these competing interests.

I. INTRODUCTION

In 1952, Alan Westin wrote:[1]

> Weighing the individual's right to privacy against the need for effective detection of criminals, we are met with the kind of conflict of values which characterizes many areas of our law and our social organization. In the case of wire tapping, however, this competition of social interests has resulted in a dangerous stalemate — a failure to find a workable adjustment . . . .

Today that stalemate continues, made even more dangerous by the increased efficiency, availability and use of electronic eavesdropping devices which supplement the older wiretapping instruments.

This paper will deal primarily with the problems which arise when a state legislature is confronted with this issue and seeks its solution. Although the crucial issue concerns the use of eavesdropping devices by law enforcement officials, attention will be given to the correlative problem of their use by private persons. Our focus of this latter problem will be found principally in the statute presented in Part III of the paper. The material presented in Part II will deal with factors that a state legislature must consider before it can attempt a meaningful solution.

It is necessary at this point to provide some definitional clarification of the subject matter. "Electronic surveillance" is a broad term which includes three basic types of procedures.[2] First, there

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1. Westin, *The Wire-Tapping Problem: An Analysis and A Legislative Proposal,* 52 COLUM. L. REV. 165, 167 (1952).
2. This ternary delineation is borrowed from Note, *Electronic Eavesdropping — The Inadequate Protection of Private Communication,* 40 ST. JOHN'S L. REV. 59 59-60 n.2 (1965).

is *wiretapping,* which is the interception of a wire communication, such as a telephone conversation or telegram. Second, there is *bugging,* which involves the use of microphones, tape recorders or miniature radio transmitters to overhear and/or record normal (*i.e.,* not wire) conversations. Third, there is *long distance eavesdropping* in which parabolic or directional microphones are used to overhear normal conversation from a distance. We are concerned here only wth the concealed use of such instruments, not with whatever legitimate and above-board functions they may serve. Finally, the term "electronic eavesdropping," or simply "eavesdropping," will be used to encompass devices in the second and third categories. The other term, wiretapping, will be limited to its specific category.

II. THE LEGAL BACKGROUND

A. THE FEDERAL STATUTE

Because of the possibility of conflict or preemption, it is important for a state legislature to understand the scope of the federal concern in this field. The relevant provision is part of section 605 of the Communications Act of 1934.[3]

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . .

It is the contention of this writer that, because the prohibition is a blanket one and makes no distinction between the public and private spheres, the only acceptable interpretation of the law is that it prohibits all wiretapping in the United States.[4]

Nonetheless, there have been attempts to carve exemptions out of the section. Nicholas de B. Katzenbach, when he was Deputy Attorney General, stated as the position of the Justice Department that:[5]

> Section 605 . . . prohibits the interception *and* disclosure of the contents of any wire communication; it does not prohibit mere

3. Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605 (1964). This statute deals only with wiretapping; it does not apply to eavesdropping.

4. This interpretation is by no means original with the author; but, since most commentators seem content with stating the conclusion, a more detailed analysis seemed worthwhile.

5. Katzenbach, *An Approach to the Problems of Wiretapping,* 32 F.R.D. 107 (1963) (emphasis supplied).

> interception by itself. 'Wiretapping' as such is not prohibited; it is only the disclosure or the use for personal benefit of the information obtained by a wiretap that is prohibited. This is how the Justice Department has consistently construed the act . . . .

It is true that a literal reading of section 605 does require both interception and divulgence to be found before a violation is established.[6] However, it is a necessary implication of such a reading that Congress did not want to protect privacy so much as it wanted to prevent the harm arising from the publication of material obtained by an invasion of privacy. Under that presumption and Katzenbach's interpretation of the act, not only federal officials, but anyone can wiretap so long as he does not divulge the contents of the intercepted communication. In this respect, if Katzenbach's intent was to justify interception by the Justice Department (as distinguished from later "publication" by use as evidence in court proceedings), his thesis has proven more than was intended; it extends the license to wiretap beyond the halls of the Justice Department to the populace as a whole.

Even assuming such a result to be in accord with Congressional intent, another flaw undermines the plausibility of the theory. To avoid violating his own interpretation of the statute, Katzenbach must argue that when a field agent reports to him the contents of an intercepted communication, the agent is not "divulging" the information in violation of the law. However, such an argument requires a manipulation of the common meaning of the word "divulgence." This maneuver might be accomplished by an analogy to traditional agency concepts: since the subordinate is merely an extension of his superior, performing what the superior himself could have performed, his reporting will not constitute a divulgence. Unfortunately, by allowing an unspecified number of agents to participate in the chain of command, this rationale greatly increases the likelihood of unauthorized disclosures with the threat of resultant harm, somewhere along the line. Furthermore, the same argument would apply in the private sphere as well as in the Justice Department, and it would protect both the corporate chain of command and the private detective's report to his client.

Carried to this extreme, the interpretation so increases the danger of actual harm and so emasculates the force of the

6. United States v. Coplon, 91 F. Supp. 867, 871 (D.D.C. 1950), *rev'd on other grounds sub nom.*, Coplon v. United States; *see* Nardone v. United States, 302 U.S. 379, 382-83 (1937); Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L.J. 799, 803 (1953).

statute that it clashes directly with the assumption of a rational, purposive Congress. By increasing the likelihood of disclosure the section becomes internally inconsistent with its own stress on the elimination of harmful effects. The more logical explanation, it seems, would be to disregard the literal language and assume that the draftsmen carelessly employed "and" when they intended "or." Read this way, with the stress on interception standing by itself, privacy is protected and the chances of harmful disclosures are diminished.

Another route by which federal agencies have sought to avoid the application of section 605 is Presidential mandate. During World War II, President Roosevelt authorized the Federal Bureau of Investigation to tap wires in cases involving national security.[7] By the early 1960's, the Justice Department had extended such authorization to itself (either by implication from the original order or by express grant from later presidents) and added as another category in which wiretapping would be allowed in cases involving the protection of human life.[8] Moreover, there is evidence that at least one other federal agency, the Internal Revenue Service, admits to some wiretapping, though the source of its supposed exemption from the law is unclear.[9] Also unclear is the scope of that exemption. Current investigations by Senator Long's subcommittee[10] indicate that the IRS has added at least one more protected area, that of organized crime, to those already claimed by the FBI and the Justice Department.

It should be apparent that such inroads on federal law are neither consistent with nor typical of the American system of separation of powers. There is no claim here by the executive branch or its agencies that such power can be extracted from the language of the statute. Indeed, the Supreme Court has held that federal officers fall within the scope of the prohibition.[11] Nor can it be claimed that Congress has given any tacit approval

7. Authentication of this authorization comes from several sources, among them Lynch, *Electronic Eavesdropping: Trespass By Device*, 50 A.B.A.J. 540, 543 n.3 (1964), where it is described as a confidential memorandum from President Roosevelt to Attorney General Jackson on May 21, 1940; and DASH, THE EAVESDROPPERS 32 (1959).

8. Katzenbach, *supra* note 5, at 108.

9. *Hearings on Invasion of Privacy Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st & 2d Sess. (1966) [hereinafter cited as *1966 Hearings*]. See especially the testimony of Alvin M. Kelley, *id.* at 1340-42, 1343-53, & 1498-1504, and James J. O'Neill, *id.* at 1409-19, 1445-46, & 1456.

10. Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st & 2nd Sess.

11. Nardone v. United States, 302 U.S. 379 (1937).

to the practice. On the contrary, Congress has rejected many attempts to give some sort of wiretapping power to law enforcement agencies. According to one writer, President Roosevelt himself favored efforts to write in such power in cases of kidnapping, extortion and where the national security was involved, but such efforts were unsuccessful.[12] In the light of this legislative history it would be unreasonable for the Justice Department to infer any approval in the silence of Congress merely because "Congress has been repeatedly advised of it."[13] Where literal, purposive and historical analysis fails to provide any measure of justification for the violation of federal legislation, a so-called presidential mandate can add no justification, for it is itself violative of existing law.

Even though our conclusion is that section 605 prohibits all wiretapping, there remains one limitation on the scope of the statute which is important for our purposes: the statute's prohibition only reaches wiretapping techniques and has no relevance in the eavesdropping field.[14]

B. The FCC Regulations

In an attempt to close, at least partially, the huge gap in the federal law as to eavesdropping, the Federal Communications Commission put into effect in April of this year a new set of regulations intended to outlaw radio eavesdropping.[15] Since these

12. Dash, *op. cit. supra* note 7.
13. Katzenbach, *supra* note 8.
14. This view was affirmed in Silverman v. United States, 365 U.S. 505 (1961).
15. Information in this section relating to the FCC regulations is based on In the Matter of Amendment of Parts 2 & 15 (Docket No. 15262), 31 Fed. Reg. 3397 (1966) [hereinafter cited as Docket No. 15262].

1. Part 2 [of 47 C.F.R.] is amended by adding a new Subpart H to read as follows:

SUBPART H—PROHIBITION AGAINST EAVESDROPPING

§ 2.701 Prohibition against use of a radio device for eavesdropping.

(a) No person shall use, either directly or indirectly, a device required to be licensed by Section 301 of the Communications Act of 1934, as amended, for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

(b) Paragraph (a) of this section shall not apply to operations of any law enforcement officers conducted under lawful authority.

2. Part 15 [of 47 C.F.R.] is amended by adding a new section to Subpart A to read as follows:

§ 15.11 Prohibition against eavesdropping.

(a) No person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation.

rules have only been in effect a short time, it is difficult to evaluate their effectiveness. But they are relevant to a state legislature's activities in this field, and some brief comments on their possible impact are in order.

Presumably because of the FCC's limited power under its enabling act,[16] the new regulations only encompass procedures wherein a radio transmitter is employed. Excluded from their scope are wiretaps, hidden tape recorders, long distance eavesdropping instruments, and an ingenious new device which turns a telephone diaphragm into a bug but which, because it ceases to function when the receiver is lifted from the cradle, does not violate section 605.[17] Furthermore, it is conceivable that even in their present restricted form these regulations might extend beyond the power given the FCC by Congress. In the language of the Commission it is empowered to "prescribe the nature of the service to be rendered by radio stations."[18] It would seem that operation of the standard type of low-power, short-distance eavesdropping transmitter would fall outside the scope of the Commission's duty to regulate the public airwaves, unless such devices could be shown to interfere with transmission or reception on regulated frequencies. Nevertheless, if the question of the Commission's jurisdiction comes before the courts, it would not be surprising if, out of a strong desire to protect the citizen's right of privacy, they upheld these regulations.

The regulations take a strict view on the issue of consent. Thus, contrary to the assumption under section 605,[19] the consent of all parties to a conversation is necessary before any eavesdropping will be allowed.[20]

16. The Commission itself cites the Communications Act of 1934, §§ 4(i), 301, & 303 (b), (g) & (r), [as amended, 47 U.S.C. §§ 301, 303(b), (g) & (r) (1964)]. Docket No. 15262, 31 Fed. Reg. at 3398 & 3400.

17. This device is described in a recent news article. Graham, *Eavesdropping Still Easy*, N.Y. Times, March 6, 1966, § 4, p. 8., col. 1.

18. Docket No. 15262, at 3399-400.

19. In Rathbun v. United States, 355 U.S. 107 (1957), the consent of one of the parties to a conversation negated an "interception" under § 605.

20. The proposed statute adopts a somewhat different approach. See § 101(a), *infra*.

(b) Paragraph (a) of this section shall not apply to operations of any law enforcement officers conducted under lawful authority.

3. Subpart B of Part 15 [of 47 C.F.R.] is amended by adding a new section to read as follows:

§ 15.220 Eavesdropping prohibited.

As provided in § 15.11, the use of a low power communication device for eavesdropping is prohibited.

31 Fed. Reg. at 3400.

In the course of its hearings on these regulations, the Commission received testimony from the Columbia Broadcasting System to the effect that it feared that the regulations would interfere with its normal broadcast activities.[21] As a result, the Commission adopted a distinction between private conversations, which may not be overheard, and public ones, which may. The future will tell us whether the Commission will be able to work out a coherent differentiation between the two.[22]

The Commission seems on safer ground in regard to security and "beneficial" monitoring.[23] Here its solution is to allow eavesdropping as long as adequate warning is given to the public that such monitoring is taking place.

Another problem with the new rules lies in the sanctions, which the FCC has placed at $500. per day for each violation. It is doubtful whether this rather small fine, unaccompanied by any criminal sanction, will prove very effective; particularly in view of the tremendous profits to be gained from some types of eavesdropping, the high stakes in others and the compensation paid for such eavesdropping.[24] Certainly, no wiretapper complies with the FCC requirement of having a beeping sound on a telephone when a call is being recorded, nor is it likely, in the wiretapping situation, that the fear of a fine will be an effective deterrent.

Finally, and perhaps most important to a state legislature, law enforcement officials, when acting under "lawful authority," are specifically excluded from coverage by the regulations.[25]

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21. Docket No. 15262, at 3399. CBS specifically cited its broadcast "Biography of a Bookie Joint" as one example of where its reportage might be hampered by poorly drafted rules.

22. The Commission refers to two cases which supposedly show the clear distinction here but which suggest the contrary to this writer:

> "It has been held that a conversation between a husband and wife in a railroad station waiting room . . . is not a private conversation. *Linnell v. Linnell*, 143 N.E. 813 (Mass. 1924). In *Freeman v. Freeman*, 130 N.E. 220 (Mass. 1921), the court found that a conversation between a husband and wife in a public street was private because 'none of the passers-by or persons in the vicinity paid any attention to them, *or even could hear the words.*' (Emphasis supplied)"

Docket No. 15262, n. 7.

23. Docket No. 15262, *supra* note 21. Beneficial monitoring, if it is to be fully distinguishable from security monitoring, would seem to include that done for legitimate business purposes.

24. A lawyer in the office of the Attorney General in Massachusetts has estimated in conversation with this writer that an expert wiretapper gets a minimum of $100. per day.

25. Docket No. 15262, *supra* note 21.

C. THE COURTS AND THE CONSTITUTION

Court decisions raise further significant problems in the area of electronic surveillance. We shall touch on them briefly in this section; seeking only to raise issues, not to resolve them.

1. *Wiretapping*. The landmark case on the constitutionality of wiretapping is *Olmstead v. United States*.[26] Chief Justice Taft, writing for the majority, held wiretapping to be outside the scope of the fourth amendment. The rationale was three-fold: first, no "tangible" property was "seized" within the traditional meaning of the amendment; second, the use of the telephone was a willful extension of the voice beyond the boundaries of the room (and thus beyond the protection of the amendment); and third, the tapping was not accomplished by the physical trespass necessary to violate the amendment.

Shortly after the enactment of the Communications Act of 1934, the Court held in the first *Nardone* case[27] that section 605 renders evidence obtained by wiretapping inadmissible in the federal courts. In 1952, however, in *Schwartz v. Texas*,[28] evidence assumed to have been obtained in violation of section 605 was held to be admissible in state courts. In 1957, the Court again shifted its emphasis. In *Benanti v. United States*[29] wiretap evidence was excluded from the federal courts despite the fact that the taps had been conducted by New York officials acting under a New York law[30] which allowed court-ordered wiretapping. *Schwartz* was distinguished as dealing with a state rule of evidence, whereas *Benanti* involved a federal conviction in a federal court. Despite the sweeping language of the *Benanti* decision, the right of the states to admit wiretap evidence was reaffirmed in *Pugach v. Dollinger*,[31] on the authority of *Schwartz* and *Steffanelli v. Minard*.[32]

It should be noted that, with the exception of *Olmstead*, these cases were decided on the basis of the federal statute and not on constitutional grounds. Although *Olmstead* has been subject to strong attack and the Court has since rejected at least one of the grounds of its decision,[33] its ruling that wiretapping is outside

26. 277 U.S. 438 (1928).
27. 302 U.S. 379 (1937).
28. 344 U.S. 199 (1952).
29. 355 U.S. 96 (1957).
30. N.Y. CODE CRIM. PROC. § 813(a) (McKinney Supp. 1965).
31. 365 U.S. 458 (1961).
32. 342 U.S. 117 (1952).
33. See the discussion of Silverman v. United States, 365 U.S. 505 (1960), in section II C. 2. *infra*.

the fourth amendment remains the law. Since wiretapping is not covered by the fourth amendment, law enforcement officials will not be restrained in their use of such equipment by *Mapp v. Ohio's*[34] prohibition of the use in criminal trials of evidence so obtained.

In spite of the continued validity of *Olmstead* and *Schwartz*, section 605 has posed problems for state law enforcement officials. The *Benanti* court spoke in broad language which indicated that section 605 might have preempted the field to the exclusion of any state legislation.[35] Thus, in *People v. Broady*,[36] private wiretappers who had been convicted under the prohibitory sections of the New York statute appealed on preemption grounds. Their appeal was not allowed by the New York Court of Appeals and the Supreme Court denied certiorari. It seems that the result in *Broady* is correct. It is doubtful that concurrent powers of enforcement place the federal and state governments in any degree of conflict since the states are better equipped to detect and prosecute wiretaps used in purely local matters, which are not likely to attract the attention of federal officials.[37]

While there may be no conflict between the prohibitory sections of state law and section 605, the latter clearly conflicts with permissive state laws which allow law enforcers to wiretap under court order.[38] Consequently, judges may be reluctant to issue court orders; at least two judges have refused to grant such

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34. 367 U.S. 643 (1961). For a post-*Mapp* case in which New York again upheld its court order provisions, see People v. Dinan, 183 N.E.2d 689, *cert. denied*, 371 U.S. 877 (1963). Mr. Justice Douglas cast the only vote in favor of review.

35. 355 U.S. 96, 105 (1957).

36. 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230 (1959), *appeal dismissed, cert. denied*, 361 U.S. 8 (1959).

37. For an elaboration of this view under the doctrine of Pennsylvania v. Nelson, 350 U.S. 497 (1956), see 108 U. PA. L. REV. 1224 (1960). For an article expressing some doubts, see Comment, *Wiretapping: The Federalism Problem*, 51 J. CRIM. L., C. & P.S. 630 (1961).

38. In twenty-six states, wiretapping by either private persons or law officials is prohibited by statute. ALA. CODE tit. 48, § 414 (1958); ARK. STAT. ANN. § 73-1810 (1957); CAL. PEN. CODE §§ 591, 640 (West Supp. 1965); COLO. REV. STAT. ANN. § 40-4-17 (1963); CONN. GEN. STAT. REV. § 53-140 (1958); DEL. CODE ANN. tit. 11, § 757 (Supp. 1964); FLA. STAT. § 822.10, (1965); IDAHO CODE ANN. § 18-6705 (1948); ILL. REV. STAT. ch. 134, §§ 15(a), 16 (1963); IOWA CODE § 716.8 (1962); KY. REV. STAT. § 433.430 (1962); MONT. REV. CODES ANN. §§ 94-3203 (Supp. 1965) & 94-35-220 (1947); NEB. REV. STAT. § 86-328 (1958); N.J. REV. STAT. § 2A: 146-1 (1951); N.C. GEN. STAT. § 14-155 (1951); N.D. CENT. CODE §§ 8-10-07—8-10-08 (1959); OHIO REV. CODE ANN. § 4931.28-29 (Page 1953); OKLA. STAT. tit. 21, § 1757 (1961); PA. STAT. ANN. tit. 15, § 2443 (1958); R.I GEN. LAWS ANN. §§ 11-35-11—11-35-13 (1956); S.D. CODE § 13.4519 (1939); TENN. CODE ANN. § 65-2117 (1955); UTAH CODE ANN. §§ 76-48-6, 76-48-11 (1953); VA. CODE ANN. § 18.1-156 (1960); WIS. STAT. § 134.39 (1961); WYO. STAT. ANN. § 37-259 (1957). In one state, eaves-

orders on the grounds that to do so would violate federal law.[39] Furthermore, any state official who testifies in court as to the contents of material so obtained would similarly be admitting his guilt under oath. It is not unlikely that this fact has some deterrent effect on the use of wiretapping by prosecutors.

2. *Eavesdropping and the Fourth Amendment.* No judicial opinion comparable to *Olmstead* excludes eavesdropping from fourth amendment coverage, but the Supreme Court has declined to put all eavesdropping within the scope of that amendment. In *Goldman v. United States,*[40] a detectaphone had been placed against a wall to pick up conversations in the adjoining room. Evidence from such a conversation was held admissible, even though the party was talking into a telephone. Similarly, in *On Lee v. United States,*[41] where one government agent, equipped with a hidden transmitter, talked to the defendant while another received the transmissions, the evidence was allowed.

However, in *Silverman v. United States,*[42] evidence obtained by use of a 'spike mike', inserted through the wall of an adjoining house into the heating duct of defendant's house, was not allowed. The controlling element in *Silverman* was that the eavesdropping was accomplished by means of an unauthorized physical penetration. Thus its holding is in line with the view in *Olmstead* that a physical trespass is necessary before the fourth amendment will be violated. On the other hand, since *Silverman* found interception of conversations to be within the amendment, it overturned that aspect of *Olmstead* which found speech too intangible to be subject to seizure in the traditional sense of the amendment.[43]

39. Judge Hofstader in Matter of Interception of Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (1958), and Judge Davidson of the New York Court of General Sessions, discussed in New York Times, March 14, 1960, p.20, col. 4.

40. 316 U.S. 129 (1942).

41. 343 U.S. 747 (1952).

42. 365 U.S. 505 (1960).

43. *Accord,* Wong Sun v. United States, 371 U.S. 471, 485 (1963).

dropping is also specifically prohibited. MONT. REV. CODES ANN. § 94-35-274 (Supp. 1965).

However, Louisiana and Maryland both permit wire tapping by law enforcement officials under court order, LA. REV. STAT. § 14.322 (1950); MD. ANN. CODE art. 35, §§ 92-99 (1965). Massachusetts, New York, and Oregon provide for eavesdropping by law officers as well. MASS. GEN. LAWS ANN. ch. 272, §§ 99-100 (Supp. 1965), 101 (1959); N.Y. CODE CRIM. PROC. §§ 813(a)-(b) (McKinney Supp. 1965); ORE. REV. STAT. §§ 141.720-40 (Supp. 1963), 165.535-45 (Supp. 1965).

Practically and analytically, the concept of physical penetration seems unresponsive to the issue of privacy, especially since wiretapping, surveillance by telescope, binoculars, and camera, and human eavesdropping all are allowed. Even the concept of physical penetration presents difficulties, as in *Clinton v. Commonwealth,*[44] where the Supreme Court of Virginia thought that penetration as slight as that of a thumb tack was not really penetration at all. The United States Supreme Court, in a per curiam decision, disagreed.

Perhaps the most significant recent case is *Lopez v. United States,*[45] where it was held that a police officer's recording made on a device hidden on his person did not violate the defendant's constitutional right. The court reiterated that the only fourth amendment protection is "that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area."[46]

Despite the rejection of numerous attempts to broaden fourth amendment protection against electronic surveillance, the growing public awareness of the increased use of such devices and the strong voices of those protecting the right of privacy on the Court, in law journals and before Congressional committees, have combined to keep the issue alive. Last year, New York Supreme Court Justice Sobel met the issue head-on in *People v. Grossman.*[47] In that case, New York police operating under the New York statute[48] obtained court permission to plant a 'bug' in defendant's service station, then broke into the station and planted the device. The 'bug' was supposedly to aid the investigation of a larcency but the evidence so obtained was used not in a prosecution for larcency, but as probable cause to get a search warrant for the crime of illegal possession of weapons.

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44. 204 Va. 275, 130 S.E.2d 437 (1963), *rev'd per curiam sub. nom.,* Clinton v. Va., 377 U.S. 158 (1964).
45. 373 U.S. 427 (1963).
46. *Id.* at 438-39 (dictum).
47. 45 Misc. 2d 557, 257 N.Y.S.2d 266 (1965). Interestingly enough, in the case of People v. Berger, 239 F. Supp. 219 (S.D.N.Y. 1965), defendant sought to remove to federal court under 28 U.S.C. § 1443 (1964), but the case was remanded on the authority of People v. Grossman, *supra. Berger's* disposition indicated that New York would adequately protect defendant's constitutional rights, even though the *Grossman* decision was only at the Supreme Court level. The *Grossman* case has been the subject of recent notes in 32 BROOKLYN L. REV. 216 (1965), 66 COLUM. L. REV. 355 (1966), 64 MICH. L. REV. 526 (1966), 31 MO. L. REV. 170 (1966), 11 N.Y.L.F. 328 (1965).
48. N.Y. CODE CRIM. PROC., § 813-a (McKinney Supp. 1965).

Relying heavily on Mr. Justice Brennan's dissent in *Lopez*,[49] Judge Sobel ruled that no court order could constitutionally authorize a physical trespass nor could such an order[50]

> serve as a "search warrant" under the Warrant Clause of the Fourth Amendment to validate an intrusion or invasion into a constititionally protected area. I base such ruling on the many cases . . . which hold that a "search warrant" may not constitutionally authorize a search for or seizure of *mere evidence* in the nature of conversations or verbal statements.

3. *Some Other Considerations.* Two other points deserve mention in this survey of case law and constitutional doctrines. First, as Donald King has argued,[51] serious first amendment issues are raised by the use of electronic eavesdropping. Under this view, the prevalence of such devices could lead to the inhibition of free speech in our society and a concommitant loss of first amendment values. King pointed to the language of Mr. Justice Douglas in *Silverman*,[52] where the latter voiced fears as to the impairment of the freedom to communicate created by eavesdropping. A later statement of this fear, though not arising in a first amendment context, can be found in the words of Mr. Justice Brennan:[53]

> I believe that there is a grave danger of chilling all private, free, and unconstrained communication if secret recordings . . . are competent evidence of any self-incriminating statements the speaker may have made. In a free society, people ought not to have to watch their every word so carefully.

The second consideration is the "right of privacy," a term which has been heard more and more frequently of late and which was elevated to constitutional status in *Griswold v. Connecticut*.[54] Of course, the key question regarding this "right" is to what extent it would go beyond first, fourth and fifth amendment guarantees in the area of electronic surveillance. A preliminary guess is that since *Griswold* did not deal with communication, which is central to the discussion here, the case will

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49. 373 U.S. at 446 (Brennan, J., dissenting, joined by Douglas and Goldberg, JJ.).
50. 45 Misc. 2d 557,578 (1965) (emphasis in original).
51. King, *Wiretapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961).
52. 365 U.S. at 513.
53. Lopez v. United States, 373 U.S. at 452.
54. 381 U.S. 479 (1965).

not have any great impact in this field. Nevertheless, given its newness as constitutional doctrine, speculation on this question might lead us too far from our central purpose, and we will be content here to merely note it as a possible factor.

III. THE ROLE OF THE STATE LEGISLATURE

A. Some Problems

The cursory examination of legal doctrines in Part II was intended to raise only some of the problems facing a state legislature. More basic questions still face it — what its goals should be in this area, and how it can accomplish them. But certain things should now be clear to any legislature wishing to act in this area. Any law it passes allowing anyone to wiretap will stand in violation of the existing federal statute. On the other hand, both federal and state officials have violated that law with impunity since its inception, and it is a reasonable assumption that the only reason section 605 remains on the books is that Congress has been unable to replace it with a statute that it finds suitable. Practically, then, a state may be able to lead the way to section 605's replacement by legislating a better act without too much concern over its conflict with the federal statute.[55] Furthermore, there is a high degree of probability that the states will not get a second chance to attempt their own solutions in this field should Congress act first. Any new federal statute can be expected to preempt the field, and it is within the power of Congress to provide, as some writers have urged,[56]

55. This view will offend some who would view it as their duty to erase any permissive state statute from the books rather than write a new one that continues to flout federal law, even if such a new law be morally and practically more acceptable. (Of course, this objection will have no effect in the eavesdropping area, which has been shown to be outside the scope of § 605.) The position taken here, that a state legislature should proceed to enact the proposed statute, § 605 notwithstanding, is defended largely on pragmatic grounds. The alternative for a state legislature is to remain inactive and wait for Congress to act. Such a course would do nothing to alleviate inadequacies in the present system; it might result in a stalemate if Congress for some reason did not act; and it certainly would not give the states a chance to implement whatever innovations they have or might develop in this field. If Congress or the courts later disapprove of any action taken by a state, it is within their power to apply their traditional prerogative under the Constitution and either preempt or strike down such action. But if such action meets with approval, then Congress, the courts and the other states will be the beneficiaries.

56. This position was taken by the then-United States Deputy Attorney General Rogers, *The Case for Wiretapping*, 63 YALE L.J. 792 (1954), and by his superior, Attorney General Brownell, *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195 (1954).

that electronic surveillance, if not totally outlawed, be limited to the direct control of the Attorney General of the United States. The best the states could hope for under a new Congressional act would be for power to act within whatever guidelines Congress chose to set.

This last possibility is by no means an unattractive proposition. Certainly, it would solve the dilemma of those state officials who are worried that they may be violating both section 605 and the federal constitution. By acting within congressionally determined guidelines, the former problem would be eliminated and the latter problem would be shifted to the federal government. But from the broader perspective of one trying to cope, as well as possible, with the electronic surveillance problem by writing the best laws possible, a federal solution has certain disadvantages. It is doubtful that the statute contained herein, or any other proposal now available, will be the ultimate answer to the problems involved with electronic surveillance. A period of experimentation is necessary, and that experimentation can better be achieved by the diverse efforts of several states than by the necessarily singular and less flexible efforts of the federal government. Also since the states are more closely involved with these issues on a broader scale than is the federal government (as the latter's role in the criminal sphere is traditionally restricted), it is to be expected that the states will have more expertise than the federal government, an expertise which they can apply towards the solution of these problems. Furthermore, the fact that the states have more day-to-day contact in this area may very well mean that they need more flexibility than federal guidelines might allow them. To the extent that it accepts the above reasoning, a state legislature will move forward and seek to implement its own ideas in the form of a new statute.

Such a resolve would be bolstered by the fact that the federal government itself is creating a special problem for the states. Much has been written about the unrestrained police practices of state officials,[57] but recently more and more examples of unrestrained electronic surveillance by federal officials have come

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57. See generally, DASH, THE EAVESDROPPERS 21-286 (1959). The author also ran across more than one statement, which assumed that "a consistent pattern of state violations of federal law continues unrestrained," 60 COLUM. L. REV. 871, 876 (1960), without mentioning the similar practice by federal officials. Perhaps such oversights were due to a lack of knowledge caused by the lack of publicity given to federal wiretapping and eavesdropping.

to light. Last summer, when the Long subcommittee turned up sworn testimony of federal wiretapping and eavesdropping in Massachusetts in violation of state and federal law,[58] the Attorney General's Office in Massachusetts chose not to prosecute, perhaps out of fear of retaliation by federal officials against Massachusetts enforcement agents who had tapped under court order,[59] and perhaps out of a sense of self-guilt at the inadequate provisions of its own laws. The likelihood is that this episode is not an isolated example. Other factors combine to make the intelligent law enforcement officer reluctant to use this weapon even when he feels it is necessary and justified. He can expect accusations of his being engaged in a "dirty business" by the press and his being labeled "irresponsible" or worse by civil libertarians. Furthermore, he is wary of jeopardizing an important case by the use of evidence which may be declared to have been unconstitutionally obtained.

An awareness of the practicalities of the situation and of a growing public concern[60] should bring any state legislature to the conclusion that it is time to put its own house in order. What then should its goal be? One clear objective is that of tightening existing laws against all unauthorized taps. A question far more difficult to decide is whether or not law enforcement personnel should be given authorization to place taps or bugs. The arguments pro and con have been set forth in abundance in law journals and the press. The central competing forces are the individual's right to privacy and the need of the police to eavesdrop and wiretap in certain instances. The case for the sanctity of the individual's home and thoughts was eloquently stated by Brandeis in his famous dissent in *Olmstead:*[61]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and

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58. *1966 Hearings* at 1411-12, 1475.

59. These are personal observations based on the author's experience with the Attorney General in the summer of 1965 when he was assigned to write a memorandum on the possibility and advisability of prosecution of certain IRS agents.

60. There has been an increasing amount of material in the daily press on eavesdropping. Also NBC recently ran an hour-long documentary called "The Big Bar," and popular magazines such as *Playboy* and *Esquire* have devoted attention to the subject. See *The Playboy Panel: Crisis in Law Enforcement,* 13 Playboy No. 3, p. 47, at pp. 55-56 (March 1966); Pileggi, *Bugging the Bedroom,* 65 Esquire No. 5, p. 96 (May 1966); *Someone Knows All About You, id.* at 98.

61. 277 U.S. 438, 478 (1928).

> satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone — the most comprehensive of rights and the right most valued by civilized men.

But law enforcement officials point out that, in *Olmstead,* Brandeis was reacting to an unchecked and admittedly illegal wiretap by federal agents — not by any means the court-controlled surveillance they advocate today. Nor, they argue, did Brandeis contemplate the mechanized, electronically-equipped crime syndicates against which police today seek to employ this tool.[62]

The principle of the inviolability of the individual's privacy will on occasion be overbalanced by the value of the preservation of human life or national security. On the other hand, however, the assertion by some law enforcement officials of their need for eavesdropping equipment runs into problems of empiric proof. Statistics presented to Congressional committees have varied greatly, both as to the extent to which electronic surveillance is actually employed and as to its success in convicting criminals who otherwise would not be brought to justice. It seems safe to conclude, as Evan Semerjian does in a recent article, that only opinions and no real facts have emerged from the hearings on the question of whether it is necessary to wiretap.[63] Nevertheless, it is a fact that law enforcement officials believe they need this tool. In 1954, Deputy Attorney General William Rogers appealed for power in his office to wiretap and carefully showed that every Attorney General since William Mitchell in 1931 "has endorsed the desirability and need for the use of wire tapping as an investigative technique in certain types of cases.[64] Nor have the Attorneys General since that time deviated from that view. Similarly, state attorneys general, district attorneys and police chiefs have all spoken out in support of this need at Senate hearings[65] and in the press, principally, as stated above, on the

62. The argument that the police need modern devices to keep up with the modern criminal (who, purportedly, has all these new electronic tools at his disposal) should be distinguished from the argument that police should be able to tap a phone when the crime itself is being committed over the phone. In the latter case, the use of the phone is an element of the crime.

63. Semerjian, *Proposals on Wiretapping in Light of the Recent Senate Hearings,* 45 B.U.L. Rev. 216 (1965). The hearings involved are *Hearings on Wiretapping and Eavesdropping Legislation Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. (1961) [hereinafter cited as *1961 Hearings*].

64. Rogers, *supra* note 56, at 794.

65. *E.g., 1966 Hearings* at 1676, 2058.

theory that electronic surveillance is needed to combat the modern criminal. But the counterargument is made that lack of cooperation among law enforcement agencies, lax police work, public indifference and even corruption of officials are responsible for most of the inefficiency of the police.[66] Supposedly, if these problems were solved, wiretapping and eavesdropping would be weapons unnecessary to a police arsenal.

The proponents of court-ordered surveillance fail to see any significant difference between electronic devices and other accepted police tools. Former Attorney General Brownell pointed out that those who would forbid tapping and bar such evidence "seem to be unaware that the law presently admits evidence which is obtained from informers . . ."[67] Again, counterargument is available. There is an element of choice and judgment when one talks to another person, and one risk involved is that such person may turn out to be an informer. But no choice or judgment can be exercised when a totally unknown third party listens in on a conversation. (In this respect, eavesdropping is more dangerous to the individual than wiretapping, since a bug catches all conversations in a room, not just those carried on a telephone.) The nature of the risk is thereby changed, and, it must be admitted, there is an increased and more insidious danger to the individual from eavesdropping than from the possibility that a party to a conversation may repeat its contents to others. Also, a tape can be used more readily and to greater effect, both in and out of court, than can an individual's personal and fallible recollection of a conversation.

Yet, while these arguments build a very strong case against private eavesdropping and wiretapping, they are not conclusive against the use of these devices by law enforcers. There are some respects in which it is very difficult to perceive any substantial difference between the use of electronic instruments and of certain accepted surveillance practices. In *On Lee v. United States,* for example, the majority found that the use of a radio transmitter and receiver had the[68]

> same effect on his [defendant's] privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision

66. *1961 Hearings* at 412.
67. Brownell, *supra* note 56 at 204.
68. 343 U.S. 747, 754 (1952).

> is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions.

The stake-out and the tailing of suspects or defendants are also standard police tactics, both of which involve constant covert surveillance of an intimate nature over an unlimited area, and of an indefinite duration. Yet there has been no movement to ban this less restricted type of invasion of privacy, or subject it to judicial controls.

Analytically, there seems to be no difference between these methods and electronic surveillance, unless it lies in the higher degree of effectiveness, within its limited range, of the electronic device. But this difference does not lend support to any rational argument for outlawing electronic instruments so much as to the emotional argument that somehow the pitting of man against man is all right, but that of man against machine is not.[69]

Even assuming the lack of any logical differences, it does not follow that because some devices are allowed, all must be. The law does draw lines. As Alan Westin points out, "The law prohibits the thumbscrew, rack, and rubber hose — all extremely efficient instruments for inducing criminals to admit guilt."[70] Although the disagreeable disadvantages of such devices make them readily distinguishable, one preserve that has generally been kept from police is much harder to distinguish. That preserve is the so-called "sanctity of the mails." Historically, the police have not been allowed to interfere with the federal mail system, nor do federal officers claim any legal right to open or tamper with first-class letters. Why, then, should law enforcement officials be allowed to intercept a phone conversation, a similarly private and guarded type of communication?[71] Perhaps the only answer here is an historical one. The practice might have developed that the mails be fully subject to police inspection. Whether phone conversations should or should not be is precisely the question before us, and neither history nor tradition gives a clear answer.

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69. One area in which this "emotional" argument finds an analogy is in prevalent attitudes toward the use of certain weapons in war. Thus, the use of poison gas and "dum-dum" bullets, both highly effective, is voluntarily forgone, presumably because it somehow offends our sense of fairness.

70. Westin, *supra* note 1, at 189.

71. For an analysis of the British view of this problem, see *Tapping Telephones and Opening Letters*, 1957 CRIM. L. REV. 502 (1957).

The analogy to the informer raises another issue. A principal use of the informer is to provide evidence admissible in court. Unfortunately, such evidence is often unreliable and given little weight by the jury, which often concurs in the underworld view of the character of the typical "stool pigeon." Even when the evidence is given by a respected citizen, his testimony is subject to the vagaries of memory and the skill of the cross-examiner. Given this state of affairs, law enforcement officials argue that the tape of a conversation is truly the best evidence available. Our immediate danger in admitting such recordings in evidence is the possibility that they may be altered by surreptitious editing.[72] This danger becomes acute when one considers that a jury will probably give more weight to recorded than to remembered testimony. But this problem can probably be avoided by means of available tests to determine if tampering has been performed, by staff criminal penalties where tampering is found (and exclusion of the evidence), and, ultimately, by faith in the honesty of the police and prosecutors involved.

B. Some Conclusions

The above analysis has resulted in no conclusive determination. Logic has dictated no answer, and it is still the task of a legislature to weigh the competing interests. Nevertheless, it should be clear that the police cannot demonstrate the absolute necessity for such tools, nor can the civil libertarians maintain an absolute ring of protection around the individual when to do so would endanger the life or security of innocent individuals, or the society as a whole.

It would seem that an acceptable balance can be discovered. The police should have their weapon, but not for unlimited use. The individual should have his privacy, but subject to exception in some grave circumstances. And if a hestitant legislature desires the traditional icing on the cake of compromise, it has been estimated that public opinion, as evidenced by editorial support in newspapers, is two to one in favor of such a middle of the road solution.[73]

In summary, the goals of a state legislature should be as follows: *First,* to draft the tightest possible statute outlawing private electronic surveillance, since it is in the private realm,

72. A good technical discussion of this operation may be found in Dash, *op. cit. supra* note 57, at 367-371.

73. *1961 Hearings* at 212-222.

not subject to court controls, that most of the blatant abuses occur. The proliferation of spying in business affairs, labor-management disputes, divorce actions and the like cannot be justified as the pursuit of legitimate ends or the use of legitimate means. *Second,* to draft a statute that will effectively enforce the above prohibition. Since by their nature spying devices are not readily detectible, extraordinary means must be used to insure proper enforcement. *Third,* to define the situations where law enforcers will be allowed to use electronic surveillance, and to subject such use to as much control as necessary to best protect the privacy and constitutional rights of potential defendants and the citizenry as a whole. *Fourth,* to insure that this power is not misused by the entrusted authorities.

Before the task of actually drafting a statute can begin, a legislature must confront the potential obstacle of the case and constitutional doctrines outlined above. It is submitted that these doctrines pose no real, practical problem for the state legislature. Even this brief survey should indicate that the courts have not followed any one line of reasoning to its ultimate conclusion. To do so would be either to outlaw completely any statutory solutions such as we have described, or to allow almost unlimited and unchecked use of electronic devices. To be sure, Judge Sobel in the *Grossman* case makes powerful arguments against the constitutionality of any court-order provisions under the fourth amendment. Constitutional problems of specificity, general searches for evidence, and court-ordered trespassing do exist.[74] But the Constitution is not an unbending instrument, and there is evidence that the Supreme Court will be willing to stretch a point if it is satisfied that a proper balancing of interests has been achieved. For example, Mr. Justice Brennan, a staunch defender of the right to privacy, has said:[75]

> [I]n any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyield-

74. It is quite possible that trespassing poses the greatest problem, and it is conceivable that even if police are given the power to eavesdrop and wiretap, they will not be able to do so by means of a trespass to place their equipment. This restriction would severely limit, especially in eavesdropping, the number and type of devices which can be used.

75. Lopez v. United States, 373 U.S. 427, 464-465 (1963) (Brennan, J., dissenting, joined by Douglas and Goldberg, JJ.). For the view that it would be better to use the fourteenth amendment due process clause rather than to stretch fourth amendment concepts, see the concurring opinion of Harlan, J., in Ker v. California, 374 U.S. 23, 44 (1963).

> ing to the legitimate needs of law enforcement. It is at least clear that "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" . . . could be made a precondition of lawful electronic surveillance . . .
>
> This is not to say that a warrant that will pass muster can actually be devised. It is not the business of this Court to pass upon hypothetical questions, and the question of the constitutionality of warrants for electronic surveillance is at this stage purely hypothetical. But it is important that the question is still an open one . . .

Mr. Chief Justice Warren, who is also a liberal in matters of privacy, said in the same case:[76]

> I also share the opinion of MR. JUSTICE BRENNAN that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions . . . . However, I do not believe that, as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods.

Thus hopeful that the Supreme Court will listen with an open mind to the end project of its endeavors, a legislature can in good faith proceed to the drafting of a statute which will attempt to balance these competing interests.

C. A PROPOSED STATUTE

Hopefully, the statute will, for the most part, speak for itself. On important policy issues some comments are presented, both to defend the draftsman's choice and to indicate other available theories or alternatives. For the sake of simplicity, the statute has been worded for a particular state — Massachusetts. Obviously, minor adjustments will be needed to make it applicable to other states, but functionally it is intended as a model for all states.

One point should be made about the form of the statute. It is in separate parts and is intended to be three distinct acts. The reason for physically severing the three operative parts is that if one part encounters preemption, fourth amendment or other constitutional problems, the others will have a better chance of

76. 373 U.S. at 441 (Warren, C.J., concurring).

survival. In any case, Part VI includes a severability clause. And, indeed, there are different constitutional issues involved in each part.

PART I—EAVESDROPPING

SECTION 101. *General Prohibition.*

Except as otherwise specifically provided in this section, and in Part III, it shall be unlawful for any person:

(a) willfully to overhear, attempt to overhear, or procure any other person to overhear, or attempt to overhear any spoken words at any place by using any electronic amplifying, transmitting, or recording device, or by any similar device or arrangement, without the consent or knowledge of all parties engaging in the conversation;

(b) willfully to disclose, or attempt to disclose, to any person the contents of any conversation, if the person disclosing that information knows or has reason to know that that information was obtained in violation of subsection (a) above;

(c) willfully to use, or attempt to use, for any purpose the contents of any conversation, if the person using that information knows or has reason to know that that information was obtained in violation of subsection (a) above;

(d) willfully to acquiesce in the installation of any device which is to be used or is used in a manner which violates subsection (a) above;

provided, that nothing in this section shall be interpreted to prevent a news agency or an employee thereof, from using the accepted tools and equipment of that news media in the course of reporting or investigating a public and newsworthy event; and provided further, that nothing in this section shall be interpreted to prevent private persons or businesses from using eavesdropping devices on their own premises for security or business purposes as long as reasonable notice is given to the public that such devices are in operation.

A violation of this section shall constitute the crime of Eavesdropping and be punishable by imprisonment for not more than five years or a fine of not more than $10,000, or both.

SECTION 102. *Right of Civil Action.*

Any party to a conversation which is eavesdropped upon in violation of section 101 above and who has been damaged by such violation, may sue the violator or violators therefor and shall recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. No award under this section shall be less than $500.

SECTION 103. *Failure to Report.*

The willful failure by any person who owns or is an employee or agent of the owner of any building in which space is rented for dwellings or for business purposes to report to a District Attorney or to the Attorney General of the Commonwealth any knowledge he has of the use on such premises of any devices which violate section 101(a) above shall constitute the crime of Failure to Report Illegal Eavesdropping and may be punished by a fine of not more than $250.

COMMENT: a. It will be noted that in section 101(a) the issue of consent has been resolved by requiring the consent of all parties, as did the FCC in its new regulations.[77] This decision was influenced by a belief that the nature of the risk significantly changes when an unknown and unobserved party may listen in or and/or record a conversation. This result differs from the generally accepted view that any individual can secretly record (or authorize another to record) any conversation to which he is a party. The term "knowledge" is intended specifically to expand the concept of consent. If a person has been informed that his words are being recorded or overheard by another person and he still continues to speak, he has knowledge of the eavesdropping and no violation will have occurred even though he has not formally consented.

b. The two provisos are inserted to allow certain legitimate uses of electronic devices. It is hoped that "public and newsworthy event" will prove an easier test for the courts to handle than the "public and private conversations" distinction adopted by the FCC.

c. The triple damages provision in section 102 exists to put teeth into a civil action remedy where damages are often of an intangible nature and difficult to prove. Proof of damages should be easier in a business situation than where the harm results from an invasion of the privacy of an individual.

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77. 31 Fed. Reg. 3400 (1966), adding §§ 2.701 & 15.11 to 47 C.F.R. pts. 2 & 15 (1966).

d. Section 103 contains the most controversial provision of Part I. There is a general aversion in our society to imposing affirmative duties on the citizenry as a whole to report crimes. The affirmative obligation is created here for two reasons: (1) The extreme difficulty of detecting eavesdropping devices means that the police will need extra help if the law is to be effectively enforced. Experience has shown that voluntary reporting by individual citizens provides inadequate assistance. (2) Since an owner, renting agent, superintendent or other employee is normally in control of and responsible for the premises, his failure to report would be very close to the "willful acquiescence" of section 101(d). For this reason, the duty is not placed on the entire public.

The mild sanction is provided in the hope that having a relatively small fine will encourage the use of this section.[78]

PART II — WIRETAPPING

SECTION 201. *General Prohibitions.*

Except as otherwise specifically provided in this section and in Part III, it shall be unlawful for any person:

(a) willfully to intercept, attempt to intercept, or procure any other person to intercept, or attempt to intercept, any wire communication without the consent or knowledge of all parties engaging in the communication;

(b) willfully to disclose or attempt to disclose to any other person the contents of any wire communication, if the person disclosing that information knows or has reason to know that that information was obtained in violation of subsection (a) above;

(c) willfully to use or attempt to use the contents of any wire communication, if the person using that information knows or has reason to know that that information was obtained in violation of subsection (a) above;

(d) willfully to acquiesce in the installation of any device which is to be used or is used in a manner which violates subsection (a) above;

(e) who is an employee of any communications common carrier and has knowledge obtained during the course of his duties for that carrier of any violation of subsection (a) above,

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78. This theory — that moderate penalties will lead to increased enforcement — is presented in Comment, *Do We Have to Live With Eavesdropping: A Legislative Proposal,* 38 So. CAL. L. REV. 622 (1965).

to fail to report such knowledge to a District Attorney or the Attorney General of the Commonwealth;
provided, that it shall not be unlawful under this section for an operator of a switchboard, or an officer, agent or employee of any communication common carrier whose facilities are used in the transmission of a wire communication to intercept, disclose or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident of the rendition of service.

A violation of this section shall constitute the crime of Wiretapping and shall be punishable by imprisonment for not more than five years, or by a fine of not more than $10,000, or both.

SECTION 202. *Right of Civil Action.*

Any party to a conversation which is intercepted in violation of section 201 above and who has been damaged due to such violation, may sue the violator or violators therefor and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. No award under this section shall be less than $500.

SECTION 203. *Failure to Report*

The willful failure by any person who owns or is an employee or agent of the owner of any building in which space is rented for dwellings or for business purposes to report to a District Attorney or the Attorney General of the Commonwealth any knowledge he has of the use on such premises of any devices which violate section 201(a) above shall constitute the crime of Failure to Report Illegal Eavesdropping and shall be punishable by a fine of not more than $250.

COMMENT: a. The concept of "interception" is used in section 201(a), as opposed to "overhearing," because it best describes the manner in which a tap is placed (i.e., by locating the wire or leads and then "plugging" into the line in one of several possible ways). The situation where a party secretly listens in at an extension phone would also be considered an unauthorized interception, although this would not be a tap in the classical sense.

b. Section 201(e) is a special provision covering the employees of a communications common carrier. Police experience has indicated that it

is not uncommon for phone company employees to be approached and offered quick money if they will place a tap. Further, a phone company employee, in the course of his duties, is the person most likely to discover a tap. Such an employee has a clear duty to maintain and protect the public utility for which he works. Failure to disclose a tap could be covered exclusively by section 203 on failure to report, where the penalty is smaller; but to deter the suborning of phone company employees, this subsection has been added to the definition of Wiretapping.

PART III
COURT ORDER TO EAVESDROP OR WIRETAP

SECTION 301. *Application.*

(a) Application may be made by either a District Attorney or the Attorney General of the Commonwealth to any justice of the Supreme Judicial Court or of the Superior Court for an *ex parte* order allowing such officer to order an electronic eavesdrop or a wiretap of a given communication when there are reasonable grounds to believe that

(1) the electronic eavesdrop or wiretap requested is necessary to save human life; or

(2) in the case of a wiretap, the communication itself is an element of the crime alleged; or

(3) the communication intercepted will contain evidence of homicide, extortion, kidnapping, armed robbery, rape, or arson; or

(4) the security of the Commonwealth or the public safety is endangered.

(b) An application under subsection (a) shall be accompanied by an affidavit personally signed by a district attorney or by the Attorney General of the Commonwealth. Where those officials are unavailable and delay would endanger either human life or the public safety, the affidavit may be signed by the highest-ranking official available.

The affidavit shall contain the following:

(1) a full and complete statement of the facts and circumstances relied on by the applicant, including but not limited to the crime or crimes involved, the information expected to be obtained, the results of previous investigation which led to the application, and the sources of the information leading to the application, unless such sources are confidential;

(2) the precise location and the nature of the premises which are to be eavesdropped upon, or of the wire to be tapped, and the identity of the person or persons whose conversations are to be overheard or intercepted. In the case of eavesdropping, the affidavit shall specify as precisely as possible the building or the particular rooms in a building to be bugged. In the case of a telephone, the affidavit shall specify the number of the line, and the names of the individuals to whom the phone is listed, as well as those who are known regularly to use the phone;

(3) a statement of all previous applications in the same matter which involved the same premises, facilities or individuals, and the action taken by the court on each application; and

(4) an allegation that all other methods of investigation have proven to be or will be inadequate or impracticable and that there is reasonable cause to believe that eavesdropping or a wiretap will be successful.

(c) If the court is not satisfied that the application substantially complies with the requirements of subsections (a) and (b) above, it may require the applicant to furnish additional information in support of the application.

(d) If the court is satisfied that the application substantially complies with subsections (a) and (b), it may enter an *ex parte* order granting leave to the applicant to eavesdrop or to wiretap in conformance with the terms of the order.

(e) An order to eavesdrop shall specify as precisely as possible the building and the particular room or rooms in that building in which permission to eavesdrop is granted. An order to wiretap shall specify the particular wire to be intercepted. A telephone shall be specified by its number.

(f) An order entered under subsection (d) above shall describe or identify the person or persons who are authorized to implement it, or the person or persons under whose supervision it is to be implemented.

(g) Such order shall state with particularity the purpose or purposes for which it has been granted and the grounds for the grant of permission.

(h) Such order shall be limited to a period of not more than

sixty days, but may be renewed for additional periods of thirty days each, provided that the requirements of subsections (a) and (b) above are satisfied. An application for a second or subsequent renewal must be heard by a panel of three judges of the Superior Court.

SECTION 302. *General Rules.*

(a) When an order is granted in accordance with section 301, it shall be the responsibility of the signer of the application, and all persons connected with implementing the order, to see that it is implemented in a way entirely consistent with the provisions of the order, and that utmost respect is given to the constitutional rights and the privacy of those persons whose conversations are overheard or intercepted by virtue of the order.

(b) When any criminal prosecution is brought which involves a defendant who has been the subject of a court order under section 301, the state must furnish the defendant with a copy of the order and an accurate transcript of the material proposed to be used as evidence, at least thirty days before the commencement of the trial. If the defendant has any objections to the grounds on which the order was granted, or the manner in which the order was implemented, he must make them known to the court at least ten days before the commencement of the trial.

(c) Material obtained by means of an eavesdrop or wiretap shall be admissible as evidence in judicial proceedings in the Commonwealth only if obtained in a manner consistent with a valid order granted in accordance with the provisions of section 301.

(d) It shall be unlawful for any person to edit, alter, or tamper with any tape, transcript, or other recording of any kind of any conversation overheard or intercepted by a court order granted under section 301, and then to present such material in any judcial proceeding, or any proceeding under oath, without fully indicating the nature of all changes made and the original state of the material. Any violation of this subsection shall be punishable by imprisonment for not more than one year, or by a fine of not more than $500, or both.

(e) Any law enforcement official who misuses in a grossly negligent or malicious manner, the powers given him by a court

order under this section, shall be liable in an action for damages by any person aggrieved by or as a result of such action. The minimum award for such injury shall be $250.

COMMENT: a. Section 301 (a) (1) is aimed at such situations as where the family of a kidnapped person expects to be contacted by the kidnappers by means of a telephone.

b. Section 301 (a) (2) refers to the situation where the illegal act itself is committed over the telephone. This provision could apply to such crimes as extortion or gambling. It does not include any case where the commission of a crime was merely aided by a telephone conversation.

c. The requirement in section 301(b) that a District Attorney or the Attorney General personally sign the application is designed to place immediate and ultimate responsibility in an elected official, who will face popular dissatisfaction at the polls if he abuses this power. Section 301(b) is intended to give the judge as much relevant background information as possible on which he can base his decision. Subsection (2) requires specific factual information on current matters, which can be compared with the background material for any inconsistencies. Subsection (3) should lessen the dangers of "judge-hopping," i.e., of moving from one judge to another until one is found who will grant an order. It will not prevent the corollary danger that law enforcers will find one judge who consistently is favorable to their application and to whom they will turn as a matter of course. Subsection (4) is a result of the basic compromise discussed in the main text. Law enforcers are not given this power as a matter of right, but only when their need for it outweighs its inherent harms. If other, more acceptable methods will get the job done, the use of electronic tools will not be authorized. It is probable that a provision such as this one is necessary if Part III is to meet with ultimate judicial approval.

d. Section 302 will allow the defense an opportunity to inspect the order, compare it with the transcript and, in a pre-trial motion, move to strike any material obtained in a manner inconsistent with the order, or indeed, to seek review of the order itself. From the record on search warrants, the discretion of the judge granting the order will probably rarely be overturned.

Section 302 also shields the defense from any problems of surprise involving the covertly recorded conversations. But the defense is not given the opportunity to view the application for fear of possible abuses and of unnecessarily disclosing the extent of the state's investigations.

e. Section 302(c) excludes tainted material. Once it is shown that infractions have occurred, the burden may be placed on the prosecution to show that some material was untainted. Because of the difficulty of proving negative facts, such a burden has not in terms been included here.

f. The standard of liability in section 302(e) is purposely high to discourage suits against officials in cases where some material was excluded as tainted, but on fairly technical grounds.

PART IV — CUSTODY AND DISPOSITION OF PAPERS AND RECORDINGS

SECTION 401. *Purpose.*

In order to protect innocent parties it is essential to preserve the secrecy of any tapes, transcripts or other recordings of any kind intercepted or overheard pursuant to an order granted under section 301 above, and to insulate the entire proceedings from unauthorized view.

SECTION 402. *Custody and Disposition.*

(a) No application or order under section 301 shall be made public by the court, or the applicants, or by any person with knowledge of its existence or contents, until a true indictment is returned against the individual or individuals named as its subjects in the application or order or, if no indictment is returned, until a cause of action has been stated under sections 302 (e) or 403.

(b) The court shall seal and keep in the custody of the court as the official record, a true copy of each application and order. The order itself shall be delivered to and retained by the applicant as authority for its implementation.

(c) Any tapes, transcripts or other recordings of any kind of conversations intercepted or overheard pursuant to an order granted under section 301 above shall be deemed to be in the custody of the court, but may be kept in the possession of the applicant at the discretion of the court.

(d) All such tapes, transcripts or other recordings must be returned to the possession of the court either at the conclusion of the trial of a defendant who was the subject of such order, or of a civil action based on a violation of section 302 (d), for which action the recording is needed as evidence, or at the end of one year from the date of the expiration of the order, whichever is latest.

(e) All such tapes, transcripts or other recordings shall be destroyed by the court five years after the date on which they are returned to the possession of the court under paragraph (d) above, unless, prior to the expiration of such period, the Supreme Judicial Court, for good cause shown, issue a stop-order, which

may delay the destruction of any such recordings for a period not to exceed five years.

SECTION 403. *Right of Civil Action.*

Any person who has been damaged by a violation of section 402 may sue the violator or violators therefor and shall recover the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. No award shall be less than $500.

COMMENT: a. Section 402(a) prevents regular court house checks by criminals to see if they are the subjects of an order, and by any person (for example, a reporter or a political candidate) who might hope to gain by the publication or other use of such information. Of course, its central purpose is to protect innocent parties.

b. Much as in the case of grand jury transcripts, the court will be in control of the material, but it may, under section 402(c), turn it over to the state so that it may be utilized.

c. Sections 402(d) and (e) have the obvious purpose of preventing the resifting and misusing of old tapes at some future date. The last clause is intended to provide for the case where a legitimate need for such recordings arises before the tapes are destroyed.

PART V—COMMISSION ON ELECTRONIC SURVEILLANCE AND WIRETAPPING

SECTION 501. *Creation and Function of the Commission.*

A Commission on Electronic Surveillance shall be created. Its members shall consist of the Chief Judge of the Supreme Judicial Court, who shall be the Chairman; the Governor, or his appointed representative; the Attorney General; a representative appointed by the Massachusetts Bar Association; and a member of the faculty of a Massachusetts law school, to be appointed by the Chairman. The Commission shall meet at least once every year following the passage of this section and by the end of the fifth year after passage, it shall file a written report to the General Court giving its evaluation of how well the provisions of Parts I, II, III and IV have been carried out in practice, and recommending any changes it believes will improve the functioning of these parts. The Commission shall have limited subpoena power, including the power to inspect all applications and

orders under section 301. One year from the date of submission of such report, the Commission shall terminate as an official body, unless renewed at that time by act of the General Court.

COMMENT: Section 501 sets up a special commission because of the uncertainties involved in the operation of this legislation, once passed. The Commission is needed to inspect and supervise the functioning of the various provisions and to suggest revisions where necessary, and to remove this very delicate area from the political sphere by creating in advance an essentially non-political committee. (Three of the five members hold non-political offices.) This is not to deprive the General Court of any power it rightfully holds, for, in any case, the legislature will ultimately determine whether or not the law remains in effect, and whether it changes or remains unchanged. But this provision will give the new law an incubation period in which it can have a fair chance to operate on its merits.

PART VI—SEVERABILITY

SECTION 601. *Severability.*

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are severable.

THE CONFINEMENT AND RELEASE OF PERSONS ACQUITTED BY REASON OF INSANITY

CHARLES M. HAMANN*

When a person has been acquitted of crime by reason of insanity, state law prescribes the procedure by which he may be committed to a mental institution. From this kernel of similarity the commitment laws of the several states diverge sharply in a number of essential respects. The author undertakes a review of legislation in this field, with particular attention to the solution proposed by the Model Penal Code. He then presents a model provision intended to emphasize the essentially rehabilitative purpose of such legislation, the need for the safeguarding of the constitutional rights of the committed person, and the courts' primary responsibility for the sound operation of such laws.

I. THE QUESTION OF SPECIAL TREATMENT

Striking a balance between the rights of society and those of the individual is a major objective of law; nowhere is this concern greater than in the area of civil liberties. The confinement and release of persons acquitted on grounds of insanity is a particularly striking illustration of the working of this balancing process.[1] Although the draftsmen of Model Penal Code, section 4.08,[2] make substantial concessions to individual rights, their emphasis is on the social interest in the protection of the public. The primary objectives of this paper and the replacement statute which it presents[3] are to give greater weight to individual rights and to create a fairer and more rational law.

A more fundamental issue is that of the value of the insanity defense. Authors approaching the problem from radically different viewpoints have concluded that the defense is either a legal deceit or a stopgap measure necessary only until the goal of full individualization of treatment for all criminal offenders

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1. The goal in the disposition and treatment of persons acquitted by reason of insanity is to achieve "a proper balancing between the social interest in the rights of the individual and the social interest in the safety of the public." GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 409 (1925).

2. Proposed Official Draft 1962. Section 4.08 is set out in App. A, *infra.*

3. The replacement statute is set out in App. B, *infra.*

may be realized.[4] Discussion of these arguments, is, however, beyond the scope of this paper. A major premise on which the replacement statute is based is that the first seven sections of Article 4 of the Model Penal Code will be enacted along with it.

A conceivable alternative to a statute dealing specially with persons acquitted by reason of insanity would be one dealing generally with the confinement and release of the mentally ill. In addition to some procedural objections, the basic objection raised against this alternative is that those acquitted by reason of insanity constitute an "exceptional class."[5] However, incomplete statistics cast doubt on this common assumption. The most distinguished legal authority in this area has asserted that "insofar as our fear that 'criminally insane' patients may escape has a rational as distinguished from a merely emotional basis, it rests on the assumption that such persons are more dangerous than other mental hospital inmates. The evidence, however, is that this assumption is false."[6] The legislatures of three states have applied the law of ordinary civil commitment to persons acquitted by reasons of insanity,[7] and many states, a majority of them without any statutory recognition of the fact, permit the use of ordinary release procedures for such persons.[8] Nonetheless, even if available data conclusively demonstrated that no statistical distinction existed between offenders and non-offenders, society arguably should have a

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4. The ghost of the "dangerous mental patient" will not be laid to rest until it is recognized that the institution to which the so-called mental patient is committed is not a hospital but a prison. Lawbreakers, irrespective of their mental health, ought to be treated as offenders. This would afford possibilities for "therapy" in a context in which personal liberties could be protected.

SZASZ, LAW, LIBERTY AND PSYCHIATRY 144 (1963). A less revolutionary authority believes that more complete individualization of treatment "would practically eliminate" the need for the insanity defense. GUTTMACHER & WEINHOFEN, PSYCHIATRY AND THE LAW 446 (1952). See also Fried, *Impromptu Remarks,* 76 HARV. L. REV. 1319 (1963).

5. Overholser v. Leach, 257 F.2d 667, 669 (D.C. Cir. 1958), *cert. denied sub nom.* Leach v. Overholser, 359 U.S. 1013 (1959).

6. Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity,* 38 TEXAS L. REV. 849, 855 (1960).

7. ARIZ. R. CRIM. P. 288; LA. REV. STAT., § 28:59 (1950); WYO. STAT. § 7-242(b) (1957).

8. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 379 (1954).)See the recently enacted Illinois commitment statute which provides that, after a person acquitted by reason of insanity has been ordered committed as not recovered, "the admission, detention, care and treatment, and discharge of the defendant after such order, and all circumstances thereof, shall be governed by the provisions of [the Mental Health Code]." ILL. REV. STAT. ch. 38, § 118-2 (1965).

right to treat persons acquitted by reason of insanity differently. One recent case argues, "One found to have been and to be insane in a criminal proceeding is committed not because he did the act which caused him to be brought into court, but because it is not safe for him or the community for him to be at large."[9] In a sense the court's major premise here is clearly correct: society does excuse the offender from criminal liability if he was mentally irresponsible, and commits him because of his danger to society. At another level, however, this reasoning is wrong. After all, it is precisely *because* "he did the act which caused him to be brought into court" that society is justified in reaching the conclusion that "it is not safe for him or the community for him to be at large." While society can speculate that the non-offender might commit offenses, it can confidently assert that the offender has done so. This *proven* dangerousness is, in this writer's opinion, sufficient grounds for treating persons acquitted by reason of insanity as a special class.

Another justification for such special treatment is procedural clarity. The fact that there is confusion in two of the three jurisdictions which use civil commitment procedures for offenders and non-offenders alike lends weight to the argument for differentiation. In both Arizona and Wyoming, the mental health laws were revised without any corresponding revision in the provision which directs that the disposition of persons acquitted by reason of insanity shall be in accordance with the general mental health law.[10] In both cases the special provision referred by number to a specific section of the mental health law which was subsequently revised or abolished. While part of the confusion could be removed by general reference to the mental health laws, changes in the mental health laws could still create incongruities and ambiguities between that law and the infrequently used referral provision. Thus, even if a legislature should decide to treat offenders and other mentally-ill individuals substantially alike, a special law modelled after the general law would probably be advisable.[11]

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9. Salinger v. Superintendent, Spring Grove State Hosp., 206 Md. 623, 628, 112 A.2d 907, 909 (1955).

10. ARIZ. R. CRIM. P. 288; ARIZ. REV. STAT. ANN. §§ 36-501—36-510 (1956); WYO. STAT. § 7-242(b) (1957); WYO. STAT. §§ 25-49—25-89 (Supp. 1965). Counsel for the Arizona State Senate Judiciary Committee has written, "I agree with you that the law of this State on the subject presents some critical problems which I personally think should be co-ordinated and clarified." Letter from Leslie C. Hardy to the author, January 30, 1964.

11. For an excellent annotation on the subject of commitment procedures, see Lynch v. Overholser, 369 U.S. 705, 724-28 (1962) (dissenting opinion).

A last reason for according the mentally irresponsible offender special treatment is popular expectation. Except for the three states which provide for civil commitment, all the states have special commitment laws. Most states have special laws on release as well.[12] Probably the public would be more receptive to a law which modifies existing legislation than to the abandonment of such legislation.

After deciding that some special legislation in this area is desirable, a legislature must ascertain the goals which such legislation is to serve. One prime obstacle to a proper assessment of the competing social and individual interests involved lies in a widespread confusion over their nature. Persons who regard commitment as strictly therapeutic tend to regard social and individual interests as completely harmonious. The most vociferous exponent of this view is the Court of Appeals for the District of Columbia Circuit. With regard to the law of automatic commitment in force in the District,[13] a majority of that court has said:[14]

> No penal or punitive considerations enter into this procedure. It has two purposes: (1) to protect the public and the subject; (2) to afford a place and a procedure to rehabilitate and restore the subject as to whom the standards of our society and the rules of law do not permit punishment or accountability.

Automatic commitment for an indeterminate period, this court has said, "is in no sense a 'punishment.' "[15]

Others are equally vehement in their insistence that involuntary hospitalization is punishment:[16]

> A dogma that equates normal adults with helpless victims of disease is incompatible with respect for personality. On the other hand, since incarceration in a mental hospital not only entails the

12. WEIHOFEN, *op. cit. supra* note 8, at 378.

13. D.C. CODE ANN. § 24-301 (1961).

14. Ragsdale v. Overholser, 281 F.2d 943, 947 (D.C. Cir. 1960).

15. Overholser v. O'Beirne, 302 F.2d 852, 859 (D.C. Cir. 1962). *Accord,* Salinger v. Superintendent, Spring Grove State Hosp., 206 Md. 623, 628-29, 112 A.2d 907, 909 (1955); Bailey v. State, 210 Ga. 52, 55, 77 S.E.2d 511, 514 (1953).

16. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 460 (2d ed. 1960). See also Szasz, *Psychiatry, Ethics and the Criminal Law,* 58 COLUM. L. REV. 183, 196 (1958) ("[W]hat is a 'hospital' to which one is committed against one's will if not a 'jail'?") In the first case to hold a law requiring automatic commitment unconstitutional, one finds the less sophisticated statement, "Any involuntary control or seclusion is imprisonment." Underwood v. People, 32 Mich. 1, 4 (1875) (dictum).

loss of freedom but is often extremely painful, the final result may be that punitive treatment is imposed without the benefit of, or control by law.

In a sense, any restraint on liberty is a punishment. To a mental patient longing to escape the confines of an institution, his stay is a frustration of liberty and thereby an imprisonment. The Court of Appeals for the District of Columbia Circuit insists that where rehabilitation is the aim, punishment is not involved. The basic fallacy in that approach is its equation of statutory purpose with effect. What the patient thinks and feels bears no necessary relation to what the society intends. On the other hand, assertions such as that the "two basic ways in which a person may be penalized in our present society [are] by running afoul of the law [or] by running afoul of psychiatrists"[17] assume that individual concern is the only factor in the equation. Yet, in fact, except when the patient is a psychopath, in which case a mental hospital is operated like a prison, without concern for treatment, protection, rehabilitation, and punishment may co-exist in the hospital's relationship with its patient.

How should these various factors — the social interest in self-protection, the individual's interest in liberty (which in the long run is a social interest as well) and rehabilitation — be weighed? A basic problem is the elusive character of the rehabilitation factor.[18] Consequently, the draft replacement statute, while recognizing the desirability of rehabilitation both to the individual and society, is framed with primary regard to the conflict between the society's interest in self-protection and the individual's interest in freedom from restraint.

II. COMMITMENT

Section 4.08 of the Model Penal Code requires automatic commitment of persons acquitted by reason of "mental disease or defect excluding responsibility."[19] Under the Code formulation, the Court "shall order" the defendant, after acquittal, "to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate insti-

17. Szasz, *Civil Liberties and the Mentally Ill,* 9 CLEV.-MAR. L. REV. 399, 407 (1960).

18. Many of the special confinement statutes state as their purpose a desire to rehabilitate the offender, but their real motive may more often be a desire to protect the society from such individuals.

19. MODEL PENAL CODE § 4.08(1) (Proposed Official Draft 1962).

tution for custody, care and treatment."[20] In place of an automatic commitment procedure, the draft replacement substitutes a post-acquittal observation period and a generally required hearing on the issue of dangerousness to determine whether the defendant ought to be committed or released.

The Code requirement of automatic commitment followed by release application restrictions has been attacked in the United States House of Representatives as unconstitutional by the dissenting minority of the House committee which studied a bill which would have adopted Article 4 of the Model Penal Code for the District of Columbia.[21] The dissenters claimed that the restriction on individual efforts to regain freedom in section 4.08 raises far-reaching constitutional issues:[22]

> This section provides that a person who is committed to a mental institution, after acquittal on grounds of insanity at the time of the offense, cannot . . . apply for release until after 6 months from the date of his confinement. However, the defendant may be sane at the time of the verdict. Under this bill, therefore, a sane man could be committed to a mental institution for a minimum of 6 months without any opportunity to obtain his release. Furthermore, if his application at the end of the 6-month period is denied for any reason, the bill prohibits his filing another application for 12 additional months. Such provisions are clearly unconstitutional as a deprivation of liberty without due process of law.

The minority view has several infirmities which cast considerable doubt on its position. The most damaging is that it simply misstates the case. Section 4.08 (5) does not bar the filing of an application for release during the six-month period after commitment, but, rather, provides that such applications "need not be considered." Furthermore, the argument does not evaluate the constitutional significance of the fact that the Commis-

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20. *Ibid.* The requirement of automatic commitment has counterparts with varying consequences in fourteen American jurisdictions. COLO. REV. STAT. ANN. § 39-8-4 (1965); GA. CODE ANN. § 27-1503 (1953); KAN. GEN. STAT. ANN. § 62-1532 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 123, § 101 (1958) (murder and manslaughter only); MICH. COMP. LAWS § 767.27 (1948) (murder only); MINN. STAT. § 631.19 (Supp. 1965); MO. REV. STAT. § 546.510 (1959); NEB. REV. STAT. § 29-2203 (1964); NEV. REV. STAT. § 175.445 (1963); N.Y. CODE CRIM. PROC. § 454 (McKinney Supp. 1965); OHIO REV. CODE ANN. § 2945.39 (Page 1953); WIS. STAT. § 957.11 (1963). Virginia has recently adopted a law based on Model Penal Code § 4.08 in most respects. VA. CODE ANN. § 19.1-239 (Supp. 1966).

21. H.R. 7052, 87th Cong., 1st Sess. (1961).

22. 107 CONG. REC. 11173 (1961).

sioner of Mental Hygiene may at any time institute proceedings to obtain a patient's release.[23]

Attacks on the constitutionality of statutes requiring automatic commitment have taken two avenues: (1) that the judiciary may not be deprived of the right to inquire into the cause of any restraint of liberty,[24] and (2) that commitment without hearing is *per se* objectionable.[25] The first argument, concentrating on restrictions on release rather than on commitment, has, with one exception,[26] given the courts little difficulty. They have either created a judicial remedy[27] or have found the restrictions imposed to be reasonable.[28] The restrictions on release in section 4.08 do deprive the judiciary of some of its power to inquire into the condition of the person acquitted. Except at the regular intervals when that person may apply for release, hospital psychiatrists have wide discretion in determining whether or not he is ready for release. But the Code restrictions are not severe and have a rational basis. The official comment notes that "applications by the patient are limited by what is thought to be the period necessary to observe him initially (six months) and by the interval probably necessary for a significant change in his condition to occur after any application has been denied (one year)."[29]

A federal habeas corpus case, *Brown v. Urquhart,* raises the second and more extreme argument:[30]

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23. The new Virginia law (see note 20, *supra*) departs from Model Penal Code § 4.08 in providing that "no application may be made . . . until three months have elapsed from the date of the defendant's confinement." VA. CODE ANN. § 19.1-239 (2) (Supp. 1966).

24. See *In re* Boyett, 136 N.C. 415, 423, 48 S.E. 789, 792 (1904). This case is the only one which has held a statute unconstitutional on this ground.

25. See Brown v. Urquhart, 139 Fed. 846, 849 (W.D. Wash. 1905), *rev'd on other grounds sub nom.* Urquhart v. Brown, 205 U.S. 179 (1906).

26. *In re* Boyett, 136 N.C. 415, 48 S.E. 789 (1904).

27. Golden, petitioner, 341 Mass. 672, 171 N.E.2d 473 (1961); Wright, petitioner, 1966 Mass. Adv. Shts. 87, 213 N.E.2d 404 (1966); People v. Dubina, 304 Mich. 363, 8 N.W.2d 99 (1943).

28. In *Ex parte* Slayback, 209 Cal. 480, 288 Pac. 769 (1930), the Supreme Court of California held that the need to observe the mental condition of a person acquitted by reason of insanity justified a statute banning all applications for release for one year. The court said, "Perhaps a lesser or greater time would serve the same purpose, but the Legislature was in as good a position to judge of the time required as are the courts." *Id.* at 491, 288 Pac. at 774.

29. MODEL PENAL CODE § 4.08, comment (Tent. Draft No. 4, 1955). The California statute, amended in 1957, now bans such applications only for ninety days. CAL. PEN. CODE § 1026(a) (West Supp. 1966).

30. Brown v. Urquhart, 139 Fed. 846, 849 (W.D. Wash., 1905), *rev'd on other grounds sub nom.* Urquhart v. Brown, 205 U.S. 179 (1906).

> If this statute must be construed . . . as a law authorizing the judge of the trial court to commit a defendant to jail after a verdict of acquittal on the ground of insanity, without a new arraignment upon a formal complaint or information, . . . and an opportunity given to controvert the averments of such complaint or information, or interpose a lawful defense, it is, in my opinion, unconstitutional and void.

If any court today were to agree, the automatic commitment of Code section 4.08 would clearly violate due process. A person committed under section 4.08 might never have a hearing unless he were to demand one. But the chief concern should not be, as it was in *Brown*, with how rights are protected but rather that they are protected. Because the limitations placed on individual requests for discharge by Code section 4.08 are rational, objections to them do not seem constitutionally significant. Furthermore, the harm the preservation of formalities such as "a new arraignment on a formal complaint or information" may cause medically may well outweigh whatever it may do otherwise.[31]

Whether the automatic commitment and related provisions of the Code are wise is, however, open to question. The arguments in support of automatic commitment fall into five broad categories: (1) a person who benefits by the insanity plea consents to those consequences of which he has statutory notice;[32] (2) a person insane at the time of the offense is presumed to remain insane (or, less extremely, dangerous) until he has proven the contrary;[33] (3) automatic commitment is necessary to discourage false pleas of insanity;[34] (4) public and jury acceptance of the insanity defense will increase if hospitalization is mandatory;[35] and (5) an informed judgment on dangerousness cannot be made without extended observation.[36] The official comment

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31. GUTTMACHER & WEIHOFEN, *op. cit. supra* note 4, at 288, 290.

32. Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 230 (1960). *Cf.* People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 162, 117 N.Y. Supp. 322, 324, *aff'd*, 196 N.Y. 525, 89 N.E. 1109 (1909).

33. *E.g., In re* Brown, 39 Wash. 160, 166, 81 Pac. 552, 553 (1905).

34. See, *e.g.*, Lynch v. Overholser, 369 U.S. 705, 715 (1962) (dictum).

35. See MODEL PENAL CODE, *op. cit. supra* note 29, § 4.08, comment ("more acceptable to the public and to the jury").

36. See Ragsdale v. Overholser, 281 F.2d 943, 948 (D.C. Cir. 1960).

to section 4.08 raises the last three arguments, but it neither analyzes them nor explains how the section will achieve their objectives. The examination of all five points undertaken in the paragraphs which follow indicates that the first four have serious defects. The draft replacement for section 4.08 attempts to satisfy the fifth.[37]

The theory that the defendant who pleads insanity voluntarily accedes to the consequences of his plea, including waiver of a hearing prior to commitment, is founded on the untenable assumption that the insanity defense is a privilege rather than a right. Society does not grant a concession in allowing the insanity defense but rather gives effect to a broad conviction that society has no reason to punish one who is not mentally responsible for his acts. It is arguably permissible for the law to require that a defendant consent to the unfavorable consequences of the exercise of a privilege when he elects to receive its benefits; but where he exercises a fundamental right, a requirement that he consent to such consequences is an impermissable derogation of that right.

The best virtue of the presumption theory — the second argument — is the simplicity of its statement.[38] When stated in its boldest form to include *insanity,* the presumption is *ab initio* suspect. A finding of fitness to stand trial, at least in jurisdictions which require more than mental disease or defect to excuse an offense, would ordinarily indicate partial recovery of sanity.[39] The Code presumption of continued *dangerousness* is not unreasonable. However, this presumption does not justify denial of a pre-commitment hearing. Since continued dangerousness is by no means inevitable the presumption should be rebuttable.[40] Society has no legitimate interest in confining persons involuntarily and indefinitely unless it has determined, by some fairly reliable means, that it has something or someone to protect itself against.

A somewhat more tenable basis for automatic commitment than a presumption of continuing insanity or dangerousness is the conclusion that compulsory commitment will discourage false

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37. Replacement para. (3).

38. Ohio Rev. Code Ann. § 2945.39 (Page 1953). See State v. Behan, 80 S.D. 370, 374, 124 N.W.2d 179, 181 (1963) ("An accused acquitted by reason of insanity is presumed to be insane.").

39. *But see* People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 117 N.Y. Supp. 322, 324, *aff'd,* 196 N.Y. 525, 89 N.E. 1109 (1909).

40. Comment, *Compulsory Commitment Following a Successful Insanity Defense,* 56 Nw. U.L. Rev. 409, 424-25 (1961).

or frivolous pleas of insanity.[41] Undoubtedly, in jurisdictions with a liberal insanity test, the threat of automatic commitment would deter some defendants from relying on the defense. However, the necessity and justice of such a deterrent are doubtful. In most cases it would be "extremely difficult for an imposter to mislead a competent psychiatrist."[42] Thus, automatic commitment does not seem necessary to prevent guilty persons from avoiding payment of their debt to society. Further, automatic commitment may also deter those who need psychiatric care from pleading insanity. The possibility of abuse, as Mr. Justice Harlan once pointed out in a related context, "ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice."[43]

The argument as to the need for public acceptance[44] rests entirely on the validity of other reasons for automatic commitment. The public has a right to be *properly* safeguarded from persons acquitted because of mental irresponsibility, but clearly this right does not extend to the arbitrary or unreasonable confinement of such persons. As the argument applies to jury action, it has perhaps some pragmatic justification; a juryman may hesitate to find a defendant not guilty by reason of insanity if he feels that commitment is less "punishment" than the defendant "deserves." The thrust of this argument is, however, somewhat blunted by the fact that the jury may be kept in ignorance of the consequences of acquittal.[45] And too, there is no certainty that an intelligent jury, at least, would equate public safety with automatic commitment. As previously noted, only twelve American jurisdictions require automatic commitment.[46] Although a good percentage of the statutes concerned with the disposition of persons acquitted by reason of insanity have ancient origins, their status as an expression of the popular will cannot be entirely discounted.[47]

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41. *E.g.*, MODEL PENAL CODE, *op. cit. supra* note 29, § 4.01, app. B at 177.

42. WEIHOFEN, *op. cit. supra* note 8, at 45-46.

43. Davis v. United States, 160 U.S. 469, 493 (1895).

44. MODEL PENAL CODE, *op. cit. supra* note 41 and § 4.08, comment.

45. See State v. Bracy, 215 N.C. 248, 258, 1 S.E.2d 891, 897 (1939), and State v. Eisenstein, 72 Ariz. 320, 337-38, 235 P.2d 1011, 1023 (1951).

46. See note 20 *supra*.

47. Hawaii has within the past decade abandoned automatic for discretionary commitment. HAWAII REV. LAWS, § 258-38 (Supp. 1961).

The most substantial reason for not requiring a hearing prior to commitment is the need for observation.[48] In justifying the District of Columbia statute, which, like the Code section, requires automatic commitment, the Court of Appeals has said: "[A] hearing would be meaningless until trained medical experts had a reasonable opportunity to observe and examine the subject and report their findings. Hence some time between the verdict and the appraisal of the defendant's then existing mental condition is unavoidable under any scheme which would provide adequate safeguards."[49] The Code's official comment says of the six-month commitment provision in section 4.08 (5) that six months is "the period necessary to observe him [the person acquitted] initially,"[50] but section 4.08 (5) itself gives no intimation that observation is the purpose to be served. The only objectives announced in subsection (1) are "custody, care, and treatment." The draft statute recognizes the need for observation of the patient at critical periods. It requires commitment — but for the express purpose of an examination of the "present mental condition" of the acquitted defendant.[51] It also requires an examination of the committed person upon the acceptance by the court of an application for his release.[52]

Pursuant to its objective of limiting confinement to the period for which it is needed, the draft statute gives a court the right to commit a person it has acquitted by reason of insanity for an examination period "not exceeding ninety days," or 180 days

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48. In *In re* Boyett, 136 N.C. 415, 48 S.E. 789 (1904), the court, holding a state commitment law unconstitutional because it denied the defendant a judicial hearing, said, *id.* at 422-23, 48 S.E. at 792:

"We do not wish to be understood as saying that a person acquitted of a grave crime upon the ground of insanity may not be detained for a reasonable time, so that by some appropriate proceedings the condition of his mind may . . . be examined for the purpose of ascertaining whether his own safety and that of other persons or the public generally requires that he be committed to the hospital for treatment and care."

49. Ragsdale v. Overholser, 281 F.2d 943, 948 (D.C. Cir. 1960).

50. MODEL PENAL CODE, *op. cit. supra note* 29, § 4.08, comment.

51. Replacement para. (2). Tennessee authorizes a court of criminal jurisdiction to commit a person acquitted by reason of insanity "for observation, care and treatment for a period not exceeding thirty (30) days" after his acquittal. Before the expiration of that time, the superintendent of the hospital to which he is committed must certify whether or not the condition which justified his hospitalization still exists. Perhaps somewhat illogically, a hearing is required before, rather than after, such a thirty-day commitment. TENN. CODE ANN. § 33-701 (Supp. 1966).

52. Replacement paras. (5) and (7).

if an extension is needed,[53] followed in the usual case by a hearing.[54] The regular ninety-day limit reflects the average of the outer limits suggested by eleven hospital superintendents and administrators as to the period necessary for observation.[55] If ninety days is more than adequate time for the examination, the Court has an opportunity to set a shorter time limit. In reaching such a conclusion, a court might consider the psychiatric report made during the observation prior to trial required by section 4.05 of the Code.[56] Optionally, the court could call for direct psychiatric testimony on this point.

Since in some circumstances the time allowed for observation may prove insufficient, the draft statute allows the examining psychiatrists to request an extension of the observation period, again "not exceeding ninety days."[57] The more involved renewal procedure was chosen in order to protect the individual against the possibility of a court's automatically — and unnecessarily — ordering hospitalization for the maximum period. The limitation on the period in which a request for an extension may be made (10 to 20 days prior to the expiration of the original examination) will prevent prolongation of the commitment period in anticipation of a hearing and will also prevent the making of an application for extension before the need for it is fully established.

Although novel in its specific terms, the requirement of an automatic observation period has some related statutory antecedents. In three states the trial judge has authority to commit a person for observation in some circumstances.[58]

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53. *Id.* para. (3).

54. *Id.* para. (4). If the evidence is conclusive that the defendant is not dangerous, the court may discharge him without a hearing. This provision prevents delays in release where restraint is clearly unnecessary.

55. Comment, *supra* note 40, at 466. One administrator specified that "a matter of weeks" was necessary for accurate diagnosis, another, "one year."

56. MODEL PENAL CODE § 4.05 (Proposed Official Draft 1962).

57. Replacement para. (3).

58. ARIZ. REV. STAT. ANN. § 36-515 (Supp. 1965); LA. REV. STAT. § 28.54 (Supp. 1963); MD. ANN. CODE art. 59, § 8(b) (Supp. 1964). The applicability of the Arizona statute to persons acquitted by reason of insanity is not entirely clear. See note 10 *supra*. Maryland's law, the newest and most noteworthy of the three, provides that a person acquitted by reason of insanity

> may be committed to one of the appropriate mental hospitals of the State for examination and evaluation to determine whether or not, by reason of mental disease or defect, the person is a danger to himself or to his own safety, or will be a menace to the safety of the person or property of others. He shall be released forthwith upon a negative finding by such hospital, and in any event shall, at any time after three months from the date of such confinement, have the right to apply for release . . .

Under the draft statute a hearing is automatic before final commitment; the statute insures that the right to a hearing cannot be lost through neglect.[59] Administrative considerations also enter into the employment of this requirement. Under a discretionary system, the person committed for observation might delay his application for release for 30 days after the end of the examination. Under the draft statute, a question would arise in such a case as to whether another observation period would be necessary. A delay would, in any event, dull the memory of the examining psychiatrists, hampering efforts to provide an adequate hearing, though, admittedly, where a person still shows obvious signs of mental instability, a hearing will accomplish little. The discretion which the draft statute gives the judge in determining the degree of formality of the proceedings may reduce the chance of their having ill effects upon the mental health of the patient.

Providing for observation prior to a hearing is not the only alternative to the Code provision. Another method would be a pre-trial examination. Section 4.05 of the Code requires a period of observation "not exceeding sixty days" upon the filing of a notice of intention to rely on a defense of mental irresponsibility.[60] Perhaps at this time the examining psychiatrists could make some assessment of the defendant's dangerousness. However, two factors militate against making the results of that examination conclusive. First, the wide-ranging nature of the examination would tend to make it less thorough than a post-acquittal examination. Second, the ordeal which the defendant experiences between the examination and the end of the trial may aggravate his mental condition and cause some degree of relapse.

III. PROCEDURE FOR RELEASE

If, after post-trial observation and a hearing, the acquitted defendant is committed, a problem of controlling post-commitment applications for release is created. Under Code section 4.08, once a committed person has unsuccessfully applied for his release, he "shall not be permitted to file a further application until [one year] has elapsed from the date of any preceding hearing."[61] The rationale which the official comment uses to support its ban is that one year measures "the interval probably

59. Replacement para. (4). *Contra,* MD. ANN. CODE art 59, § 8(b) (Supp. 1964).

60. MODEL PENAL CODE, *op. cit. supra* note 56.

61. *Id.* § 4.08 para. (5). The Virginia adaptation of § 4.08 provides that the one year period will be measured from the time of an "adverse determination" with respect to an application for release made by the committed person. VA.

necessary for a significant change in his [the patient's] condition to occur after any application has been denied."[62] The Code provision has some justice. The one-year ban prevents nuisance requests for release, and ordinarily if the person confined recovers his mental health, hospital authorities "will be glad to permit his release."[63] But the comment's indirect suggestion that habeas corpus is an appropriate supplement of statutory procedures where the institution unreasonably insists on a patient's further detention[64] seems mistaken.[65]

> To say that [a person committed without a hearing] is not remediless, that as he may resort to the writ of habeas corpus . . . he is not deprived of due process of law, is to miss the purpose of that safeguard. It [due process] requires that a hearing be given before a permanent judgment or order depriving one of his liberty, and does not intend the hearing which he may afterwards be able to get by dint of seeking relief against his unlawful commitment. A principal office of the writ is to get people out who have been committed without due process of law, and on that ground.

If a person committed is allowed any relief during the interim period between regular applications for release, such relief is more appropriately granted by the creation of a statutory remedy than by a forced resort to habeas corpus. Moreover, a danger exists that such a person will be denied any nonstatutory remedy[66] during such an interval. Section 4.08(2) of the Code does allow the Commissioner of Mental Health to institute proceedings for release at any time, but bureaucratic actions tend to be slow, and hospital superintendents are not always liberal. Because of dissatisfaction with habeas corpus as an alternative remedy and because of doubts about the adequacy of providing for release only on the institution's application, the draft replacement provides that such applications by the patient "need [not] be considered,"[67]

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62. Model Penal Code, *op. cit. supra* note 29.
63. Weihofen, Mental Disorder as a Criminal Defense 383 (1954).
64. Model Penal Code, *op. cit. supra* note 62.
65. People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 177-78, 117 N.Y. Supp. 322, 335 (dissenting opinion), *aff'd,* 196 N.Y. 525, 89 N.E. 1109 (1909).
66. California's Supreme Court has held that the statutory remedy is exclusive. *Ex parte* Slayback, 209 Cal. 480, 490, 288 Pac. 769, 774 (1930).
67. Replacement para. (8).

Code Ann. § 19.1-239 (5) (Supp. 1966). Under the latter formulation the committing court may affect the committed person's right to future applications by delaying an adverse determination.

rather than that they "shall be permitted," allowing the court to entertain those interim applications that warrant consideration.

The draft replacement makes several other minor changes in the terms of the commitment and release application provisions of the original statute. Instead of the "custody, care and treatment" provision of section 4.08(1), it states that, "If the acquitted person is committed, the Commissioner shall have him placed in an appropriate institution for purposes of treatment."[68] Custody and care are presumably normal concommitants of commitment; treatment is not, particularly in overcrowded and understaffed state hospitals, where the emphasis is all too frequently on security. As one writer has observed, "One effect of custody-orientation is actually to transform the nature of the psychiatric practice in the institution. The patient's physical and mental health is subordinated to considerations of custody."[69] The elimination of custody and care from the three-term phrase used in the Code is intended to prod hospital superintendents to think primarily of the welfare of the patient.[70]

The draft replacement eases the Code restrictions on applications for a patient's release in one other way. Section 4.08 permits such application to be made only by the Commissioner of Mental Hygiene[71] and the patient himself.[72] However, an illiterate patient may not be able to draft the application; and in any case the Commissioner should not be given the burden of being the only other person with capacity to seek a patient's release. Therefore the draft statute allows "some person, other than a mental patient, acting on his behalf" to make the application.[73] This expanded group would include friends, relatives or an attorney, persons capable of more closely attending an individual patient's progress than can the staff of most state institutions. Other mental patients are excluded from this category because of the trouble-making capacity which they might have.[74]

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68. Replacement para. (4).

69. Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity,* 38 TEXAS L. REV. 849, 860-61 (1960). See also *id.* at 853-54.

70. The Virginia adaptation of § 4.08 omits all reference to the purpose of commitment. VA. CODE ANN. § 19.1-239 (Supp. 1966).

71. MODEL PENAL CODE, *op. cit. supra* note 57, § 4.08 (2).

72. *Id.* § 4.08 (5).

73. Replacement para. (7).

74. The Maryland provision is not thus limited. The person confined or "anyone in his behalf, including the superintendent, the chief officer or physician in charge of [the institution where he is confined]" may petition for his release. MD. ANN. CODE art. 59, § 21 (1957).

Under both section 4.08 of the Code and the draft provision, the committing court has the major responsibility for the release of those committed. The Code provides that the Commissioner of Mental Hygiene, or the person acquitted, shall make application for discharge or release "to the Court by which such person was committed."[75] Following receipt of the application, the Court has the duty to appoint two psychiatrists to examine the patient and "to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition."[76] If the Court is satisfied by the report or other testimony that the committed person is no longer dangerous, it must release him, but "if the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released."[77] Except for its mandatory requirement of a post-trial observation period,[78] the draft statute follows these Code provisions with, for the most part, only minor variations.

Perhaps the most difficult problem in this area lies in the choice of a person to supervise the release of committed offenders. State laws run a wide gamut: one state allows appeals to the legislature in capital cases;[79] three states allow appeals to the governor in special circumstances;[80] and a number of states require a hearing before a jury.[81] A petition to the legislature is so obviously inappropriate that it hardly deserves mention. Suffice it to say that this method maximizes political pressures. A governor may have more investigatory resources than a legislature, but he can be subjected to even more clearly focused political pressures.

A jury hearing also seems inappropriate. The question of whether a committed person ought to be released is one in which medical judgments are both crucial and, often, very difficult to make. One might well question the soundness of putting the ultimate decision in the hands of a body which by its nature both is inexpert in such matters and can bear no responsibility for

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75. MODEL PENAL CODE § 4.08 paras. (2), (5) (Proposed Official Draft 1962).

76. *Id.* para. (2).

77. *Id.* para. (3).

78. Replacement paras. (2)-(3).

79. N.C. GEN. STAT. § 122-86 (1964).

80. MASS. GEN. LAWS ANN. ch. 123, § 101 (1958); MICH. COMP. LAWS § 766.15c (1948); N.C. GEN. STAT. § 122-86 (1964).

81. *E.g.*, TEX. CODE CRIM. PROC. art 46.02, § 3 (1966); WASH. REV. CODE ANN. § 10.76.070 (Supp. 1965).

error in the event that the released person performs other anti-social acts after release. Furthermore, although too great an emphasis on procedural informality may in some instances impair the rights of the person seeking release, insistence on a jury hearing, the "most public, most formal and most elaborate form of judicial proceeding,"[82] may have other harmful results.[83]

Supervision by hospital authorities[84] or by an administrative board[85] are the two most frequently offered alternatives to court supervision. The arguments in favor of the first alternative follow two lines: (1) that hospital authorities are best qualified to determine dangerousness[86] and (2) that judges are incompetent to decide this question.[87] According to the proponents of hospital release, discharge by institutional authorities is entirely logical: "It should require no argument to demonstrate that the authorities of the hospital where the patient is under daily supervision and to whom the facts of his previous history and of his mental state are the best known are the persons who should determine his fitness to be returned to the community."[88] The view of the draftsmen of Article 4 of the Model Penal Code, who also advocate institutional control of release, is that "the judgments of whether a mentally disordered individual is of danger to himself or to others and whether he will profit from treatment for which he himself sees no need are primarily medical decisions and should not be left to the Court."[89] The major bases for the second line of argument are concern over the skepticism with which judges frequently view the effectiveness of psychiatric treatment, the fragmentation of decision-making which decentralized supervision by the courts may entail, and the superficiality of judicial observation of the patient.[90]

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82. Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307, 345 (1946).

83. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 288, 290 (1952).

84. *E.g.*, ARK. STAT. ANN. § 59-242 (Supp. 1961).

85. *E.g.*, OHIO REV. CODE ANN. § 2945.39 (Page 1953), which provides for supervision by a three-man commission, composed of a judge, an alienist, and the superintendent of the hospital where the person seeking release is being confined.

86. See Weihofen & Overholser, *supra* note 82, at 333; OVERHOLSER, THE PSYCHIATRIST AND THE LAW 94 (1953).

87. See OVERHOLSER, *op. cit. supra* note 86, at 95-96; Note, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 YALE L.J. 293, 301 (1958).

88. Weihofen & Overholser, *supra* note 86.

89. MODEL PENAL CODE § 4.01, app. B at 178 (Tent. Draft No. 4, 1955).

90. See, *e.g.*, Note, *supra* note 87, at 301-02.

The logic of hospital release, unsupervised by the courts, is hardly as indisputable as its proponents proclaim. Because release is in large measure dependent on medical considerations, psychiatry obviously has some role to play. By providing for a sixty-day examination period prior to a hearing and for psychiatric testimony at the hearing,[91] the Code recognizes the relevance of psychiatric considerations. But to say that psychiatric concerns are relevant is not to say that they will be dispositive. For example, before a psychiatrist can make an adequate assessment of dangerousness, a standard of dangerousness must be established. But "no hospital, however careful, can guarantee the good behaviour in perpetuum of any ex-patient; indeed, the good conduct of the so-called normal [person] cannot be guaranteed!"[92] Because a determination of dangerousness in terms of absolutes is out of the question, society must determine the risk which it is willing to accept. This determination is a judicial one, not a medical one.[93] There must be weighed matters of right as well as of science, social attitudes as well as the individual's mental condition. A psychiatrist, however familiar he may be with a person's case history, strays beyond the area of his special competence in attempting to analyze these competing concerns.

Furthermore, the psychiatrist may be moved by considerations which should not influence his judgment. It has been observed that[94]

> the medical officer is likely to err on the side of liberty, particularly because he is by training a medical practitioner, regarding himself as a doctor and not as a jailer. For these reasons . . . the special powers of the criminal courts . . . are sometimes an important additional safeguard.

Of course, in security-conscious hospitals, precisely the opposite may be true.[95] Other irrelevancies, such as a desire to eliminate overcrowding, may also prejudice the doctor's judgment.[96] It

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91. MODEL PENAL CODE, *op. cit. supra* note 75, § 4.08 (2).

92. OVERHOLSER, *op. cit. supra* note 86, at 100. See also Weihofen, *supra* note 69, at 864.

93. See Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 230 (1960).

94. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 432 (2d ed. 1961).

95. Weihofen, *supra* note 69, at 885. See also SZASZ, LAW, LIBERTY AND PSYCHIATRY 230 (1963).

96. Overholser, *The Present Status of the Problems of Release of Patients from Mental Hospitals*, 29 PSYCHIATRIC Q. 372, 378 (1955).

should be emphasized that these criticisms are not directed against the hospital representative's integrity, but against his likely point of view. Whereas a hospital superintendent must ask himself how the possibly premature release of an insane killer or rapist or thief will affect the liberty of his other patients in the wake of a popular outcry,[97] the court owes loyalty only to the individual petitioner and the public at large. In addition, the greater public acceptance of the courts as arbiters of questions of human liberty probably makes the court less responsive to popular reaction than hospital psychiatrists. Court-supervised release can provide a needed buffer between hospital officials and the public.

The attacks on the competence of the courts to decide questions of the desirability of release are largely misplaced. Some judges, no doubt, are suspicious of the effectiveness of psychiatric treatment. The proper solution to this problem may be to employ more enlightened judges rather than to disqualify the judiciary from any role in release proceedings. The fear of a proliferation of differing release standards is a very minor concern. In the first place, the emphasis on individualization of treatment in the mental health area belies somewhat the need for a uniform rule. Also, the requirement in section 4.08 and in the draft replacement that all applications for release be directed to the committing court assures some degree of uniformity in the handling of each patient. Finally, psychiatric reports and witness testimony should partly compensate for the lack of depth in the court's first-hand knowledge of a patient's condition.

Some critics remain unconvinced that judicial supervision of release is appropriate; at the same time, they recognize the disadvantages of hospital control. They argue that the solution is an administrative board "having a larger experience [with mental health problems than the courts] and better opportunity for observation of mentally-abnormal persons,"[98] and yet freed from the special conflicts of interest which confront the hospital administrator.[99]

> An administrative board composed of psychiatrists, lawyers, and representatives of the community at large would possess the balanced perspectives needed to evaluate discharge recommendations properly. If feasible, the psychiatrists should be experts on criminal insanity. The lay members could be civic leaders or

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97. Weihofen, *supra* note 69, at 884.
98. *In re* Timm, 129 Kan. 126, 130, 281 Pac. 863, 865 (1929).
99. Note, *supra* note 87, at 303.

> clergymen whose extensive contacts would facilitate finding employment for discharged patients. Sociologists, criminologists and other specialists could also be employed, either on the board or as expert consultants.

The above proposal has a utopian appeal, but it is unrealistic. In the average state, even in one which might have adopted the Code test of insanity, the number of cases involving mentally irresponsible offenders would probably be insufficient to justify the establishment of such a board. Even if this were not so, an administrative board composed of "psychiatrists, lawyers, and representatives of the community at large," would probably function much less smoothly than the proposal envisions. In all likelihood, either one group (probably the psychiatrists because of their special competence) would dominate the proceedings, or internal dissension arising from irreconcilable points of view would paralyze the board. Furthermore, administrative review would introduce complexities of judicial review not presented by court or hospital supervision.[100]

In the opinion of this writer, the procedure for release established by section 4.08, and for the most part included in the replacement statute, does achieve "the balanced perspectives needed to evaluate recommendations properly" and does so more adequately than would an administrative board of the type described. Under these provisions both psychiatrist and judge have substantial roles in determining eligibility for release,[101] but their relationship differs from what it would be on an administrative board. As equals on a board they would probably compete for authority. Here, final authority rests in the court serving as chief consultant. This relationship is workable and in accordance with sound public policy, recognizing that psychiatric investigation is indispensable, but also that psychiatry alone cannot establish the standard and basis for release. And by placing final authority in the court, this solution mitigates the psychiatrist's problem of divided loyalty by restricting his role to that of a doctor.

The draft replacement does change some details of the release procedure in Code section 4.08. The draft statute adopts the

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100. See *id.* at 305-06.

101. The draft replacement also indirectly encourages the introduction of community representatives into the proceeding by providing that in the court's discretion the committed person may call witnesses at the hearing. Replacement para. (4).

requirements that application for release be made to the committing court, and that notice of application to be given to the prosecuting attorney,[102] but it restricts the court's choice of psychiatrists,[103] modifies the time-limit on the examination period,[104] and amplifies on the nature of the hearing.[105]

Instead of requiring applications for release to be made to the committing court, application could be allowed to the court in the county where the person is confined, either alternatively[106] or exclusively.[107] Either method might result in the saving of expense and effort in transporting patients from the institution to the place of hearing. Also, the court in the county of confinement may develop some degree of expertise in the area. On the other hand, such courts lacking the committing court's familiarity with the facts of particular cases, may be unwilling to assume the responsibility of difficult decisions.[108] In view of the probability that no court will have extensive experience with cases of this kind because of their relative infrequency, the argument that the court most familiar with the particular case should hold the hearing seems the more convincing. Also the committing court may well have a special interest not shared by the court in the county of confinement, for people often live in the community in which they are tried and committed and return to that community upon release.

The notice provision in section 4.08(2) might also have been altered,[109] or omitted. However, protection of community interest is an important objective of the court's decision at the

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102. MODEL PENAL CODE, *op. cit. supra* note 75. Replacment paras. (4), (5), (7).

103. MODEL PENAL CODE, *op. cit. supra* note 75, § 4.08 (2). Replacement paras. (1)(b), (3), (7).

104. MODEL PENAL CODE, *op. cit. supra* note 103. Replacement para. (3).

105. MODEL PENAL CODE, *op. cit. supra* note 75, § 4.08 (3) Replacement para. (4).

106. *E.g.*, CAL. PEN. CODE §§ 1026 (West 1956) & 1026(a) (West Supp. 1965); UTAH CODE ANN. § 77-24-15 (1953).

107. CONN. GEN. STAT. REV. § 54-38 (1958).

108. In one California case, the judge sitting in the county of confinement refused to take the responsibility for the release of a possibly insane killer. Claiming that he could not make an intelligent judgment on the issue of restored sanity, he said, "I think the committing court, where they have all the records of this should be the one to pass upon it." *In re* Perkins, 165 Cal. App. 2d 73, 77, 331 P.2d 712, 715 (1958).

109. *E.g.*, CONN. GEN. STAT. REV. § 54-38 (1958): "The petition shall be served like civil process upon the selectmen of the town to which he belongs and upon the person, [the victim], if any, upon whom the offense was charged to have been committed and upon the state's attorney of the county in which the trial was had."

hearing, and the prosecuting attorney is a knowledgeable and presumably fairly objective representative of that interest. A simple notice provision like that of section 4.08(2) has administrative advantages which a more complex one would lack. Service on the prosecutor avoids the preliminary search that service on someone other than a public official might require. Finally, it does not seriously interfere with efforts to keep the hearing procedure simple.[110]

The choice of psychiatrists to examine the candidate for release is an area of significant divergence between section 4.08 and the draft statute. The Code provision requires simply that "at least two qualified psychiatrists" conduct the examination and report to the court.[111] The draft provides for the appointment of "two or more qualified psychiatrists, at least one of whom shall be an independent psychiatrist" to conduct both the post-trial observation (which has no equivalent in section 4.08) and the post-commitment examination at the instance of the person committed or someone other than the Commissioner of Mental Hygiene.[112] The draft defines "independent psychiatrist" as one "whose principal employment is not with the State. A psychiatrist is principally employed by the State if in the year preceding an examination to be made pursuant to this Section he spent more than one half of his working hours in the employment of the State."[113] The substitution of this more elaborate provision for that of section 4.08 is not a reflection on the integrity of the average state psychiatrist but rather a recognition that the force of circumstances may divide the interests of the state psychiatrist and patient,[114] and that therefore the patient's interest should have some outside protection. The draft's proposal is only intended as an effort to effectuate the Code's call "for an independent psychiatric examination of the defendant before action on the application for release."[115] Despite this statement of purpose in the official comment, Code section 4.08 does nothing to guarantee its achievement.

"Principal employment" was made the dividing line between an independent and non-independent psychiatrist with an eye to

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110. The replacement statute does not require any notice of the post-trial examination because of its automatic nature. Replacement paras. (3)-(4).

111. MODEL PENAL CODE, *op. cit. supra* note 75, § 4.08(2).

112. Replacement paras. (3) and (7).

113. *Id.* para. (1) (b).

114. See notes 94-97 *supra* and accompanying text.

115. MODEL PENAL CODE, *op. cit. supra* note 89, § 4.08, comment.

practicality. Perhaps ideally a psychiatrist dependent in any degree on the state for a livelihood should have been eliminated from the category of "independent psychiatrist," but the task of finding such psychiatrists would probably be a substantial — if not insurmountable — obstacle to the speedy appointment of examiners. Nevertheless, the principle of independence is important enough to warrant insistence that one not be a full-time hospital psychiatrist. Fairness also dictates placing the responsibility for appointment of the independent psychiatrist in the hands of the court. The alternative of giving this responsibility to the applicant was not adopted because it would favor those who could afford their own psychiatrist over those who could not. Nor does the draft *permit* the applicant to choose his own psychiatrist.[116] As the hearing is not intended to take the form of an adversary proceeding, even the suggestion that the applicant is appearing with an advocate before the court might lead the court to discount the testimony of a witness of whose objectivity it was uncertain. Furthermore, the choice of a partisan psychiatrist might interfere with the orderly conduct of the examination. And nothing in the draft provision prevents the committed person from suggesting that the court appoint his psychiatrist or from producing the latter, with the approval of the court, as a witness at the hearing following the examination.[117]

Where the Commissioner of Mental Hygiene institutes the proceedings for release, the draft statute dispenses with the requirement that an independent psychiatrist be appointed,[118] reflecting a judgment that the interests of the committed person can in this instance be adequately protected without the burden of this restriction on the court's power to choose the examining psychiatrists. It would be possible for the Commissioner to abuse this provision by applying for a patient's release in anticipation of an application by the patient himself, in order to forestall independent examination. This possibility, however, seems sufficiently remote to be disregarded.

Although seemingly modest in their requirements, both the

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116. In a proceeding for release Colorado permits both the district attorney in the judicial district where the committing court is located and the person acquitted to "select" physicians of their own choosing to examine the latter after a certification as to his recovery by the superintendent of the hospital to which he has been committed. COLO. REV. STAT. § 39-8-4 (Supp. 1965).

117. Replacement para. (4). N.Y. CODE CRIM. PROC. § 454(3) (McKinney Supp. 1965) provides instead that "the committed person may offer the testimony of any qualified psychiatrist at such a hearing."

118. Replacement para. (5).

Code and draft provisions may in some cases overtax the psychiatric resources available. The New York statute, based on an earlier draft of section 4.08,[119] provides only that the court "may then appoint up to two qualified psychiatrists to examine such person."[120] Statutes which require an examination typically do not demand that the person who conducts the examination be an expert on mental disorder.[121] The possibility of a shortage of available psychiatrists weighs against any precise definition of "qualified psychiatrist," but that possibility should not lead to a lowering of standards unless the shortage is so acute that two psychiatrists cannot be obtained. Individual legislatures must make this determination. A lowering of standards, if substantial, would defeat the purpose of the examination, which is to provide the court with reliable and competent evidence of the present mental condition of the patient.

Although the draft statute provides "a period not exceeding ninety days" with a possible ninety-day extension, for the post-trial examination,[122] it adopts the sixty-day norm of the Code for subsequent examinations.[123] The reason for the shorter period is that the post-trial report should greatly ease the task of ascertaining any subsequent changes in the applicant's mental condition. If, in fact, an even shorter period would be sufficient,[124] the appointed psychiatrists can apprise the court of the fact.

Code section 4.08 declares that the report must be made "within sixty days, or such longer period as the Court determines to be necessary for the purpose."[125] The draft statute substitutes for "within sixty days" the words "within a period not exceeding sixty days."[126] The object of the change is to emphasize that, subject to an extension, sixty days represents the maximum, and

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119. MODEL PENAL CODE § 4.08 (Tent. Draft No. 4, 1955).

120. N.Y. CODE CRIM. PROC. § 454(2) (McKinney Supp. 1965).

121. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 334 (1954). *E.g.*, ARIZ. REV. STAT. ANN. § 36-501 (Supp. 1965) (an experienced mental health examiner "whenever possible"); LA. REV. STAT. § 28.54 (1950). The Arizona law applies to all mental patients.

122. Replacement para. (3).

123. *Id.* para. (5).

124. *Cf.* WEIHOFEN, *op. cit. supra* note 121, at 339 (Where the insanity plea is used as a defense, "some of the simpler cases could be diagnosed in a few hours without commitment.") COLO. REV. STAT. ANN. § 39-8-2(1) (Supp. 1965) provides that a pre-release examination will be limited to a period "not exceeding one month."

125. MODEL PENAL CODE, *op. cit. supra* note 75, § 4.08 (2).

126. Replacement para. (5). The same form of language is used in MODEL PENAL CODE, *op. cit. supra* note 76, § 4.05 (1) with respect to pre-trial examinations.

not the optimal, length of the examination. The draft provision also discards the clause allowing the court, in its discretion, to extend the examination period beyond sixty days. It substitutes the more formal procedure, also used in conjunction with the ninety-day post-trial observation period, of allowing the examining psychiatrists to request a sixty-day extension of the original examination period ten to twenty days prior to the original deadline.[127]

Code section 4.08 provides that, after the filing of the psychiatrists' report, the court may discharge or conditionally release the committed person if satisfied that he is no longer dangerous. Otherwise, it "shall promptly order a hearing" which shall be deemed a "civil proceeding."[128] The draft statute accepts the limitation of a hearing to cases where the court believes it necessary. If there is convincing evidence that the mental health of the patient has been completely restored, there is no reason to prolong his detention. However, because important individual rights are involved, the draft replacement requires that "at such hearing the Court shall, in its discretion, appoint counsel to represent the acquitted person and allow such person to call witnesses in his behalf."[129]

The lack of a provision for counsel in the Code probably results from a desire for informality in the hearing.[130] Evidence does exist, however, that an overly formal proceeding may have a deleterious effect on the mental health of a patient;[131] and recognition has been given to this factor in the draft statute, paragraph (4), by making the appointment of counsel and allowance of witnesses at hearings discretionary with the court. However, it is important to remember that these statutory provisions are dealing with persons who are not necessarily mentally ill in the medical sense of the term. The possibility that a formal hearing

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127. Replacement paras. (3), (5). The reasons for this kind of two-step approach were mentioned earlier. See text accompanying notes 54-58 *supra.*

128. MODEL PENAL CODE, *op. cit. supra* note 75, § 4.08 (3).

129. Replacement para. (4); see also *id.* para. (8).

130. *E.g.,* LA. REV. STAT. § 28.55 (Supp. 1965); TENN. CODE ANN. § 33-604(c) (Supp. 1966). The Tennessee statute provides

> The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the individual with respect to whom the hearing is held. The court shall exercise its best judgment in determining the situs of the hearing and may exclude the public from the room in which the hearing is being conducted if in the judgment of the court the interests and welfare of the individual who is the subject of the hearing would best be served by such exclusion.

131. See GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 290 (1952).

will harm them is less than with ordinary mental patients, and the possibility that an informal one will infringe their constitutional rights to a hearing is greater. The provisions concerning counsel and witnesses in the draft statute acknowledge this distinction.[132]

In any close case the court should appoint counsel if the patient is unable to provide his own. The draft provision points the court toward liberal appointment by directing that the court *shall* rather than *may* in its discretion appoint counsel.[133] The draft uses the same formula to exhort the court to allow the committed person to call witnesses.[134] Except where they will obviously be of no assistance to the patient or are incompetent, witnesses for the committed person should be liberally allowed.

If the applicant for release cannot himself pay for either counsel or witnesses, the state should pay the bill rather than countenance the unwarranted deprivation of his liberty.[135] However, the draft statute contains no provision on this issue. Separate legislation concerning witness and counsel expenses can deal with the problem in a uniform manner and in more detail. Similarly, the draft statute has no provision for appeal. In most states broad statutes governing appeal would make such a provision unnecessary.[136]

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132. The Tennessee statute, which applies to involuntary civil commitment as well as the commitment of persons acquitted by reason of insanity, takes into consideration both the desirability of informality and the rights of the individual. The person to be committed, who is the subject of some degree of paternalistic protection by the court, may call witnesses on his behalf and is entitled to counsel. TENN. CODE ANN. § 33-604(c) (Supp. 1966).

133. A few states make the appointment of counsel mandatory in some circumstances. *E.g.*, ARIZ. REV. STAT. ANN. § 36-514 (Supp. 1965); COLO. REV. STAT. ANN. § 39-8-4(16) (Supp. 1965); TENN. CODE ANN. § 33-604(c) (Supp. 1966); VA. CODE ANN. § 19.1-239.1 (Supp. 1966).

134. Replacement paras. (4), (8). See MD. ANN. CODE art. 59, § 21 (1957): "Any party in interest shall have the right to process to compel the attendance of witnesses." See also TENN. CODE ANN. § 33-604(c) (Supp. 1966): "In conducting the hearing, the court shall hear the testimony of any person whose testimony may be relevant and shall receive all evidence which may be offered."

135. In Colorado, "upon motion of the defendant, and proof thereof, that the defendant is indigent and without funds to employ physicians or attorneys to which he is entitled . . . the trial court shall appoint such physicians or attorneys, for him, who shall be paid" out of the county treasury. COLO. REV. STAT. ANN. § 39-8-4 (16) (Supp. 1965).

The Vermont law on persons acquitted by reason of insanity provides that "if it appears to the court that the person is for reasons of poverty unable to procure the attendance of witnesses in his behalf, it may order such witnesses subpoenaed at the expense of the state." VT. STAT. ANN. tit. 13, § 4810 (1958).

136. One state does specifically provide for appeal from the denial of release after hearing. WASH. REV. CODE ANN. § 10.76.070 (Supp. 1965).

IV. STANDARD FOR RELEASE

A standard for release is central to a proper balancing of social and individual rights and interests. But whereas Code section 4.08 establishes detailed machinery for release, as to standards, it simply provides that the court may discharge or conditionally release a committed person when it is satisfied that he may be so released "without danger to himself or to others."[137] If the court determines that a hearing is necessary, "the burden shall be upon the committed person to prove that he may safely be discharged or released."[138] The most serious weakness of these provisions is their indefiniteness.[139] The draft statute attempts to spell out both a substantive standard and the allocation of burden of proof, in preference to the open-ended approach of the Code, which allows each jurisdiction to engraft its own conceptions into the law. In determining the basis for confinement, the draft replacement also deals specifically with the related

137. MODEL PENAL CODE § 4.08 (3) (Proposed Official Draft 1962). Compare COLO. REV. STAT. ANN. § 39-8-4 (4) (Supp. 1965) ("no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future"); DEL. CODE ANN. tit. 11, § 4702(c) (Supp. 1964) ("the public safety will not be thereby endangered"); D.C. CODE ANN. § 24-301(e) (1961) ("not in the reasonably foreseeable future . . . dangerous to himself or others"); ILL. REV. STAT. ch. 91 ½, § 1-8 (1965) ("afflicted with mental illness to such an extent that for his own welfare, or the welfare of others or of the community he requires care, treatment, hospitalization, or training"); IND. STAT. ANN. § 9-1705 (Supp. 1966) ("recurrence . . . of insanity . . improbable"); MASS. GEN. LAWS ANN. ch 278, § 13 (1958) (whenever the court "may deem proper" release); MINN. STAT. ANN. § 631.19 (Supp. 1965) ("wholly recovered and . . . no person . . . endangered"); MO. ANN. STAT. § 552.040-1 (Supp. 1965) ("does not have and in the reasonable future is not likely to have a mental disease or defect rendering him dangerous to the safety of himself or others or unable to conform his conduct to the requirements of law"); VT. STAT. ANN. tit. 13, § 4812 (1958) ("not dangerous to the community); WIS. STAT. ANN. § 957.11(4) (1963) ("not likely to have a recurrence of insanity or mental irresponsibility").

138. MODEL PENAL CODE, *op. cit. supra* note 137.

139. The results of such vagueness can be quite disparate. *Compare* Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961) *rev'd on other grounds,* 369 U.S. 705 (1962), where the D.C. court held that a bad-check passer was "dangerous to himself or to others," within the meaning of the applicable statute, D.C. CODE ANN. § 24-301(e) (1961), *with* Yankulov v. Bushong, 80 Ohio App. 497, 77 N.E.2d 88 (1945), where the court released a mentally defective killer on habeas corpus as no longer insane. The respondents for the state had argued that the same standard ought to be applied on habeas corpus as under the statutory proceeding, OHIO REV. CODE ANN. § 2945.39 (Page 1953), which permits release on restoration of sanity and where it "will not be dangerous." The court said, however, that "the phrase 'that his release will not be dangerous' as used in the section means that the accused's release will not be dangerous by reason of his present insanity." *Id.* at 504, 77 N.E.2d at 92.

questions of who may be confined under it[140] and for what duration of time.[141]

The choice in Code section 4.08 of a standard based on dangerousness rather than insanity is not in itself open to serious criticism. The ordinary mental health laws should be able adequately to shield society from insane persons. The purpose of this special statute is rehabilitation of persons suffering from some degree of mental disorder, but the justification for their involuntary confinement is the special interest of society in its protection against such of those persons who have proven themselves serious social risks. It is on this basis that society can require a person acquitted because of mental irresponsibility to satisfy a standard more exacting than that imposed on one who is only potentially dangerous. The Code's official comment says, "It seems preferable to make dangerousness the criterion for continued confinement,"[142] but its only explanation for that standard, other than the self-evident reason that a person no longer mentally diseased may still be dangerous, is that "such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain acquittal."[143] So to impose this statute's restrictions on the freedom of what would presumably be the larger percentage of the offenders confined under it would seem a very inefficient and hardly justifiable method of protecting society against the person who wins acquittal by such a ruse.[144] Moreover, as has been pointed out earlier, the draft replacement eschews punishment as a purpose of confinement.[145] It would be contrary to its purpose of treatment of offenders to allow a man to be confined under it when it is believed that he is sane, even in the case where it is suspected that his acquittal was won by sham,[146] and contrary to the policy of the draft to consume the limited medical resources

140. Replacement para. (10).

141. *Id.* para. (9).

142. MODEL PENAL CODE § 4.08, comment (Tent. Draft No. 4, 1955).

143. *Ibid.*

144. See notes 42-44 *supra* and accompanying text.

145. See Part I, *supra*.

146. There would also be a serious due process objection to the constitutionality of a decision ordering the confinement of a person found not guilty by reason of insanity solely on the tacit belief that he was sane at the time and "should have been found guilty." Brown v. Urquhart, 139 Fed. 846, 850 (W.D. Wash, 1905) (dictum), *rev'd on other grounds sub nom.* Urquhart v. Brown, 205 U.S. 179 (1906).

of an institution's staff on the supervision of a man who can (presumably) derive no benefit from them.[147]

Except in the most general way, the Code standard of "dangerousness to himself or to others" makes no effort to articulate an underlying policy judgment. The draft statute provides a more detailed definition of the sort of dangerousness which justifies placing a man in an institution,[148] principally in an effort to give content to the Code's definition. The draft directly conflicts with the Code standard only in its exclusion of dangerousness to oneself as an independent ground for confinement. The infliction of injury on oneself may be considered an antisocial act, but it does not immediately threaten society. To "protect from himself" a person committed under section 4.08 or a similar statute by refusing him release is to allow the remedy to exceed the cause of special treatment.[149]

The first obstacle to drafting a sensible standard of release is posed by the number of possible alternative criteria of dangerousness. Professors Goldstein and Katz have suggested ten standards based on the different forms of antisocial conduct in which a committed person might engage upon release:[150]

> (1) only the crime for which the insanity defense was successfully raised; (2) all crimes; (3) only felonious crimes . . . ; (4) only crimes for which a given maximum sentence or more is authorized; (5) only crimes categorized as violent; (6) only crimes categorized as harmful, physical or psychological, reparable or irreparable, to the victim; (7) any conduct, even if not labelled criminal, categorized as violent, harmful, or threatening; (8) any conduct which may provoke violent retaliatory acts; (9) any physical violence towards oneself; (10) any combinaiton of these.

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147. The broader psychological question of whether all criminal actions are not the result of mental disease and defect and subject to medical treatment is put to one side. Since the criminal law does not accept this rather modern — and controverted — proposition, it would be error for a judge to refuse discharge to a man believed to be a sane criminal so that he may be "treated" by the institution.

148. Replacement para. (1) (c).

149. See SZASZ, LAW, LIBERTY AND PSYCHIATRY 229 (1963): "Being 'dangerous to oneself' should never be considered a legitimate reason for depriving a person of his liberty . . . ."

150. Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 235 (1960).

The standard adopted by the draft is closest to the fifth of these suggested criteria. None of the first four is responsive to the special problems of involuntary hospitalization of persons acquitted as mentally irresponsible; moreover, the first is obviously too narrow and the second obviously too broad. The sixth is too elusive to be acceptable without further definition, since physical or psychological harm might include any case of physical or psychological loss. The seventh exceeds the purpose of confinement; the eighth may well put the wrong person in the institution; and the ninth is unsatisfactory for reasons stated in the preceding paragraph.

If the protection of society were the only function of a law like section 4.08, then no person should be released until he furnishes absolute proof that he is not dangerous in any respect. But such a statute is also concerned with the rehabilitation of the individual. The criterion for release adopted in the draft statute reflects a belief that society can afford to take some risks with mentally irresponsible but non-violent offenders which it cannot afford with those who may be expected to engage in physical violence toward others if allowed their release.

The Court of Appeals for the District of Columbia Circuit, acting under a statute which denies release to a person "dangerous to himself or to others," has refused to accept this distinction. It has said,[151]

> To describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault . . . [but] larceny, assault, and murder are all dangerous; they are simply different areas of prohibited conduct. . . . [A] 'bad check' passer at large endangers himself by exposure to additional violations and additional arrests, trials and confinements, to say nothing of the serious effect on the public of his predatory tendencies.

Larceny and murder may, in a sense, both be "dangerous" activities, but their antisocial effects are sufficiently different to place them in different categories for our purposes. Society can absorb the damage done to it by a thief — even the individual victims can protect themselves by insurance — but it can never repair the damage done by a murderer. Because the public has means available for its protection against non-violent offenders other than some form of institutionalization, the social interest in this

151. Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1962). (Footnotes omitted).

kind of protection is a poor excuse for denying freedom to a person who was not responsible for the offense which he committed and who may never commit the offense again.[152] Release of persons from confinement who may commit non-violent offenses does not leave the public at the mercy of kleptomaniacs and the like. Ordinary civil commitment is available if the mental disorder reaches the status of a disease.

Unless the offender is unwilling or unable to help himself, the rehabilitation factor also favors a restoration of freedom. "Any type of institutionalization, even in the best of hospitals, militates against therapy. A warmer, closer, family environment would be better."[153] It should be noted that few persons, if any, will gain release from confinement under the replacement version of section 4.08 on the basis of non-violent dangerousness. The draft statute also provides that "this section shall apply only to persons acquitted of offenses which include physical violence, actual or threatened, to the person [or property] of others[154] Persons who, because of this limitation, were never committed under the apparatus of this statute would be subject to civil commitment if the diseased condition which precipitated the offense of which they were acquitted should return.

Release under the draft statute depends, in part, on a finding that an acquitted or committed person is not likely to engage in "offenses which include physical violence which would injure the person [or property] of others."[155] That inclusion of the words "or property" has been made optional reflects a continuing indecision on the part of the author as to where the limit of this condition on release should be placed. One argument supporting their inclusion is that a person who physically injures property is more likely to attack persons than one who does not engage in such acts. Another and a more debatable argument is that the destruction of property may have more serious social consequences than its misappropriation. The argument could be made, for example, that a person who wilfully destroys a famous painting does more harm to society than one who steals it with the intention of reselling it or hanging it in his living room. Also, some

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152. See Comment, 56 Nw. U.L. Rev. 409, 439, 462 (1961).

153. Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity,* 38 Texas L. Rev. 849, 853-54 (1960).

154. Replacement para. (10).

155. *Id.* para. (1) (c). *Cf.* Ariz. Rev. Stat. Ann. § 36-5154(C) (Supp. 1965): "the proposed patient is mentally ill to such a degree that he is in danger of injuring himself or the person or property of others if permitted to remain at liberty."

offenses, such as arson, cause direct harm to property and often endanger lives as well. One way to include the latter cases within the draft language would be to change paragraph 1(c) to read "*may* injure the persons of others." However, aside from conceptual difficulties,[156] such permissive language might result in judicial searching *ad absurdum* for possible ways in which the commission of an offense could result in physical harm to persons. Consequently inclusion of injury to property in the statutory standard would seem the preferable approach.

The word "offense" is used to describe the category of proscribed acts in order to limit the judge's attention to acts of a criminal nature. Another draftsman might have chosen the phrase "criminal act." However, "criminal" suggests a moral judgment which cannot be made in this context; persons who are mentally irresponsible at the time they commit a wrongful act cannot be guilty of a crime. Hence the use of the less colored term. The selection of the phrase "offenses including physical violence" in preference to "physically violent offenses" recognizes that some offenses which should qualify as dangerous for the purposes of the statute may contain non-violent elements. For instance, the destruction of a building by an arsonist is a violent act, but the lighting of the match which lit the kerosene-soaked rags is not.

One way of avoiding these definitional problems is to list the offenses which qualify as dangerous.[157] A suggestive listing may aid a judge in determining which crimes are to be considered dangerous, but an exclusive list would be too inflexible. Also, alterations of the penal code might produce, through oversight, some disparities between the offenses mentioned in the list and those catalogued in the penal code. This same reasoning also justifies the use of general language, rather than a specific enumeration of offenses, in the paragraph which excludes non-violent offenders from its terms.[158]

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156. To give an example, arson is no longer simply arson when a person has been killed or injured by the fire. State v. Leopold, 110 Conn. 55, 147 Atl. 118 (1929).

157. North Carolina uses this approach, adding, however, the final category "or other crime." N.C. GEN. STAT. § 122-84 (1964).

158. Replacement para. (10). Confronted with the petition of a man found not guilty by reason of insanity of a crime not explicitly included in the statutory language (see note 157 *supra*) the North Carolina Supreme Court said that the statute "does not extend to or include . . . misdemeanors which are not inherently vicious or threatening and may be and not infrequently are committed with very little demonstration of force." State v. Craig, 176 N.C. 740, 745, 97 S.E. 400, 402 (1918).

Under the draft statute, a person is entitled to release if he is "unlikely as a result of his present mental condition to engage in the reasonably foreseeable future" in violent offenses.[159] Prediction of human behavior is a practice based on the balance of probabilities; it inevitably involves an element of chance and, therefore, of risk. Yet that risk must at times be taken and the bare percentage figures be read with due regard to the particularity of the applicant.[160] To rely solely on generalizations about the class to which an applicant for release belongs is to remove an element necessary to a rational decision. Also, the continuation of his confinement without reference to his present mental condition removes one principal justification for his confinement — the contribution of confinement to his rehabilitation — and leaves only the conflict between the individual's interest in liberty and the society's in its protection.[161]

A determination of the mental condition of the person confined is, therefore, essential to a determination as to whether he should be further confined.[162] Both Code section 4.08 and the draft statute give recognition to this fact by providing for extensive involvement of psychiatrists in the proceedings. The difficult problem is determining how to express the relevance of mental condition to dangerousness, not the degree of its relevance. But the use of a term like "present mental disorder" or "present mental abnormality" would raise as many problems

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159. Replacement para. (1)(c). See D.C. CODE ANN. § 24-301(e) (1961).

160. "Statistical surveys regarding human behavior are valuable for many purposes, but they cannot in themselves be made the basis of depriving any man, innocent before the law, of his liberty, without at least applying the general information to the particular individual whose liberty is placed in jeopardy by the proceedings." Wyatt v. State, 235 Ind. 300, 305, 133 N.E.2d 471, 474 (1956). The court noted that while 60 to 66% of schizophrenics suffer from a recurrence of their disease, testimony indicated that in the case of the petitioner the possibility of recurrence was considerably lower. *Ibid.*

161. *Cf.* Goldstein & Katz, *supra* note 150, at 238: "To hold a patient solely for potential dangerousness would snap the thin line between detention for therapy and detention for retribution." See also Note, 109 U. PA. L. REV. 756, 759 (1961).

162. Despite the absence of explicit language in D.C. CODE ANN. § 24-301 (1961), the Court of Appeals has consistently required a determination of mental condition in deciding the question of dangerousness. In the first case under this section, the Court stated the standard as "freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future." Overholser v. Leach, 257 F.2d 667, 670 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 1013 (1959). See also Overholser v. O'Beirne, 302 F.2d 852, 857-58 (D.C. Cir. 1962).

The Colorado statute provides that prior to release the committed person shall have "no abnormal mental condition" such as would make him dangerous in the reasonably foreseeable future. COLO. REV. STAT. ANN. § 39-8-4 (4) (Supp. 1965).

as it would solve.[163] Psychiatrists disagree on the poles of mental disease. Any effort to distinguish as a matter of law between shades of abnormality and normality would only create psychiatric and judicial confusion. The word "condition" is more nearly neutral. Since present mental health may not accurately indicate future dangerousness and since a psychiatrist could not conscientiously guarantee that a person who has already slipped into a mentally diseased condition once will never do so again,[164] the draft statute limits consideration of dangerousness to "the reasonably foreseeable future."

Who should have the burden of proving that the standard has been satisfied? Code section 4.08 states that "any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released," without specifying what degree of proof is required.[165] The draft statute omits all reference to the classification of the hearing and provides that the burden of proof shall be satisfied "by a preponderance of the evidence."[166] The District of Columbia Circuit has insisted that the petitioner prove his readiness for release beyond a reasonable doubt.[167]

> Would the standard of a preponderance of the evidence satisfy the purposes and objectives of Congress? We think no. A person so committed has made himself one of "an exceptional class." In a "close" case even where the preponderance of the evidence favors the petitioner, the doubt, if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public or the individual.

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163. "A disease is said to be an abnormal condition and if one therefore seeks the meaning of 'normal,' *i.e.* the condition or standard by reference to which 'disease' must be defined, one encounters the greatest diversity imaginable." HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 450 (2d ed. 1960).

164. See OVERHOLSER, THE PSYCHIATRIST AND THE LAW 100 (1953). See also Weihofen, *supra* note 153, at 864. The Illinois law formerly required a person committed after acquittal by reason of insanity to prove that he was "fully and permanently recovered." 1 ILL. LAWS 1943, at 586. Under that law the Illinois Supreme Court held that a schizophrenic person could never obtain release, on a theory that schizophrenics never entirely recover. People v. Misevic, 32 Ill. 2d 12, 203 N.E.2d 393 (1964).

165. MODEL PENAL CODE, *op. cit. supra* note 136, § 4.08 (3). Compare COLO. REV. STAT. ANN. § 39-8-4 (6) (Supp. 1965): "Any such hearing shall be deemed a civil proceeding and the burden shall be upon the defendant to prove *by a preponderance of the evidence* that he is no longer insane, as such insanity is defined in this section." (emphasis added).

166. Replacement para. (4). See COLO. REV. STAT. ANN. § 39-8-4 (6) (Supp. 1965).

167. Ragsdale v. Overholser, 281 F.2d 943, 947 (D.C. Cir. 1960). *But see* Robertson v. Cameron, 224 F. Supp. 60 (D.D.C. 1963).

While that court may think itself to be acting in the best interest of the patient,[168] that explanation is inconsistent with prevalent Anglo-American legal notions about the placing of the burden of proof where a person's freedom is at stake.

The person already tried and acquitted by reason of insanity does not stand in the same position as the ordinary criminal defendant during trial, who is presumed innocent until proven guilty. The mentally irresponsible offender has shown that he is a danger to society. Yet, while society may hold him to an especially exacting standard before releasing him, it is not justified in placing upon him a burden of proof that is, for practical purposes, insuperable. Fairness still requires a balancing of his interests and his society's. A standard higher than "a preponderance of the evidence" is inconsistent with such fairness and inconsistent with the usual standard in civil proceedings, which is one of reasonable probabilities.

It should be noted that, when an offender has been conditionally released and the state is seeking to recommit him, the draft statute places the burden of proof on the state.[169] Perhaps this change reflects an instinctive, though not necessarily logical, conclusion that it is a more serious matter to take away the patient's freedom, once it is granted, than to refuse him it in the first place. On a less abstract plane, this allocation of the burden of proof follows the normal rule of civil procedure that places the burden on the party seeking to establish the affirmative, as the state is the one now seeking relief.[170]

The elimination of the phrase, "any such hearing shall be deemed a civil proceeding," from the draft statute may seem to contradict the reliance in the preceding arguments on the assumption that the draft, like the Code version, does call for a civil hearing for release. However, the elimination of the reference to the "civil" nature of the hearing is not intended as a denial that it is, in fact, a civil proceeding, but rather the result of a belief that an explicit labelling of the proceeding as civil is both largely unnecessary and potentially misleading.[171] A conscientious court would look to the consequences of the proceeding if forced

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168. Comment, Nw. U.L. Rev. 409, 452 (1961).

169. Replacement para. (8). *Contra,* Model Penal Code, *op. cit. supra* note 136, § 4.08 (4).

170. *Accord,* Wash. Rev. Code § 10.76.080 (Supp. 1961) (recommitment: "the burden of proof . . . shall be upon the state.")

171. *But cf.* N.Y. Code Crim. Proc. § 454 (3) (McKinney Supp. 1965). The New York statute omits the "burden" of proof provision and retains the term "civil proceeding."

to decide whether it was criminal or civil. A legislative assertion that a proceeding is "civil" would create an inference toward that conclusion but should not be decisive of the case. Here the emphasis on rehabilitation and the absence of punitive intent (notwithstanding the possibility of a punitive result) should lead a court to characterize the proceeding as "civil" rather than penal, even though it bears no label. On the other hand, while it may be appropriate to note the possibility of a punitive result only parenthetically, that possibility is a real one, since the principal result of a finding adverse to the offender patient is a continuation of his enforced confinement. Despite the relative informality of the prescribed hearing, no notion of its civil nature should induce a court to be less conscious of the offender's need for and claim to the court's protection of his rights, whether he appear in the posture of an applicant for release under paragraph (4) or (7) or that of a defendant in a paragraph (8) recommitment proceeding.

The draft statute provides that "No person committed for examination and treatment pursuant to this Section shall be confined for a period or periods exceeding the maximum period for which he could have been imprisoned if he had been found guilty of the crime with which he was charged prior to acquittal."[172] Persons acquitted by reason of insanity are singled out for special treatment because they "have committed offenses"[173] which demonstrated their dangerousness to society, while others suffering from mental disorder who may be equally dangerous[174] are subject only to ordinary civil commitment procedures. It follows, then, that a person should be subject to the more stringent restrictions imposed by this statute for a period no longer than the maximum term to which he could have been sentenced had he been found guilty of the offense charged. Professor Hall has noted some other relevant considerations:[175]

> From a medical viewpoint, it may be absurd to release an offender at a fixed time that has no relation to his rehabilitation. But if no law fixes an upper limit, there is no protection for

172. Replacement para. (9). *Cf.* the New Jersey sex offender law, N.J. REV. STAT. § 2:192-1.16 (Supp. 1950): "[I]n no event shall the person be confined or subject to parole supervision for a period of time greater than that provided by law for a crime of which such person was convicted."

173. Overholser v. Leach, 257 F.2d 667, 669-70 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959).

174. Weihofen, *supra* note 153, at 855.

175. HALL, *op. cit. supra* note 163, at 461, 464.

> anyone . . . . While the law must adapt to a changing world and the increased knowledge of that world, the need for stability, certainty and predictability in the law must also be remembered.

This limitation will not turn unusually dangerous persons back onto the streets. The draft statute provides that "nothing in this paragraph shall prevent any person qualified by law from instituting civil proceedings for the continued confinement of any person committed pursuant to this Section within [sixty] days prior to his scheduled discharge or release."[176] Thus, persons in unusual need of rehabilitation will remain hospitalized. Also, persons whom society regards sufficiently dangerous to imprison for life — murderers, for example — can be kept institutionalized under this section for an indeterminate period until they are no longer dangerous. Consequently, the risk from limiting hospitalization under the special criminal insanity law will probably not exceed that which society regularly undertakes when it releases prisoners from jail. Such statistics[177]

> as exist indicate that persons acquitted by reason of insanity and subsequently discharged from the hospital as recovered are not more likely to commit further crimes than are persons with similar prior criminal records who have never been in a mental hospital. . . . If anything, the rate of subsequent arrest among ex-mental patients with a record of criminal arrest prior to hospitalization seems to be lower than the re-arrest rates in persons with similar records who had not been in a mental hospital.

V. CONDITIONAL RELEASE

Both Code section 4.08 and the draft replacement carefully underline the rehabilitative purpose of involuntary hospitalization.[178] Since, however, the possibility of effective rehabilitation is reduced in an institutional environment,[179] the statute must make sufficient provision for conditional release if it is to accomplish that goal in a substantial percentage of cases.[180]

176. Replacement para. (9). The sixty-day period specified represents an estimate as to the amount of time needed to arrange for the civil commitment of the person committed specially under the replacement statute.

177. Weihofen, *supra* note 153, at 868-69.

178. MODEL PENAL CODE § 4.08 (1) (Proposed Official Draft 1962); Replacement para. (4).

179. See note 153 *supra* and accompanying text.

180. Weihofen, *supra* note 153, at 867.

The Code provision on conditional release is briefer than its importance would warrant. It provides that if the court is satisfied that the person seeking his release is not dangerous, it "shall order his discharge or release on such conditions as the court determines to be necessary."[181] The official comment explains, "Release [on condition] . . . furnishes additional protection to the public in the case of those individuals who need some supervision upon their return to the community.[182] The serious flaw in this provision is that it fails to give the court guidelines for the granting of conditional release. From the comment one might deduce that the primary function of conditional release is to permit the state to continue to exercise some measure of control over the patient's conduct despite his release.

The draft replacement, on the other hand, emphasizes the positive use which conditional release may have in the rehabilitation of the offender. In determining the patient's dangerousness, the court is required to consider the restrictions which it intends to impose on the patient in granting him release.[183] This provision, which has no counterpart in the Code version, allows the Court to consider the best interests of the person confined as well as the protection of society. An early release, made possible by this provision, may help to complete the rehabilitation of the offender. The draft statute also reminds the court that " 'release on condition' shall include provisions for continuing responsibility to and supervision by an appropriate institution and may include a plan of treatment on an out-patient basis."[184] These conditions are intended to be suggestive of the types of condition which may be appropriate in individual cases.

Particularly in view of the fact that supervision may last five years or more,[185] the draft statute provides that "the Commissioner [of Mental Hygiene] may modify the imposed conditions

181. MODEL PENAL CODE, *op. cit. supra* note 178, § 4.08(3). The analagous provision in the replacement statute, that if the court is satisfied that the committed person is no longer dangerous, it "shall order either his discharge or his release on condition" is so phrased to insure that the terms "discharge" and "release on condition" will be read disjunctively. Replacement para. (4). *Cf.* N.Y. CODE CRIM. PROC. § 454 (3) (McKinney Supp. 1965) (comma used).

182. MODEL PENAL CODE § 4.08, comment (Tent. Draft No. 4, 1955).

183. Replacement para. (1)(c). *Cf.* MICH. STAT. ANN. § 28.967 (Supp. 1965) (conditional release of committed persons other than murderers before recovery of sanity where not "detrimental to the public welfare . . . or injurious to the patient"); MINN. STAT. § 631.19 (Supp. 1961) (conditional release where committed person "not wholly recovered, but . . . no person will be endangered.")

184. Replacement para. (1)(d). *Cf.* LA. REV. STAT. § 28:100.1 (Supp. 1965); N.D. CENT. CODE § 25-03-16 (1) (Supp. 1965); WYO. STAT. § 25-69 (Supp. 1965).

185. Replacement para. (8).

at any subsequent time with the approval of the Court."[186] Thus, flexibility in administrative action is provided for without the sacrifice of judicial supervision.

While release on condition is less restrictive than involuntary hospitalization, it does involve some impingement of liberty and therefore should continue only so long as it serves a constructive purpose. Although a person newly released from an institution may still be of questionable mental stability, his stability becomes more firmly founded the longer he lives in society without incident. Thus, after a period of time, his discharge should be made complete. Code section 4.08 makes this period five years.[187] Such a provision also makes administrative sense. The number of trained social workers capable of providing competent outpatient services is limited. These workers should supervise those who most need supervision, whether or not they have committed offenses, rather than those whose further need for such assistance is doubtful at best.

The draft statute adopts the five-year limitation with one major change, that "on motion of the Commissioner and after a hearing at which the person subject to recommitment may have counsel, the period in which conditional release may be revoked may be extended by the Court for periods not exceeding [one year]."[188] This mechanism will allow for continued observation — but without the deleterious effects of recommitment — where there remains a real question as to whether the released patient may suffer a relapse. Moreover, if the court has the power to extend the period of conditional release, it will probably be more hesitant to order recommitment upon a minor infraction of the release conditions near the end of the statutory period than if the released offender may pass irretrievably beyond the court's control if not promptly recommitted.

In keeping with the general scheme of the draft statute, offenders may not be recommitted if they have already been confined for the maximum period for which they could have been imprisoned if they had been found guilty of the crime with which they were charged, or for a period [one year] less than such

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186. *Id.* para. (4). Compare N.Y. CODE CRIM. PROC. § 454 (3) (McKinney Supp. 1965): "The commissioner of mental hygiene shall make suitable provision for the care and supervision by the department of mental hygiene of persons released conditionally under this section."

187. MODEL PENAL CODE, *op. cit. supra* note 178, § 4.08 (4).

188. Replacement para. (8).

maximum unless such maximum is for life."[189] However, neither this provision nor paragraph (9) prevents the court from imposing voluntary conditions on the release of such persons. Furthermore, persons who have committed murder or other crimes punishable by life imprisonment could be supervised until their death. Others could be committed in accordance with ordinary civil commitment procedures if their behavior warranted such a step.

The draft statute has omitted several provisions which might be relevant to its subject but which can probably be better treated in more general statutes. One of these is a provision for the transfer of patients for administrative purposes.[190] Another is a requirement of periodic review of the patient's condition while he is institutionalized.[191] No reason exists why persons committed under this section should be treated differently in these respects from other mental patients. Neither provision is essential to the balancing of interests necessary to make a fair decision as to when to commit and when to release persons acquitted of crime by reason of insanity.

APPENDIX A—THE MODEL PENAL CODE

SECTION 4.08. *Legal Effect of Acquittal on the Ground of Mental Disease or Defect Excluding Responsibility; Commitment; Release or Discharge.*

(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment.

(2) If the Commissioner of Mental Hygiene [Public Health] is of the view that a person committed to his custody, pursuant

189. *Ibid.* The choice of a cut-off point one year less than the maximum sentence represents a belief that to confine a person for a shorter time under this special statute would not produce a benefit commensurate with the detriment of energy and expense.

190. *But see* MODEL PENAL CODE, *op. cit. supra* note 178, § 4.08 (2), which provides for temporary transfers to facilitate psychiatric examinations.

191. "If the defendant should be permanently committed, . . . his rights should not be subject merely to the discretion of the superintendent or to the patient's ability to secure a friend, relative or lawyer to institute proceedings for him. Some provision should be made for periodic review of his condition by qualified and disinterested persons." Comment, 56 NW. U. L. REV. 409, 461 (1961). See, *e.g.*, TENN. CODE ANN. § 33-701(b) (Supp. 1966).

to paragraph (1) of this Section, may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county [parish] from which the defendant was committed. The Court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Court may cause such person to be confined in any institution located near the place where the Court sits, which may hereafter be designated by the Commissioner of Mental Hygiene [Public Health] as suitable for the temporary detention of irresponsible persons.

(3) If the Court is satisfied by the report filed pursuant to paragraph (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the Court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the Court determines to be necessary, or shall be recommitted to the custody of the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(4) If, within [five] years after the conditional release of a committed person, the Court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others his conditional release should be revoked, the Court shall forth-

with order him to be recommitted to the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(5) A committed person may make application for his discharge or release to the Court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the Commissioner of Mental Hygiene [Public Health]. However, no such application by a committed person need be considered until he has been confined for a period of not less than [six months] from the date of the order of commitment, and if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until [one year] has elapsed from the date of any preceding hearing on an application for his release or discharge.

APPENDIX B — THE PROPOSED REPLACEMENT

SECTION 4.08. *Legal Effect of Acquittal on the Ground of Mental Disease or Defect Excluding Responsibility; Commitment; Release or Discharge.*

(1) Definitions:

(a) "Commissioner" shall mean the Commissioner of Mental Hygiene [Public Health].

(b) "Independent psychiatrist" shall mean a psychiatrist whose principal employment is not with the State. A psychiatrist is principally employed by the State if in the year preceding an examination to be made pursuant to this Section he has spent more than one half of his working hours in the employment of the State.

(c) Release or discharge "without danger to the person [or property] of others" shall require that a person released or discharged be unlikely as a result of his present mental condition to engage in the reasonably foreseeable future in offenses which include physical violence which would injure the person [or property] of others. A determination of dangerousness shall take into account such conditions on release as the Court intends to impose.

(d) "Release on condition" shall include provisions for

continuing responsibility to and supervision by an appropriate institution and may include a plan of treatment on an outpatient basis.

(2) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him into the custody of the Commissioner to be placed in an appropriate institution for an examination of his present mental condition.

(3) At the time of placement the Court shall appoint two or more qualified psychiatrists, at least one of whom shall be an independent psychiatrist, to examine such person and to report within a period not exceeding ninety days. Unless the acquitted person or some person, other than a mental patient, acting on his behalf objects, such request shall be freely granted and the examination period shall be extended, at the end of which time the examining psychiatrists shall make their report. Otherwise, if an objection is made within ten days of the request, the Court must be satisfied, after a hearing at which the acquitted person may have counsel, that the time allowed for examination is inadequate, in which case it shall grant an extension.

(4) If the Court is satisfied by the report filed pursuant to paragraph (3) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the person placed for examination may be discharged or released on condition without danger to the person [or property] of others, the Court shall order either his discharge or his release on condition. If the Court is not so satisfied and either the Commissioner or the acquitted person or some person, other than a mental patient, acting on his behalf make application for a hearing, the Court shall promptly order such a hearing to determine whether the acquitted person may safely be discharged or released. Notice of such hearing shall be given to the prosecuting attorney of the county [parish] in which the acquitted person was tried. At such hearing the Court shall, in its discretion, appoint counsel to represent the acquitted person and allow such person to call witnesses in his behalf. The burden shall be upon the acquitted person to prove by a preponderance of the evidence that he may safely be discharged or released. According to the determination of the Court upon the hearing, the acquitted person shall thereupon be

discharged, or released on condition, or committed to the custody of the Commissioner. If the acquitted person is released on condition, the Commissioner may modify the imposed conditions at any subsequent time with the approval of the Court. If such person is committed, the Commissioner shall have him placed in an appropriate institution for purposes of treatment.

(5) If the Commissioner is of the view that a person committed to his custody, pursuant to paragraph (4) of this Section, may be discharged or released on condition without danger to the person [or property] of others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county [parish] in which trial and commitment proceedings were held. The Court shall thereupon appoint two or more qualified psychiatrists to examine such person and to report within a period not exceeding sixty days their opinion as to his mental condition. If, ten to twenty days prior to the expiration of sixty days or a lesser period of time set by the Court, the examining psychiatrists believe the time allowed for examination inadequate for an accurate diagnosis of the present mental condition of the committed person, they may ask the Court for an extension of the examination period not exceeding sixty days. Such request shall be granted or denied pursuant to the procedures prescribed in paragraph (3).

(6) Upon receipt of the report of the examining psychiatrists, the Court shall proceed in the manner prescribed in paragraph (4), except that no further notice need be given the prosecuting attorney.

(7) A committed person or some person, other than a mental patient, acting on his behalf may make application for his discharge or release to the Court by which he was committed. However, no application by such persons need be considered until the committed person has ben confined for a period of not less than [one year] from the date of the order of commitment for treatment. If the Court allows the application, the same procedure as prescribed in paragraphs (5) and (6) shall be followed except that at least one of the examining psychiatrists must be an independent psychiatrist. If the committed person fails to obtain

his discharge or release, no further application by him or by someone acting in his behalf other than the Commissioner, need be considered until [one year] has elapsed from the date of any preceding hearing on an application for his discharge or release.

(8) If, upon the petition of the Commissioner filed within [five] years after the conditional release of a person acquitted on the ground of mental disease or defect excluding responsibility, the Court which released him shall determine, after a hearing, that the conditions of release have not been fulfilled and that for the safety of the person [or property] of others his conditional release should be revoked, the Court shall order him to be recommitted to the Commissioner, subject to discharge or release only in accordance with the procedures prescribed in paragraphs (5), (6) and (7). At such hearing the Court shall, in its discretion, appoint counsel to represent the released person and allow such person to call witnesses in his behalf. The burden shall be upon the State to prove by a preponderance of the evidence that the conditional release of such person should be revoked. On motion of the Commissioner and after a hearing at which the person subject to recommitment may have counsel, the period in which conditional release may be revoked may be extended by the Court for periods not exceeding [one year]. If no such petition for recommitment is filed within [five] years, or such extended period as allowed by the Court on motion of the Commissioner, the released person shall be deemed discharged. This paragraph shall not apply to allow recommitment of persons who have been confined for the maximum period for which they could have been imprisoned if they had been found guilty of the crime with which they were charged or for a period [one year] less than such maximum unless such maximum is for life.

(9) No person committed for examination and treatment pursuant to this Section shall be confined for a period or periods exceeding the maximum period for which he could have been imprisoned if he had been found guilty of the crime with which he was charged. If a person is recommitted pursuant to paragraph (8), any past period of commitment shall be included in determining the permissible length of confinement. However, nothing in this paragraph shall prevent any person qualified by

law from instituting civil proceedings for the continued confinement of any person committed pursuant to this Section within [sixty] days prior to his scheduled discharge or release.

(10) This Section shall apply only to persons acquitted of offenses which include physical violence, actual or threatened, to the person [or property] of others.

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HARVARD STUDENT LEGISLATIVE RESEARCH BUREAU: ITS PURPOSE AND FUNCTIONS

PURPOSE

The primary purpose of the Harvard Student Legislative Rereach Bureau is to make available to governmental and public service groups technical services in the preparation and drafting of legislation. Since its organization in 1952, the Legislative Research Bureau has drafted legislation dealing with a variety of subjects in response to requests submitted by federal, state and local legislators and officials, state attorneys-general and law revision commissions, members of law school faculties, and civic groups.

While assisting clients in a practical manner, the Bureau provides valuable educational experience for its members. The responsibility for the work of the Bureau rests entirely with its students selected annually on a competitive basis.

The Bureau is financed by a grant from Harvard Law School and does not accept remuneration from clients.

SELECTION OF PROJECTS

Since the Bureau receives more requests for assistance each year than it can accept, selection of projects is necessary to insure that the projects undertaken will receive prompt and thorough treatment.

When a request is received, the legal and drafting problems which it poses undergo a preliminary study and analysis for the purpose of determining whether the project is one which the Bureau can accept. Several factors are considered in making this decision. Among them are: the importance of the proposed legislation to the community in which it may be enacted, the educational experience which the project offers to the membership, the availability of personnel, the interest of the membership, and the likelihood of the bill's being enacted into law.

The Bureau does not accept projects involving research alone, but only those which include the drafting of special legislation.

Drafting and Editing

A project, once accepted, is referred to a committee of the membership which does the actual research and drafting. Experienced third-year members act as committee chairmen, overseeing the work and guiding its progress. Work on projects begins shortly after the opening of the academic year, and project deadlines are established according to the requirements of the client and the complexity of the problems involved.

The completed draft and the explanatory memorandum which accompanies it are next submitted to critical review by student editors. Most of the projects are also submitted to a member of the Harvard Law School faculty for review and comment. When the staff is satisfied with the form and content of the completed draft and the covering memorandum, they are forwarded to the client for consideration. The Bureau tries to keep in close contact with clients to be certain that its draft conforms to clients' policy determinations. The procedure is flexible enough to allow adaptation to the particular needs of clients.

Bureau Policies

The Bureau serves the community by assisting proponents of legislation in presenting their ideas in statutory form appropriate for legislative consideration. It is entirely technical and non-political in function. Drafts are based on the policies of clients, and neither the Bureau nor Harvard Law School endorses any of these policies. Neither the Bureau nor any of its members will lobby for the passage of any bill.

Project requests should be directed to the Director of Research, Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138.

A STATE STATUTE TO LIBERALIZE CRIMINAL DISCOVERY[1]

This Bureau Draft utilizes the framework of the latest amendments to the Federal Rules of Criminal Procedure and sets forth a proposal intended to broaden the accused's rights to criminal discovery and to provide the courts with progressive guidelines for further expanded discovery by the accused and for mutual discovery.

I. INTRODUCTION

There has been a considerable amount of literature in recent years urging the liberalization of criminal discovery.[2] Indeed something of a trend in that direction has been established, particularly with respect to the rapid case law developments in California[3] and, to a lesser degree, in Washington,[4] Illinois[5] and

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1. Criminal discovery has been broadly defined as "all available instruments of fact ascertainment," including bills of particulars, indictments and lists of witnesses endorsed thereon, preliminary hearings, grand jury transcripts, police investigations, pretrial conferences, confessions, scientific laboratory analyses, eavesdropping techniques and advance notice of alibi and insanity defenses. Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 CALIF. L. REV. 56, 61 (1961).

2. Brennan, *Criminal Prosecution — Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279; Comments by Mr. Justice Brennan, *Symposium on Discovery in Federal Criminal Cases,* 33 F.R.D. 56 (1963); Comments, *The Self-Incrimination Privilege Barrier to Criminal Discovery?,* 51 CALIF. L. REV. 135 (1963); Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960); Krantz, *Pretrial Discovery — A Necessity For Fair And Impartial Justice,* 42 NEB. L. REV. 127 (1962); Louisell, *supra* note 1; *Moran, Federal Rules Changes: Aid or Inclusion for the Indigent Defendant?,* 51 A.B.A.J. 64 (1965); Note, *Developments in the Law — Discovery,* 74 HARV. L. REV. 940, 1051 (1961); Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U.L. REV. 228 (1964).

Mr. Justice Brennan, one of the first advocates for expanding criminal discovery, urged in his articles that it would produce the same benefits derived from civil discovery, including marshalling of all the evidence so as to expose untenable arguments, sharpen the issues, produce more guilty pleas and serve the ends of truth and justice.

3. The first expression of defendant's discovery rights in California was People v. Riser, 47 Cal. 2d 566, 585, 305 P.2d 1 (1956), which involved discovery at trial. The leading case on pretrial discovery is Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957), where the California Supreme Court emphasized the policy of ascertaining the facts in allowing discretionary discovery of defendant's statement. Subsequent cases reveal the defendant's right to discover his prior statement is almost absolute upon an allegation that he cannot fully recall its contents. People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959). Names and addresses of prosecution witnesses are also readily obtainable, Delosa v. Superior Court, 166 Cal. App. 2d 1, 332 P.2d 390 (1958), as are statements by witnesses, even though not signed or acknowledged, Funk v. Superior Court, 52 Cal. 2d

423 (1959). Defendant can even obtain a court order directing the prosecution to instruct witnesses to cooperate in interviews if the witness so desires. Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957). Of course where the prosecution demonstrates to the court that the welfare or safety of the witness might be jeopardized there may be no discovery. Yet in People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16 (1963) the trial court resolved the problem by ordering disclosure of the witness' identity shortly (at least twenty-four hours) before the witnesses were to be called. The courts also favor disclosure of informants where the informer participated in the acts with which defendant is charged or where it is necessary for defendant's preparation of his case. People v. Kiihoa, 53 Cal. 2d 748, 349 P.2d 673 (1960); People v. Durazo, 52 Cal. 2d 354, 340 P.2d 594 (1959). Finally, documents, reports, tangible objects and other real evidence are usually discoverable without any showing of admissibility though where they do not fall within the category of "public records" (CAL. CODE CIVIL PROC. §§ 1881(5), 1892-94, 1888) defendant may be required to make a stronger showing. People v. Silberstein; 159 Cal. App. 2d 848, 323 P.2d 591 (1958) (police reports); Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (1959) (photographs used in identifying accused); Bernard v. Superior Court, 172 Cal. App. 2d 314, 341 P.2d 743 (1959) (blood tests, scientific reports); Ballard v. Superior Court, 234 A.C.A. 274, 280, 410 P.2d 838 (1965) (results of poylgraph examination of complaining witness); Schindler v. Superior Court, 161 Cal. App. 2d 513, 327 P.2d 68 (1958) (medical specimens from victim's body, autopsy reports, interview of autopsy surgeon).

In Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919 (1962) the California Supreme Court upheld a trial court's order that the defendant in a rape case reveal to the prosecution the names of witnesses the defendant intended to call and any reports and X-rays he intended to introduce into evidence in support of the defense of impotency. The defendant had revealed his defense in asking the court for a continuance for the purpose of determining impotency. Thus the case does not make clear whether the prosecution can discover from the defendant when alleging on information and belief that a certain affirmative defense will be presented. There is broad language, however, that since defendant's right to discovery is based not on due process but on fairness there is no reason why there should not be mutuality, absent a violation of the privilege against self-incrimination and the attorney-client privilege.

For discussions of the developments in California, see Comments, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135 (1963); Fletcher, *supra* note 2; Garber, Criminal Discovery in State of California, Address before Lawyer's Club of Los Angeles, August 8, 1962; Louisell, *supra* note 1; Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1964); Traynor, *supra* note 2.

4. In State v. Thompson, 54 Wash. 2d 100, 338 P.2d (Wash. 1959) the defendant was allowed discovery of his statement to the police, any written reports by the FBI as a result of the examination of clothing, personal effects and blood samples, and a copy of the autopsy. In affirming the trial court's discretion the Washington Supreme Court stressed the consideration of the various interests involved and the fact that the defendant was an indigent from Canada, and was just above the juvenile court age. It has been suggested that State v. Thompson represents a new direction in Washington's formerly restrictive discovery practice that should be characterized as "neutralized discovery." Comment, *Criminal Pretrial Discovery in Washington*, 39 WASH. L. REV. 853 (1964).

Washington's procedure provides for an exchange of lists of witnesses between the defense and prosecution. WASH. REV. CODE § 10.37.030. But it has been held that a court cannot exclude testimony of a witness merely because the defendant failed to discover as ordered. State v. Sickles, 144 Wash. 236, 257 Pac. 385 (1927).

5. The Illinois statutes provide: "On motion of the defendant the court shall order the State to furnish the defense with a list of prosecution witnesses and

New Jersey.[6] Yet many state courts, while responding in some degree to this trend, have been slow to revise the traditional, restrictive approach which, it is submitted, hinders the criminal defendant of little means in the preparation of his defense and makes a mockery of the constitutional guarantees demanded by an enlightened system of criminal justice.[7]

Amendments to the Federal Rudes of Criminal Procedure[8] have expanded the limited discovery formerly available to the accused in the federal courts. On the other hand, the California cases and the new Federal Rule 16 authorize greater discovery of the accused by the government. This partially disarms commentators who have been concerned about adding to the defendant's purported advantage over the prosecutor.[9] The extent to which the privilege against self-incrimination can yield in this manner has not yet been tested. The committee believes, not

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6. State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965); *New York Times*, Sept. 8, 1966, p. 33, col. 1.

7. See, *e.g.*, PENNSYLVANIA'S RULES OF CRIMINAL PROCEDURE, Rule 310, adopted in 1964, which provides:

"The court *may* order the attorney for the Commonwealth to permit the defendant or his attorney . . . to inspect and copy or photograph any written confessions or written statements made by the defendant. *No other discovery or inspection shall be ordered except upon proof by the defendant, after hearing, of exceptional circumstances and compelling reasons. . . . In no event, however, shall the court order pretrial discovery of written statements of witnesses in the possession of the Commonwealth.*" (Emphasis supplied). This codified the result in Commonwealth v. Caplan, 411 Pa. 563, 192 A.2d 894 (1963).

Many federal courts deny inspection of defendant's statement or confession. See United States v. Peltz, 18 F.R.D. 394 (S.D.N.Y. 1955) *appeal dismissed*, 246 F.2d 537 (1957). See also Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957).

Statements of government witnesses are "virtually unobtainable" in most jurisdictions. Goldstein, *supra* note 2, at 1181; People *ex. rel.* Lemon v. Supreme Court, 245 N.Y. 24, 29-31, 156, N.E. 84, 85-87 (1927).

8. Supp., U.S.C.A. 1 July 1966.

9. Flannery, *Symposium on Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 74-81 (1963); Comments, 51 CALIF. L. REV. 135, 139 (1963).

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their last known addresses" and "any written confession . . . and a list of witnesses to its making shall be furnished." 38 ILL. REV. STAT. §§ 114-9, 114-10. Moreover, the Illinois courts have required the prosecution to furnish defendant on demand specific statements made by state's witnesses. People v. Neiman, 30 Ill. 2d 393, 197 N.E.2d 8 (1964). Yet it is within the trial court's discretion to allow the testimony of witnesses whose names have not been discovered as ordered where it appears that defendant has not been taken by surprise. People v. Quevreaux, 407 Ill. 176, 95 N.E.2d 62 (1950), *cert. denied*, 340 U.S. 938 (1951). Thus the only purpose for which discovery of a witness' statement is allowed is apparently the impreachment of the witness. People v. Bailey, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965).

See also generally Note, 11 DE PAUL L. REV. 286 (1962).

without support,[10] that it can and must bend slightly so that the way can be paved toward fairer and more efficient administration of criminal justice through pre-trial procedures aimed at ascertaining the truth.

II. BACKGROUND AND POLICY QUESTIONS

There was no criminal discovery at common law.[11] Apparently it was felt that to compel the prosecution to reveal its case in advance of the trial would "subvert the whole system of criminal law."[12] Contemporary arguments against a system of liberal discovery procedures approaching those used in civil litigation can be broken down into two categories: the accused already has the balance of the advantage; and the accused would be enabled to commit perjury or to bribe, intimidate, harass or embarrass witnesses for the prosecution.

A. Balance of Advantage.

In *United States v. Garsson*[13] Judge Learned Hand said:

> The defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. . . . It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man con-

10. Louisell, 53 CALIF. L. REV. 89 (1964); Comments, 51 CALIF. L. REV. 135 (1963).

11. Rev. v. Holland, 4 Durn. & E. 691, 100 Eng. Rep. 1248 (K.B. 1792); 6 WIGMORE, EVIDENCE § 1859g. (3d ed. 1940); 2 WHARTON, CRIMINAL EVIDENCE § 671 (12th ed. 1955).

12. Louisell, *supra* note 1, at 57.

13. 291 Fed. 646, 649 (D.C.N.Y. 1923); see also Commonwealth v. Caplan, 411 Pa. 563, 192 A.2d 894 (1963).

victed. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

The accused does appear to have an advantage by virtue of the presumption of innocence requiring proof beyond a reasonable doubt, the requirement of a unanimous verdict, the exclusionary rules applied in the areas of unlawful search and seizure and coerced confessions, the privilege against self-incrmination and the bare fact that often he alone knows what happened. Further, it is argued that the limitation upon the government's ability to use discovery procedures against the defendant, a limitation inherent in the fifth amendment, would make criminal discovery a one-way street.[14] There are three rebuttals to these propositions.

1. *Is the balance of advantage with the accused?*[15] The government has immense resources and facilities. The prosecution works hand in hand with the police who have the use of scientific laboratories and specialists as well as batteries of investigators who arrive at the scene of the crime when the evidence is still fresh. Moreover, the police can usually discover from the suspect at the time of the arrest. Documents and personal possessions may be seized, and even a statement inadmissible in court may provide "leads."[16] In addition, many states require that the accused give advance notice to the government of any alibi[17]

14. Flannery, *supra* note 8, at 78, 79; also State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186, 192 (1910).

15. For a comprehensive analysis with the conclusion that the balance of advantage is overwhelmingly on the side of the state, see Goldstein *The State and Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960). "It is imbalance of investigatory facilities which harms the defendant. The imbalance leads to an uninformed and poorly prepared defense, and consequently to an unfair trial. The real harm is done before trial and it is to that period rather than to the trial and the highly speculative impact on the jury, that courts should look." Note, 74 YALE L.J. 136, 145 (1964).

16. See HALL & KAMISAR, MODERN CRIMINAL PROCEDURE 185 (1965): "While the Supreme Court has not passed on the question, most courts have — and have ruled such physical evidence admissible." It is suggested there, however, that this procedure is inconsistent with the "fruit of the poisonous tree" doctrine used in connection with illegally seized evidence or wiretap evidence.

17. See, *e.g.,* IND. STAT. §§ 9-1631-1633 (1956); IOWA CODE § 777-18 (1958); KAN. GEN. STAT. § 62.1341 (1949); MICH. STAT. ANN. § 28-1043 (1956); MINN. STAT. § 630.14 (1947); N.Y. CODE CRIM. PROC. § 295-1; OHIO REV. CODE ANN. § 2945.58 (1954); OKLA. STAT. tit. 22 § 585 (1951); S.D. CODE § 34.28 01 (1939); UTAH CODE ANN. § 77-22-17 (1953); VT. STAT. ANN. tit. 13, § 6561-62 (1958); WIS. STAT. § 955.07 (1957); ARIZ. RULES CRIM. PROC. 192B (1956); N.J. RULES 3: 5-9 (1958). See also Dean, *Advance Specification of Defenses in Criminal Cases,* 20 A.B.A.J. 435 (1934).

or insanity[18] defense which he will rely upon at the trial or else be barred from such defenses, absent an adequate justification for failure to give notice. The same is true in some jurisdictions for advance lists of witnesses the defense intends to use at trial.[19]

It may be claimed that the defendant has an informational advantage because only he knows what happened. This view is not acceptable because in many instances it rests on the premise that the defendant is guilty. There is also a great contrast between the prosecutor's and the defendant's fact-finding abilities. By the time the prosecutor has settled on a defendant who may have counsel and investigators of his own or have assigned legal aid, most clues have vanished and witnesses, already contacted and perhaps instructed by state personnel, may be unwilling to cooperate. In the great majority of cases the defendant is left to rely on a memory which may be faulty. Finally, even if the defendant's recollection is good, he may hamper his own lawyer through unwillingness to reveal certain facts.

It has been argued persuasively that in practice the defendant's supposed advantage by reason of the requirement of proof beyond a reasonable doubt is illusory. Where the government has prepared its case using advanced investigation methods and the defendant has had no pre-trial discovery of the prosecution's witnesses,[20] the defendant may be effectively forced to take the stand — and this despite the constitutional prohibition of comment on the failure to testify.[21] As a witness he may be easily discredited by cross-examination where, for example, a prior record of convictions appears. In such a situation can it be argued that there is any reasonable doubt which way the jury will decide?

It should be added that the practice of most prosecutors is apparently to allow the defendant to obtain considerable information on his own statements or confessions, scientific reports, reports of physical or mental examinations, or other documentary

18. See, *e.g.*, ARK. STAT. ANN. § 43-1301 (1947); CAL. PEN. CODE § 1016; COLO. REV. STAT. ANN. § 39-8-1 (1963); FLA. STAT. § 909.17 (1961); IND. ANN. STAT. § 9-1701 (1956); IOWA CODE § 777. 18 (1958); MICH. COMP. LAWS § 768.20-.21 (1948); UTAH CODE ANN. § 77-22-16 (1953); VT. STAT. ANN. tit. 13, §§ 6561-62 (1959); WASH. REV. CODE § 10. 76.020 (1961); ARIZ. RULES CRIM. PROC. 192A (1956). See also WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, pp. 357-59 (1954).

19. See, *e.g.*, WASH. REV. CODE § 10-37-030 (1961).

20. Goldstein, *supra* note 15, at 1173; A.B.A. CRIMINAL JUSTICE PROJECT, PROPOSED MIMIMUM STANDARDS FOR CRIMINAL DISCOVERY, p.9,10 (Oct. 1965).

21. Comment upon defendant's failure to take the stand is prohibited by the fifth and fourteenth amendments. Griffin v. California, 380 U.S. 609 (1965).

material.[22] This practice depends on the views of the individual prosecutor and his opinion of defense counsel, and is subject to so much variation that it seems unjust on its face.

2. *Is the balance of advantage relevant anyway?* If the constitutional guarantees mean anything at all they cannot be subjected to such a balancing process.[23] There are some areas where the defendant should have discovery as a matter of right (e.g., his own confession) whether we say it is compelled by the constitution or by considerations of fairness. And in other areas (e.g., discovery of prosecution witnesses) where there are competing policies (such as the likelihood of bribery or intimidation), the presumption should be in favor of allowing discovery absent a special showing on the part of the government, because the reasons for discovery pervade each and every criminal case while the reasons against it do not.[24]

The California courts have implemented this policy, but not on the ground that the due process clause of the fourteenth amendment requires it.[25] In *People v. Riser*[26] Mr. Chief Justice Roger Traynor stated:

> Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.

On the other hand, in virtually all other states discovery is a matter of discretion for the courts. In 1945 Louisiana became the only state to hold that the accused had a constitutional right

22. For a liberal prosecutor's approach, see *Time,* Sept. 30, 1966, p. 62. See also Flannery, *supra* note 9, at 76. English discovery practice is also said to be more liberal than required. Traynor, *Ground Lost and Found in Criminal Discovery in England,* 39 N.Y.U.L. Rev. 749 (1964).

23. Fletcher, *supra* note 2, at 312.

24. A.B.A. CRIMINAL JUSTICE PROJECT, *supra* note 20, at 8-12; Brennan, *Symposium on Discovery in Federal Criminal Cases,* 33 F.R.D. 47, 56, 65 (1963); Louisell, *supra* note 2, at 100, 101; State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958); State v. Cook, 43 N.J. 560, 206 A.2d 359 (1965).

25. See note 3, *supra.*

26. 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).

to discover his own statement.[27] But the United States Supreme Court held in *Cicenia v. Lagay*[28] that refusal to allow discovery of the defendant's statement did not violate due process of law. The Massachusetts Supreme Judicial Court has recently held that the state constitution compels the government to allow defendants to interview prospective government witnesses,[29] and in New York it has been held that the accused's right to counsel includes the right to discover his confession.[30]

3. *If the defendant already has the balance of advantage and this is constitutionally relevant, is not a two-way discovery system preferable to no discovery at all?* There may be a sizeable group in the legal profession who would oppose discovery unless there is mutuality.[31] The principle of mutuality is not only politically expedient, it is also completely in accordance with the underlying discovery rationale — ascertainment of the truth. Under the new Federal Rule a trial judge has discretion to permit discovery by the defendant of his confessions or statements, scientific or medical reports, grand jury statements or other documents and tangible objects, and may, except in the case of a confession or statement, condition defendant's discovery on mutual disclosure by him to the prosecutor.[32] In *Jones v. Superior Court*[33] the California Supreme Court allowed the government's motion for discovery of documents which the defendant had indicated in his motion for discovery he would need to produce at trial for his defense.

Of course discovery by the prosecution against the defendant raises issues concerning the defendant's constitutional rights. It has been suggested that the social need for mutual discovery procedures in criminal law should be balanced against the privilege against self-incrimination, and that the former should be

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27. State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945) (state constitution involved). Later cases have limited State v. Dorsey to its particular facts.

28. 357 U.S. 504 (1958). See also Leland v. Oregon, 343 U.S. 790 (1952); Commonwealth v. Chapin, 333 Mass. 610, 132 N.E.2d 404 (1956).

29. Commonwealth v. Balliro, 209 N.E.2d 308 (1965). The Declaration of Rights of the Massachusetts Constitution (Art. 12) states that the accused "shall have a right to produce all proofs, that may be favorable to him."

30. People v. Quarles, 44 Misc. 2d 955, 255 N.Y.S.2d 599 (1964).

31. Letter from Richard A. Green, Director A.B.A. Criminal Justice Project, to Professor Livingston Hall, Harvard Law School, March 3, 1966.

32. FED. R. CRIM. P. 16 (Supp. 1966). But see the dissent by Mr. Justice Douglas (Mr. Justice Black concurring). Others have urged the use of such a "two-track" system. Brennan, *supra* note 24.

33. 58 Cal. 2d 56, 372 P.2d 919 (1962). See *supra* note 3.

treated as an additional qualification to that privilege.[34] There are examples of other such qualifications derived from social needs: immunity statutes,[35] laws requiring an auto-driver to identify himself after an accident,[36] record-keeping requirements,[37] decisions allowing dismissal of government employees who refuse to answer questions during investigations[38] and statutes requiring advance notification of defenses such as alibi[39] and insanity[40] or advance listing of witnesses.[41]

The Supreme Court has not yet ruled on the constitutionality of discovery against the defendant either as a part of a court's discovery order in favor of the defendant or as a separate order upon government motion. Nor are there any cases where the prosecution has obtained discovery without the defendant's obtaining a reciprocal order. It seems likely that such discovery would have to be limited to evidence which the defendant intended to introduce at the trial. This standard could easily be avoided by defense counsel not admitting until the day of trial that he intends to use certain evidence. The appropriate sanction, exclusion of the evidence, seems rather drastic; however, in Washington the rule prevails without the sanction and it is generally conceded that the provision is completely ineffective.[42] In *Jones v. Superior Court*[43] Chief Justice Traynor reconciled the discovery order with the privilege against self-incrimination on the ground that defendant was merely made to reveal his evidence earlier than he had anticipated. If this justification is accepted,

34. Louisell, *supra* note 3; Comments, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135 (1963).

The concern for the privilege against self-incrimination in compelling defendant to hand over documents apparently stems from the venerable case of Boyd v. United States, 116 U.S. 616, (1886), where the court said, at 622: "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be." Actually the court held that both the Fourth and Fifth Amendments were violated by the federal statute, requiring defendant to produce books, papers or invoices on motion of the government.

35. See King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377 (1954).

36. See, *e.g.*, CAL. VEHICLE CODE §§ 20001-16.

37. Shapiro v. United States, 335 U.S. 1 (1948).

38. Nelson v. Los Angeles County, 362 U.S. 1 (1960).

39. *Supra* note 17.

40. *Supra* note 18.

41. *Supra* note 19.

42. Comment, *Five Years Under State v. Thompson: Criminal Pretrial Discovery in Washington*, 39 WASH. L. REV. 853 (1964); *State v. Sickles*, 144 Wash. 236, 257 Pac. 385 (1927).

43. 58 Cal. 2d 56, 372 P.2d 919 (1962).

the conditional approach adopted by the proposed Rule 16 of the Federal Rules of Criminal Procedure need not be followed, thereby allowing the trial court to exercise greater discretion in granting discovery in favor of the prosecution. Such discretion might better serve the policies of ascertainment of the truth and fairness to the interests involved where the defendant is wealthy and the case particularly complex; *e.g.*, criminal prosecutions under the antitrust laws.

B. Perjury, Bribery and Intimidation

In *State v. Tune*[44] Chief Justice Vanderbilt stated:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. . . . "

While it is probably true that greater knowledge of the evidence against him will encourage the defendant to commit perjury, the argument presumes his guilt. Moreover, Mr. Justice Brennan, who dissented in *State v. Tune,* points out that we cannot know discovery will produce perjured defenses when we have shut the door to such discovery. He also sees in the argument a suggestion that the criminal defense bar cannot be trusted.[45]

It seems that the fears of perjury may have been exaggerated as were the alarms sounded at the advent of civil discovery.[46]

44. 13 N.J. 203, 208, 217, 219, 98 A.2d 881, 884 (1953).

45. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279, 289-93.

46. "One of the great bugaboos of the law [is perjury]. Every change in procedure by which the disclosure of the truth has been made easier has raised the spectre of perjury to frighten the profession." Sunderland, *Scope and Method of Discovery Before Trial,* 42 YALE L.J. 863, 867 (1933).

It is interesting to note that out of forty Washington trial judges surveyed in a recent poll, twenty-seven stated that their discovery orders had never resulted in perjury or harm. *Note,* 39 WASH. L. REV. 853, 870 (1964).

Though an accused murderer will not be deterred by perjury or bribery penalties, he will be under strict police surveillance so that witnesses can be pressured only by an accomplice; at the other extreme, the traffic offender will be more strongly deterred by these penalties than many civil litigants. The difficulty is that where danger is greatest there would also be the greatest need by the defendant to obtain discovery. Still, it is inconceivable that the defendant's discovery of his own statement or confession could add significantly to the danger of perjury or bribery. Scientific reports and physical objects usually could be produced without revealing the prosecution's entire case. The discovery of prosecution witnesses presents the real danger, but even there each case should probably turn on its particular facts. A flexible system, then, could make provision for those cases presenting real danger but leave discovery available where the danger has not been demonstrated.

III. THE STATUTE

It may be argued that criminal discovery does not lend itself to statutory solution. Many commentators, addressing themselves to the proper function of the courts in this area, have concluded that the trial judge must have wide discretion to take account of the complex variables on a case by case basis.[47] Some of these variables, such as perjury, bribery and intimidation, have already been discussed; others include concern for the work-product of the parties in the preparation of the case, embarrassment to victims of crime, maintenance of the secrecy of informants' activities and preservation of the attorney-client privilege. The federal experience with the Jencks legislation[48] has been an example of statutory restriction of the discretionary development of discovery; yet the federal courts are equally at fault for their narrow interpretation of the previous Federal Rule 16.[49] Nevertheless, it is felt that a statutory solution could establish absolute rights, where needed, as well as a liberal overall policy which would free the trial courts from their lack of guidelines without unduly restricting their flexibility.[50] Moreover, appellate courts as well

47. See, *e.g.*, Brennan, 33 F.R.D. 47, 56 (1963); Note, 39 WASH. L. REV. 853 (1964).

48. 18 U.S.C.A. § 3500.

49. See Louisell, *supra* note 2, at 57.

50. *Ibid.* Professor Louisell states the dilemma as follows: "How can the appellate courts or legislatures, for that matter, establish guides flexible enough to take account of realities, without committing the matter to the trial judge's unfettered 'discretion'—little more than a euphemistic slogan for leaving the trial bench wholly at large and therefore potentially wholly arbitrary?"

as legislatures face this dilemma. In California, where the California Supreme Court has led the way, it is probably true that the lower courts have relatively limited discretion to disallow defendant's motion for discovery of most information.[51] The trouble is that in other jurisdictions court discretion has meant denial of discovery in line with Judge Hand's views, above.

The Bureau draft which follows could easily be adopted in the form of court rules where that approach is preferred. Indeed, the statute draws heavily upon the form and substance of the new Federal Rule.

A STATE STATUTE TO LIBERALIZE CRIMINAL DISCOVERY

SECTION 1. When presented with a motion of defendant which is as specific as is reasonable under the circumstances the court shall order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant

(a) exculpatory information or material;

(b) written or recorded statements or confessions made by the defendant;

(e) records of prior convictions of the defendant, or copies any physical or mental examinations;

(d) recorded testimony of the defendant before a grand jury; and

(e) records of prior convictions of the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known to the attorney for the government or to the defendant.

COMMENT: This section allows the defendant or his legal representative to discover as a matter of right certain specified items. The defendant is not required to designate the particular piece of information desired, because he may not be aware that it exists or that it is in the possession or control of the government; e.g., his confession may have been recorded without his knowledge. Thus, if defendant's motion only reasonably specifies any or all of the items within the section, the trial judge has no discretion to refuse the issuance of a discovery order unless he rules that the information or material is irrelevant. It has been suggested that the test of relevancy is a sufficiently broad and general limitation and is also "familiar and workable as a rule of evidence and should be equally so as

On the basis of a survey of trial judges in Washington, it is concluded: "Many judges wish to have a set rule which will remove the *ad hoc* basis of a decision now required." Comment, 39 WASH. L. REV. 853, 868 (1964).

51. Garber, *The Growth of Criminal Discovery*, 1 CRIM. L. Q. 3, 12 (1962); Louisell, *supra* note 2, at 82.

a rule of discovery." A.B.A. CRIMINAL JUSTICE PROJECT, p. 19 (Oct. 1965). The committee felt that the items within section 1 should not be subject to the trial judge's discretion except on the questions of reasonable specification (which is intended as a liberal standard) and relevancy, because of the defendant's acute need to obtain them and the minimal danger to other countervailing policies.

"Exculpatory" information is intended to mean information which raises a reasonable doubt as to the guilt of the accused or as to the probative value of any evidence to be presented by the prosecution, if it lends credence to the accused's defense or if it is favorable with respect to the proper punishment for the accused if convicted. In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court held that the prosecutor's suppression of exculpatory evidence, whether negligent or willful, at the trial violated the defendant's constitutional right to a fair trial. The subsequent circuit court case of *Ashley v. Texas,* 319 F.2d 80 (5th Cir. 1963) followed *Brady* in holding that suppression by the prosecution of a report by two psychiatrists (in disagreement with a third) that the defendant was insane was unconstitutional; however, the court focused on the harm to defendant's pre-trial preparation. And it has been suggested that *Brady* should apply to exculpatory information as well as evidence. Note, 74 YALE L.J. 136, 147 (1964). Thus it can be argued that the Bureau statute merely codifies the accused's constitutional right to pretrial discovery of exculpatory information and material. Even so, it was felt that the statute should be as inclusive as possible of the various items available to the defendant through discovery procedures. It is true, however, that there are practical problems involved: an unscrupulous prosecutor could easily avoid production of information favorable to the defendant, especially if it were not admissible as evidence. Yet most prosecutors consider it their duty to present exculpatory evidence at trial. There is also some deterrence against the prosecutor's disregard of pre-trial discovery orders in his fear of contempt and disbarment proceedings or revelation of the suppressed information by an impartial witness. But even the honest prosecutor will continue to face difficulties in determining whether a certain piece of information is exculpatory and in deciding whether to discover where he does not believe a witness' statement which, if true, would be favorable to defendant.

Defendant's statement or confession can be discovered in several states. See, *e.g., supra,* nn. 3,4,5,6; *State v. McGee,* 91 Ariz. 101, 370 P.2d 261 (1962); *State v. Bickham,* 239 La. 1094, 121 So. 2d 207, *cert. denied,* 364 U.S. 874 (1964); *People v. Johnson,* 356 Mich. 619, 97 N.W.2d 739 (1959); *People v. Quarles,* 44 Misc.2d 955, 255 N.Y.2d 599 (Sup. Ct. 1964). Even where discovery is at the trial court's discretion, discretion is rarely exercised to exclude discovery. This accords with what the Supreme Court has called the "better practice," though a practice not constitutionally compelled. *Cicenia v. Lagay,* 357 U.S. 504 (1958). This holding may have been overturned by the right-to-counsel cases, for counsel cannot provide a capable defense without discovery. There is almost no possibility

that defendant will learn for the first time of prosecution witnesses when he discovers a copy of his confession; refreshing his memory on its contents will serve to reduce the likelihood of perjury.

Results or reports of scientific tests or experiments or medical examinations are also discoverable by the accused as a matter of right. The critical importance and high cost of obtaining such information independently were thought to justify distinguishing these items from books, documents, papers and other section 2 items which are subject to a protective order. It is true that where a case presents an extreme threat of perjury, e.g., where the accused has had past convictions for perjury, any information such as a scientific report would tend to aid the accused in his attempt to create a fabricated story. Yet as a matter of policy it seems desirable to draw the line so that in all cases the critical discovery needs of every accused can be fulfilled without allowing the defendant to pick over the prosecutor's entire case. English criminal practice apparently required the government science laboratory to communicate the result of any examination to the defendant or his legal representative. Pretrial Discovery, "Memorandum by the Council of the Law Society," Dec. 1965, p. 7. In that memorandum the Council of the Law Society suggested, at 8:

> It is not sufficient merely to communicate the result of the examination. Sufficient scientific detail should be given to enable the defense to judge whether or not the result should be scientifically challenged, accepted or prayed in aid. The nature of such scientific detail . . . should include a brief description of the control samples and exhibits of the apparatus and systems used in the examinations and the results obtained both negative and positive. Where inferences are to be drawn from these results they should also be included. There should, in addition, be a right to call for a copy of the laboratory notes made at the time . . . . There might be a further saving of time if the defense were permitted to send written questions on specific points to the laboratory.

The committee agrees that access to the scientific report itself is rendered valueless unless there is sufficient data to test the adequacy of the steps taken and inferences drawn in the experiment. The Bureau statute does not incorporate the Council's suggestions that the accused be allowed to send questions to the laboratory and to obtain laboratory notes, for it seems that appeal should be made to the court if there is insufficient detail made available in compliance with the discovery order. The Council's suggestions might unduly increase the administrative burdens of the government at the whim of the defendant. Nor does the Committee accept the even broader suggestions of the Council that the accused be allowed to have one of his own representatives present at the conduct of government scientific investigation and that the accused be allowed to utilize the government's laboratory for his own experiments. It is not known whether exist-

ing police laboratories have sufficient personnel and capacity to carry out such an administrative and investigatory burden. It seems that the expense to the state would be significant and would jeopardize the political chances for passage of a liberal discovery statute. On the other hand, if the same reasoning is felt to apply to the statute's provision for "all relevant data and conclusions drawn therefrom," this can be eliminated and it can be left to the courts to interpret the meaning of "results or reports."

Recorded testimony of the defendant before a grand jury should be regarded in the same manner as defendant's confession. None of the various arguments for secrecy of grand jury testimony apply where the defendant's testimony alone is discovered to the defendant or his legal representative. See Louisell, 49 CALIF. L. REV. 56 (1961). However, the courts have usually required a showing of special circumstances. See, *e.g.*, *United States v. Johnson*, 215 F. Supp. 300 (D. Md. 1963). The statutes of several states allow defendant to receive a transcript of the entire grand jury proceedings. See, *e.g.*, CAL. PEN. CODE § 938.1 (1959); IOWA CODE § 772.3-.4 (1958); KY. CRIM. CODE § 110 (1959).

Records of defendant's prior convictions are included among those items of mandatory discovery because defendant's counsel must decide whether to place the defendant on the stand to testify and he cannot evaluate this risk without knowledge of defendant's prior convictions — convictions the defendant may be unwilling to disclose to his attorney. Although records of prior convictions are usually available to the public, it may be difficult to obtain accurate information with minimum expense and time. The Committee preferred to make the statute all-inclusive, and this provision can be excluded where it is concluded that public records are adequate and that indigent defendants can easily obtain them.

The items discoverable under section 1 must be within the possession, custody or control of the government and their existence must be known to the attorney for the government or to the defendant. Thus the government attorney is not burdened with knowledge of everything that is in the government's files. Rather he must use due diligence to learn of their existence under section 8. If the government attorney does not know about certain exculpatory information in the hands of the government, the defendant can point out its existence and aid the government attorney in locating it.

SECTION 2. When presented with a motion of the defendant which is as specific as is reasonable under the circumstances, showing that reasonable efforts to obtain such information or material have been made, the court shall order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, within the possession, custody or control of the government, the exis-

tence of which is known to the attorney for the government or to the defendant.

COMMENT: This section allows the defendant to obtain discovery of books, papers, documents, tangible objects, buildings or places, or copies or portions thereof. Discovery of these items is discretionary once the government makes a motion and sufficient showing under section 6. This procedure, the Committee hopes, will emphasize the presumption in favor of discovery. Of course, once a government motion for a protective order has been made, the trial court has complete discretion to rule on the sufficiency of the government's reasons. It is then open to an appellate court to rule that the government has not sustained its burden and that the trial judge has therefore abused his discretion. The defendant need not show the materiality and reasonableness of his request as in the new Federal Rules, nor must he specify precisely which books or documents he desires. Instead, the motion must be as specific as is reasonable under the circumstances and defendant must satisfy the trial court that he has made reasonable efforts to obtain the items independently.

SECTION 3. When presented with a motion of the defendant which is as specific as is reasonable under the circumstances, showing that reasonable efforts to obtain such information or material have been made, the court shall order the attorney for the government to do any one or more of the following:

(a) to disclose to the defendant the names and addresses of any persons whom the attorney for the government knows to have relevant evidence or information, and to indicate those persons whom he intends to use as witnesses;

(b) to permit the defendant to inspect and copy or photograph any relevant written or recorded statements including testimony before a grand jury made by such persons or by co-defendants and any relevant records or prior convictions of such persons or co-defendants, or copies thereof, within the possession, custody or control of the government, the existence of which is known to the attorney for the government or to the defendant;

(c) to cooperate in the conducting of informal interviews by the defendant of such persons, not co-defendants, under the supervision of the court.

COMMENT: This section has no parallel in the Federal Rules because of the Jencks Act (18 U.S.C.A. § 3500) which precludes discovery of government witnesses until they have testified.

Under the same procedural standards as in section 2, the defendant can obtain names and addresses of government witnesses and other persons

known to have relevant information, any statements made by such persons or by co-defendants, including grand jury testimony, and any records or prior convictions of such persons or co-defendants. In addition the defendant can obtain cooperation of the government for the holding of informal interviews, under the supervision of an officer of the court, with government witnesses or other persons having relevant knowledge. Necessarily, all of these items are subject to a protective order on motion by the government. The interview procedure is made informal to avoid the excessive costs of formal depositions. Its purpose is not to tie down witnesses' testimony but to aid the defendant in his preparation of a defense. The procedure has the additional safeguard that an officer of the court must be present to protect the witness from harassment or threats and to advise him of his rights. This informal procedure would also allow the presence of the attorney for the government or his representative. Although there is no provision requiring the witness to cooperate in answering the questions, it is assumed that the prosecution is in most cases the chief bar to cooperation and that if the government has the duty to cooperate this puts an obligation upon it to encourage the witness to cooperate. Of course, if the defendant or his counsel wishes to tie down the witness' statement for use at the trial, there is nothing to preclude the use of signed written statements or even recorded statements where admissible.

SECTION 4. (a) When the court orders discovery or inspection to the defendant under sections 1(c) or 2, the court may upon motion of the government order that the defendant permit the government to inspect and copy or photograph any items within sections 1(c) or 2 which are known by the defendant to be in the possession, custody or control of the defendant and which the defendant intends to introduce into evidence at the trial. When the court orders discovery or inspection to the defendant under section 3(a), the court may upon motion of the government order that the defendant disclose the names and addresses of those persons, known to the defendant, whom the defendant intends to use as witnesses at the trial. This subsection does not authorize the discovery or inspection of reports, memoranda or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation of the case or the preparation of the defense, or of statements made by the defendant or by government or defense witnesses to the defendant, his agents or attorneys.

(b) The court may upon motion of the government order the defendant to serve written notice upon the attorney for the government at least forty-eight hours before trial of any defense based upon alibi or insanity which the defendant intends to rely

upon at trial. In cases of claimed alibi such notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense together with the names and and addresses of witnesses to his alibi, if known to the defendant.

COMMENT: This section gives the trial judge discretion, once discovery has been made available to the defendant under sections 1(c), 2, or 3(a), to provide limited discovery to the government. And even without prior discovery to the defendant, the court has discretion to require the defendant to reveal in advance of trial his intended alibi or insanity defenses. The government is not necessarily limited to those items within sections 1(c) or 2 which are similar to the particular items discovered by defendant. For example, once defendant discovers a scientific report, the court could allow the government to discover not only a similar scientific report but also a medical report or a document in defendant's possession which he intended to produce at trial. Of course the trial court should take into consideration the balance of advantage between the parties and their respective needs in the preparation for trial. However, the committee found it extremely difficult to write such a standard into the statute without "committing the matter to the trial judge's unfettered 'discretion.'" Louisell, *"Criminal Discovery: Dilemma Real or Apparent?."* CALIF. L. REV. 56 (1961). On the other hand, it was felt that to restrict artificially the government's discovery to the similar items discovered by the defendant would unnecessarily limit the goal of ascertaining the truth. Moreover, there is protection against constitutional attack in defendant's choice: he can refrain from seeking discovery under sections 1(c) and 2 and thus be protected against discovery by the prosecutor under those sections. In addition, he has a separate choice with regard to the names and addresses of defense witnesses.

It is difficult to imagine a case where the defendant can have a legitimate objection to revealing part of his case a little earlier than anticipated and where, at the same time, he will be deterred from using the discovery procedures available to him under the statute. When the defense counsel fears that revealing the names and addresses of defense witnesses will facilitate their impeachment by the prosecution, he need only refrain from using section 3(a) and he may still obtain statements of government witnesses whose names he already knows. Besides, the interest in avoiding thorough cross-examination of witnesses is perhaps not one entitled to protection.

Since there is no presumption in favor of discovery by the government, there is no need for the availability of protective orders under section 6. The court can consider the interests and dangers involved on its own or upon argument by defense counsel. However, it seems that a flat prohibition against discovery of internal defense work-product and defense statements is desirable. This prohibition was somewhat reluctantly ex-

tended to statements by defense witnesses because of the controversial nature of even more limited discovery against the defendant.

Discovery of alibi and insanity defenses, although involving policies which are not always directly tied to the principles of mutual discovery, can be useful in reducing the fear of perjury which in turn can lead to greater discovery by the defendant under the statute. Under subsection (b) the court has discretion, upon motion of the government, to direct such discovery whether or not there has been discovery to the defendant. The court has available the sanctions under section 8 which include the exclusion of the evidence.

SECTION 5. An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

SECTION 6. Upon a motion and sufficient showing by the government the court may at any time order that the discovery or inspection under section 2 or 3 be denied, restricted or deferred or make such other order as is appropriate. In considering the government's motion, the court may consider the following:

(a) protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and all forms of intimidation;

(b) maintenance of such secrecy regarding informants as is required for effective investigation by a governmental agency of criminal activity;

(c) protection of such confidential relationships as are recognized by applicable law; and

(d) any other relevant considerations.

Upon motion the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the government's statements may be sealed and shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

COMMENT: This section allows the trial judge to consider the possible harmful effects of pre-trial discovery under sections 2 and 3. The factors enumerated are those deemed of critical importance, but the court is free to weigh the effect of "any other relevant considerations" such as the threat of perjury and the trustworthiness of defense counsel. Necessarily the trial judge must have wide discretion, yet this discretion cannot come

into play until the government makes a formal motion providing the judge with a basis for a restriction of discovery. And this discretion does not apply to restrict defendant's discovery under section 1. Finally, the court must proceed by issuing a formal protective order if it desires to restrict discovery. These procedures, though readily susceptible to circumvention by a conservative trial judge, at least establish guidelines for those who would follow the policy of presumptive discovery which the statute attempts to establish.

A procedure for inspection by the court in camera is adopted from the new Federal Rules for matters requiring secrecy, such as a government motion to deny defendant's discovery of an informant. The government's statement can be sealed, and must be preserved for appeal where the motion is denied or, in other words, where discovery of the informant is ordered.

SECTION 7. A motion under sections 1, 2, 3 or 4 may be made only in a criminal case and within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under this section. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

SECTION 8. If, subsequent to compliance with an order issued pursuant to this statute and prior to or during trial, a party discovers additional material previously requested or ordered which is or may be subject to discovery or inspection under this section, he shall promptly notify the other party or his attorney or the court of the existence of the additional material for proper disposition by the court. If at any time during the course of the proceedings it is brought to the attention of the court that the attorney for the government has failed to use due diligence to learn whether information or material within a discovery order is in the possession, custody or control of the government or that either party has failed to comply with this section, the court may order such party to permit the discovery or inspection of such information or material not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, enter such other order as it deems just under the circumstances or enter any combination of the foregoing.

COMMENT: This section places a duty upon the attorney for the government to exercise due diligence in learning whether information in a discovery order is in the government's possession. It also provides

a continuing duty for all parties to disclose to the other party or to bring to the attention of the court information made subject to an earlier discovery order. The sanctions available to the court where there is non-compliance with a discovery order are flexible and include the exclusion of the non-disclosed information or material.

A STATE STATUTE TO PROVIDE COMPENSATION FOR INNOCENT VICTIMS OF VIOLENT CRIMES

This Bureau Draft anticipates that the programs for the compensation of innocent victims of crimes now existing in Great Britain and New Zealand will spread to this country. The Act is specifically tailored for adoption by state legislation.

I. THE PROBLEM

Perhaps the most fundamental problem in all political theory is that of defining the obligations of the state toward its citizens; the problem is especially formidable when an obligation must be translated into a legal liability. An immediate and dramatic presentation of the problem is the instance of a citizen seeking compensation from the state, claiming that the harm suffered was proximately caused by the breach of a state duty. The statute here discussed is an attempt to define one particular area within which this claim may be presented, examined and often acknowledged. The means by which the claim is to be adjudged is of far less significance than the fact that it is to be adjudged at all.

Because of the doctrine of sovereign immunity a state cannot be sued without its consent.[1] That consent may be given by statute.[2] However, since statutes waiving the immunity are, in general, narrowly construed,[3] it would appear that a statute authorizing recovery against the state specifically for injuries incurred as a result of violent crimes is a prerequisite to such recovery.

Exactly why the state should see fit in this respect to throw off the mantle of sovereign immunity has been variously explained. First, it is theorized that the state has assumed the duty to protect its citizens from crime, and hence from any injury caused by crime; when the state fails to fulfill that duty, it becomes liable to the victim of its failure. This argument reaches fullest pro-

1. Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); Florida State Hospital For the Insane v. Durham Iron, 194 Ga. 350, 21 S.E.2d 216 (1942).
2. Kennard v. State Tuberculosis Board of Florida 129 Fla. 619, 176 So. 872 (1937); Kleban v. Morris, 363 Mo. 7, 247, S.W.2d 832 (1952).
3. County of Los Angeles v. Riley, 20 Cal. 2d 652, 128 P.2d 537 (1942); Kleban v. Morris *supra* note 2.

portions as it approaches the equal protection clause of the fourteenth amendment. "The victim of a robbery, or an assault has been denied 'protection' of the laws in a very real sense, and society should assume some responsibility for making him whole."[4] Though the pronouncement is not that of an outraged layman but of a former Supreme Court Justice, it will seem to have been spoken from a realm into which few courts are prepared to venture. The New York Court of Appeals may well have taken the first step when it held that the City of New York owed "a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration."[5] However, the time when the class of collaborators will be expanded to include all citizens seems beyond the range of forseeability.

In particular instances there may be rather clear indications of governmental failure, as where attacks upon lone persons recur in an area notoriously unprotected by the police or an informer is murdered despite assurances of protection.[6] But whether or not there has been a negligent failure on the part of governmental authorities is far too vague a criterion upon which to base statutory recovery by victims — every crime, arguably, is evidence of a compensable failure. If the barrier of sovereign immunity is to be removed, it must be done first by deciding how reasonable it is to blame every violent crime upon that convenient entity, the state. If this handy assignment of blame is too facile, there may still remain sound reasons for wishing to compensate victims.

When a criminal is apprehended the state often invokes sanctions which make it impossible for his victim to obtain reimbursement from the wrongdoer on the basis of traditional tort law. The interests of society in punishing, deterring and rehabilitating interfere with the interests of the victim.[7] This argument assumes, of course, that the perpetrator of the crime is known and amenable to service, whereas much of the consternation and dissatisfaction aroused by news of a victim of criminal violence derives from the fact that there is no scapegoat available. Abhor-

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4. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205, 224 (1964).

5. Schuster v. City of New York, 5 N.Y.2d 75, 80-1, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958).

6. Schuster v. City of New York, *supra* note 5.

7. For a proposal for a combination crminal-restitution action, see SCHAFER, RESTITUTION TO VICTIMS OF CRIME ch. 20 (1960).

ring a vacuum, the public conscience turns to the state for a remedy.

A price of living in society is the risk of harm resulting from crime, which society itself generates. Because it is usually a mere fortuity that one person is victimized and not another, it is only fair that society as a whole should bear the cost of compensation. The same may be said of victims of flood, electrical failure and other risks of social life. Perhaps the answer to all of these probems is simply to leave the individual free to insure himself, rather than to distribute the burden of compensation among the taxpayers as a class. However, private medical and loss-of-income insurance is far from universally purchased,[8] especially in the lower income groups where crime resulting in physical injury is probably most prevalent. The availability of accident insurance and the cost of insurance of the kind that protects against injury from crime are major considerations for a legislature considering a compensation plan.

A much better case is thus made out for the statute by focusing on the presence or absence of remedies available to the potential or actual victim, rather than trying to locate, in the nature of government, a duty on behalf of the state to reimburse victims of crime. The extent to which the absence of remedies causes private loss is incalculable. James Vorenberg, Executive Secretary of the President's Commission on Crime, speaks of the "shock [of] discovering the extent to which we lack even the most essential knowledge about crime and the degree to which we make do with untested assumptions, myths and oversimplifications."[9] "Nothing is known statistically of those who are victimized by larceny, burglary, robbery, or even the confidence game. . . . "[10]

Historically, the idea of compensation to victims of crime is not new and thus does not represent a striking breakthrough into unexplored areas of welfare-state thinking. A recent arguer from historical precedent, however, goes back beyond the com-

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8. In 1964, when the population of the United States was 192,119,000, 151,123,000 persons had hospital expense insurance; 140,667,000 had surgical expense insurance; 108,717,000 had medical expense insurance; and 47,001,000 had major medical insurance. In the same year 48,171,000 of the 68,517,000 wage earners had loss-of-income insurance. HEALTH INSURANCE INSTITUTE, SOURCE BOOK OF HEALTH INSURANCE DATA (1965); BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. (1965).

9. Address by James Vorenberg, Harvard Law School, June, 1966, Harvard Crimson, Oct. 6, 1966, p. 5, col. 1.

10. VON HENTIG, THE CRIMINAL AND HIS VICTIM 399 (1948).

mon law to the Code of Hammurabi, the ancient Vikings and Alfred the Great.[11] Though such precedent may be cited, it would seem to be irrelevant to the considerations of a modern legislature or court, except as a footnote of academic interest. Any plan must be considered as a justifiable expression of the relationships between state and citizen; even common-law precedent, were it to be found, would be of doubtful value in assessing a modern plan for compensation.

To one who has observed the operation of the New Zealand scheme,[12] it appears that "the advantages of the act are twofold. There is the material benefit from the awards of compensation that may be made by the tribunal, and in addition there is the psychological effect on the community produced by the very fact that there is such a scheme in existence."[13] It may well be the latter effect which offers the strongest argument for a compensation plan, though it is also the most difficult to measure. Notwithstanding the traditional doctrine of sovereign immunity and modern fears of Big Brotherhood, the desire for compensation to victims of crime may represent an example of what Mr. Justice Holmes called "the felt necessities of the time,"[14] a public sentiment no less persuasive for being imperfectly articulated.

A desirable incidental effect of the statute would be to provide an incentive for full disclosure of occurrences of violence.

II. SOME SOLUTIONS

Recently programs for the compensation of victims of crime have been established in Great Britain,[15] New Zealand,[16] and the state of California.[17] A plan has also been introduced in the Senate of the United States[18] to cover the special maritime and territorial jurisdictions of the United States.[19]

The British plan is nonstatutory. It was proposed by the Home Secretary and put into operation with the consent of

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11. Kutner, *Crime-Torts: Due Process of Compensation for Crime Victims*, 41 Notre Dame Law. 487 (1966).

12. See Part II of this Memorandum.

13. Cameron, *Compensation for Victims of Crime: The New Zealand Experiment*, 12 J. Pub. L. 367, 375 (1963).

14. Holmes, The Common Law 1 (1887).

15. Home Office, Compensation for Victims of Crimes of Violence, Cmd. No. 2323 (1964); 697 H.C. Deb. (5th ser.) 89 (1964).

16. Public Act No. 134 of 1963 (N. Z.).

17. Cal. Pen. Code Ann. § 13,600 (West Supp. 1966) Cal. Welf. & Inst'ns Code Ann. § 11211 (West 1966).

18. S. 2155, 89th Cong., 1st Sess. (1965) (amended 2d Sess. (1966)).

19. 18 U.S.C. § 7 (Supp. 1965).

Parliament. Under the plan the Criminal Injuries Compensation Board was established. The Board has discretion to award compensation for personal injuries caused by violent crimes. The awards may be made for out-of-pocket expenses, loss of earnings and pain and suffering. There is no right to judicial review.

In New Zealand a Crime Compensation Tribunal was established with discretionary power to award compensation to the victim or his dependents where he has been injured or killed through the commission of any of certain specified crimes. Compensation may be awarded for out-of-pocket expenses, loss of earnings, pain and suffering and other losses. The Tribunal may also order the offender to reimburse the fund from which the award was made.

The California enactment consists of two distinct parts. Under sections 13,600-13,603 of the Penal Code compensation may be awarded by the legislature to a private citizen who was injured or whose property was damaged while the citizen was attempting to prevent the commission of a crime against the person or property of another, apprehend the criminal, or assist materially a peace officer in the prevention of a crime or apprehension of a criminal. Claims must be presented to a Board of Control. The Board conducts a hearing and at its discretion may submit a recommendation to the legislature that an appropriation be made for the purpose of indemnifying the claimant. The second part of the scheme, found in the Welfare and Institutions Code, section 11211, has the effect of doing away with the property qualifications of the program of aid to families with dependent children in those cases where the need for the aid resulted from the killing or incapacitation of a family member by a crime of violence. Expenditures for the 1965-1966 fiscal year were limited to $100,000. The section also provides fines for criminals convicted of crimes resulting in the injury or death of another person; the proceeds are put into a fund which is used to make further awards.

The proposed federal plan, introduced by Senator Yarborough, sets up a Violent Crimes Compensation Commission to process the claims of victims and their dependents for the personal injuries or death of the victim caused by enumerated violent crimes committed within prescribed geographical areas. Awards of the Commission are not subject to court review and are limited to $25,000.

The fact that such programs have been enacted in two Commonwealth nations and one of the United States does not

necessarily provide strong modern precedent for further state enactments. In the case of New Zealand, for example, it has been suggested that the program was at least partly the result of political pressures upon the Conservative Government, whose progresive penal policy had provided grounds for Labour opposition.[20] Furthermore, New Zealand's Chief Advisory Officer of the Department of Justice has noted that "crimes resulting in serious injury are relatively infrequent in this country and the indications are that the scheme will not be unduly expensive."[21] Thus, factors such as incidence of crime within the jurisdiction and tax funds available to compensate claimants would probably account for the more cautious approach exemplified in the California plan, which only provides a mechanism for the presentation of claims to the legislature.[22] The differences in implementation and the variety of reasons which have moved different legislative bodies to experiment with the plan indicates that the basic concept is compatible with the legal notions of English speaking nations and simply requires special moulding to fit particular codes.

III. THE MODEL ACT

The Model Act limits compensation to cases of injury against the person. These are more likely to involve serious and permanent losses.[23] Further, a program encompassing property losses would place a much greater financial and administrative burden on the states.[24] The Model Act also excludes those injuries caused by automobile and other accidents; while automobile accidents account for more injuries and deaths than do crimes, such injuries require a system specially tailored for their greater volume and other unique problems.[25]

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20. Cameron, *supra* note 13, at 367, 370.

21. *Id.* at 375.

22. For criticism of the California scheme and comparison of it with the schemes of New Zealand and Great Britain, see Note, *California Enacts Legislation To Aid Victims of Criminal Violence,* 18 STAN. L. REV. 266 (1965).

23. It has been pointed out that this provision would be inconsistent with the rationale of state liability founded upon negligence; Cameron, *supra* note 13, at 371.

24. In 1963 in the United States there were 8,500 murders, 16,400 forcible rapes and 147,800 aggravated assaults, while, on the other hand, there were 100,160 robberies, 975,900 burglaries, 611,400 larcenies of $50 and over and 399,000 auto thefts. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. (1965).

25. For a proposed plan dealing with claims arising out of automobile accidents, see Keeton and O'Connell, *A Basic Protection Insurance Act for Claims of Traffic Victims,* 2 HARV. J. LEGIS. 41 (1965).

The Model Act compensates not only for all crimes committed within the borders of the state, but also for injuries incurred by citizens of the state while in other states. This coverage reflects the policy of giving to the citizens of the state the broadest possible protection within the limits of the type of loss to be compensated.

The Act compensates primarily on the basis of economic loss and not on the basis of need. Thus there are no property qualifications for recovery under the Act. In accord with this loss theory, insurance recoveries and recoveries from the offender are deducted from awards made under the act in the cases of out-of-pocket expenses (section 301) and in the cases of lost earnings (section 302). Section 303, which allows compensation to the spouse and dependents of deceased victims, has no such deduction provision because some states have statutory limits on wrongful death actions,[26] and because most lives are insufficiently insured.

Section 401 sets up a Commission to administer the Act. This is usually a matter of necessity in a Model Act (unless the job is given to the courts), because the existing agencies which could handle the work vary greatly from state to state. For example, part of the California program was given to the State Board of Control, which is responsible for handling a wide range of claims against the state. Administration of the Model Act is not given to the courts for the same reasons that administration of most workman's compensation acts is not; congested court dockets (especially prevalent in large cities where the bulk of claims will arise) will thus be avoided, and the Commissioners will be allowed to acquire a familiarity and, hopefully, an expertise in the examination of claims.[27]

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26. COLO. REV. STAT. ANN. ch. 41, § 1-3 (1963) ($25,000); ILL. REV. STAT. ch. 70, § 2 (1965) ($30,000); KAN. STAT. ANN. § 60-1903 (1964) ($25,000 plus costs); MASS. GEN. LAWS ANN. ch. 229, § 2 (1958) ($5000 minimum, $50,000 maximum); MINN. STAT. ANN. § 573.02 (1954) ($35,000); MO. REV. STAT. § 537.090 (1949) ($25,000); N.H. REV. STAT. ANN. ch. 556, § 13 (1955) ($20,000, but up to $40,000 for widow, widower, minor children, or dependent mother or father; jury not told of limit); ORE. REV. STAT. § 30,020 (1963) ($25,000); GEN. LAWS R.I. ch. 7, § 10-7-2 (1956) ($5000 minimum); S.D. CODE ch. 37, § 2203 (Supp. 1960) ($20,000); VA. CODE ANN. § 8-636 (1950) ($40,000); W.VA. CODE § 5475 (1961) ($10,000); WIS. STAT. ANN. § 331.04 (1958) ($15,000; plus $2500 to spouse or parent; plus $1500 for each dependent child under fifteen, up to $7500).

27. See Kutner, *supra* note 11, at 500, where it is argued that the courts are the proper administering bodies.

In the hope of further promoting prompt handling of applications, an expedited procedure, not requiring a hearing, is provided by section 501. A claimant dissatisfied with the expedited procedure can obtain a hearing and eventually a court review.

PART I. SHORT TITLE AND DEFINITIONS

SECTION 101. *Short Title.*

This Act shall be known and may be cited as the Crimes Compensation Act.

SECTION 102. *Definitions.*

(a) "Applicant" means any person or persons claiming compensation under this Act on their own behalf or as a legal representative of the victim or dependent.

(b) "Commission" means the Crimes Compensation Commission established by section 401 of this Act.

(c) "Compensable crime" means a willful act or omission which, if committed by a person of full legal capacity, would be punishable in this state.

(d) "Dependent" means a person who was receiving substantial support or needed services from the victim at the time of the compensable crime.

(e) "Insurance" means both contractual and public forms of compensation.

(f) "Medical expenses" means charges for hospital and nursing services, physicians' fees, medicines and other expenditures prescribed by a physician.

(g) "Offender" means the person or persons who committed or was finally determined by a Court to have committed the compensable crime.

(h) "Victim" means the person or persons injured by the compensable crime.

COMMENT: (a) The definition of "applicant" is intended to make it clear that a person other than the victim can claim compensation. The applicant may be acting in his own behalf or in a representative capacity.

(b) The term "Commission" as used in the Model Act refers to the administrative body created by section 401 of the Act. If the legislature

chooses another body through which to administer this Act its name should be substituted in this definition. See discussion in comment to section 401.

(c) The concept of "compensable crime" is used to determine when an award is to be made. Compensation is to be awarded on the basis of the crime committed and its effects on the victim, without regard to who may be the actual offender or whether or not he could be convicted. It should be noted that section 202 provides for specific cases where the identity of the offender becomes relevant. The definition is designed insofar as possible to provide for an objective factual determination of whether or not a compensable crime has been committed, and to avoid any requirement that the offender be identified before the victim may be compensated. The willfulness requirement narrows the scope of coverage of this Act. Thus, automobile and other accidents — other than those in which willfulness exists — do not constitute "compensable crimes." Automobile cases, which form the major class of accidental injuries, cannot be handled effectively by the procedures of this Act because of their number and unique nature. Section 201 makes it clear that only crimes which cause personal injury are compensable under this Act. The broad definition of "compensable crime" will accommodate changes in the criminal law. The listing of specific crimes would not provide this flexibility and would also present the risk of oversight.

(d) "Dependent" is defined in terms of a person receiving substantial support or needed services from the victim. This requirement is intended to eliminate from coverage those who were receiving only nonessential support, and to be flexible enough to provide for varying fact situations. For example, one receiving a relatively small but essential portion of his support would qualify as a "dependent."

(e) The term "insurance" includes any form of compensation, whether contractual or public, which the applicant received by right or by the action of the state, whether denominated insurance or not; it does not include such items as gifts or loans or in-kind aid from relatives and philanthropic organizations. The term does not include tort recoveries against the offender, but to prevent double recovery these are separately covered by other provisions of the Act.

(f) The definition of "medical expenses" includes any necessary doctor, hospital, nursing or medical expenditure. The test of necessity is whether or not it is prescribed by a physician; but compensation for these expenses is limited by the requirement of reasonableness in section 301.

(g) The term "offender" has a very limited place in this Act. Even here it is not necessary that he be convicted of the crime but if he has, this fact will be res judicata as to the Commission. See sections 301, 302, 506 and the comment to section 202.

(h) The "victim" is the person actually injured or killed by the compensable crime whether or not he is also the applicant.

PART II. BASIS FOR RECOVERY

SECTION 201. *Elements of Recovery.*

Compensation shall be awarded under this Act for injury or death resulting from a compensable crime where

(1) the compensable crime was committed within the territorial limits of this state, or

(2) the victim is a citizen of this state at the time of the compensable crime.

COMMENT: This section contains the operative language for compensation under the Act. The use of the word "shall" makes the awarding of compensation the duty of the Commission and the enforcible right of the victim. There are two necessary elements for recovery — a compensable crime and a victim injured by the crime. Use of the words "resulting from" sets out the requirement of causation; but this is further restricted by section 202 which prohibits recovery by a victim who has participated or caused the crime.

Subsections (1) and (2) establish limitations on the class of victims who may receive compensation. The usual victim will be a citizen of the state injured within the state but this combination is not necessary.

Subsection (1) provides that any person injured by compensable crime within the state is entitled to compensation. Subsection (2) provides that a citizen of the state is entitled to compensation even if he is injured in another state.

The largest group not protected are those tax-paying residents who are not citizens and who are injured while outside the state. This is a consequence of the notion that the state owes its primary duties to those within the state and those citizens traveling outside the state.

SECTION 202. *Restriction on Recovery.*

Compensation shall not be awarded under this Act to any person who committed, provoked or aided in the commission of the compensable crime.

COMMENT: This section reflects the policy determination that the state owes no compensation to persons whose own actions have been a significant cause of the crime for which he seeks compensation. The language "provoked or aided" sets out with some definiteness the degree of causation sufficient to disqualify one from compensation.

The Commission may determine, for the purposes of the section, that the person "committed, provoked or aided in the commission of" the crime on a civil standard of proof. This determination has no relevance

to a later criminal trial and section 506 requires the Commission to withhold any information which might impair the applicant's right to a fair trial. The admissibility of documents and reports of the Commission in subsequent cases is controlled by the usual rules of evidence.

SECTION 203. *Time Limitations.*

Compensation shall not be awarded under this Act

(1) if a report of the compensable crime is not made by the applicant to appropriate police authorities within twenty-four hours after the crime, unless the delay was justified by extraordinary circumstances; or

(2) if the application to the Commission is not made within one year of the date of the compensable crime, unless the delay was justified by extraordinary circumstances.

COMMENT: This section provides two different time deadlines which must be satisfied by the applicant. They serve the dual purpose of protecting against fraudulent claims and of insuring a prompt investigation of the crime by the police authorities.

Subsection (1) reflects the determination that fraudulent claims will be deterred and the apprehension of the offender will be facilitated if the commission of the crime is promptly reported to the police. The applicant should not expect the state to award compensation if he has not made a reasonable effort to aid the state in the apprehension of the criminal. If there are extraordinary circumstances, a delay in reporting the crime will be permitted. An example of this might be where it is not clear that a crime has been committed — as in the case of a fire which is later found to have been caused by arson.

Subsection (2) provides a one year statute of limitations for applying for compensation. Again, delay is permitted in extraordinary circumstances. These might include latent injuries not discovered or discoverable for one year, amnesia or discovery that a crime has occurred only after a lengthy investigation of more than a year.

SECTION 204. *Burden of Proof.*

The applicant shall have the burden of showing it more probable than not that he has satisfied the requirements of this Act, except section 202.

COMMENT: As in most civil cases the burden of proof is placed on the applicant. He must prove each element necessary for recovery. However, proof of the elements of section 202 is expressly exempted and the burden of showing the affirmative is on the Commission.

PART III. AMOUNT OF COMPENSATION

SECTION 301. *Compensation to the Victim or his Estate.*

Compensation shall be awarded for medical, burial and other necessary expenses actually incurred or to be incurred to the extent they are reasonable, less twenty-five dollars and less any amounts received for these expenses from insurance or from the offender.

COMMENT: This section reflects the policy that only actual expenses are to be compensated and only to the extent that they are reasonable. Where an expense actually incurred is unreasonably large, a portion of the expense equal to the amount which would be reasonable for that item or service will be awarded to avoid forfeiture of compensation by persons desiring more expensive items or services, or by those who are defrauded or overcharged.

The $25.00 deductible feature is designed to eliminate the mass of small claims, especially those resulting from minor brawls, which would require an expense and administrative burden out of proportion to their importance or urgency.

SECTION 302. *Compensation to the Victim.*

Compensation shall be awarded for

(1) two-thirds of the loss of earnings resulting from total or partial physical incapacity for work, not to exceed a monthly rate of five hundred dollars less any amounts received for this loss

(A) from the offender and

(B) from insurance to the extent the insurance exceeds twenty percent of the loss of earnings.

[(2) pain and suffering not to exceed five hundred dollars less any amounts received from the offender.]

COMMENT: This section provides compensation for loss of earnings and for pain and suffering. Both compensate for loss without regard to the need of the individual victim. It is sought to put the victim in a position comparable to that he would have been in but for the compensable crime.

Subsection (1) states the formula for compensating loss of earnings. It is geared to the victim's present earning capacity, with a maximum monthly award. The award is set at two-thirds the loss of earnings. This is intended to provide an incentive for the victim to seek other employment as soon as possible. The amount of the award is diminished to the extent

that the victim has received compensation for loss of earnings from the offender. It is similarly reduced by any insurance recovery which exceeds twenty percent of the loss of earnings. The purpose here is to avoid depriving those who have an insurance recovery from receiving the benefit of their foresight; and to avoid driving private insurance out of this area. This enables a victim to recover up to 86 2/3 percent of his loss. For example, if the victim were earning $100.00 per week and was totally incapacitated by a compensable crime he would be awarded $66.67 per week compensation. If he had an insurance policy (or workmen's compensation) which would pay $60.00 per week, then his total compensation would be $66.67 less $40.00 (amount insurance exceeds 20 percent of the loss), or $26.67, plus the $60.00 insurance recovery, for a total of $86.67.

The maximum recovery of $500 per month is well above the subsistence level and adequate as the sole income of the victim.

Subsection (2) provides for compensation for pain and suffering. Of course, any actual reasonable expenses such as psychiatric help will be compensated under section 301 as a medical expense. Since pain and suffering awards are very difficult to determine objectively, the Act places a maximum amount of $500.00 on such awards. The provision is an optional one because a state having only limited funds for such a program may wish to satisfy first the economic loss of victims of crime. One reason for omitting this provision is that such awards in tort law serve to punish the tort-feasor. In the context of the Act such punishment is inappropriate.

SECTION 303. *Compensation to Dependents.*

Compensation shall be

(1) ten thousand dollars to the spouse of the deceased victim.

(2) one thousand dollars to each dependent of the deceased victim other than the spouse.

COMMENT: If the victim is killed as a result of the compensable crime, each of his dependents is given a flat sum in addition to any other recovery the dependent may receive from insurance (or from the offender). This will probably not compensate the loss to the dependent but it will help him to meet the financial burdens this loss imposes on him.

PART IV.
THE CRIMES COMPENSATION COMMISSION

SECTION 401. *Establishment of the Commission.*

There is hereby established a Crimes Compensation Commission consisting of three members appointed by the Governor and eligible for reappointment. If for any reason a vacancy occurs the Governor shall appoint a new member to fill the unexpired term.

COMMENT: This section establishes the administrative machinery needed to carry out the policies of the Act. The legislature may find it necessary, for constitutional reasons or otherwise, to have this Act administered by the courts. Similarly they may find it more convenient and economical merely to have this Act administered by some other agency, if an agency exists with personnel and procedures appropriate to the administration of this Act. However, the Act sets up a separate agency with review by the courts because it is felt that the separate agency would be best able to handle the applications, most of which would be decided on an informal basis without lengthy, expensive proceedings or attorneys.

The Commissioners are allowed to succeed themselves since this will help to preserve the expertise of the Commission. The Act establishes a three-man commission but some states may find it necessary to establish larger bodies. No provision is made for the offices and facilities of the Commission since this will depend on the particular state's needs and desires.

SECTION 402. *Term and Compensation of Commissioners.*

(a) The first three appointments made under this Act shall be for terms of two, four and six years respectively. Each subsequent appointment shall be for a term of six years.

(b) Each commissioner shall be paid a salary of ....

COMMENT: The Act provides for six-year terms which are staggered in order to provide continuity and time to develop skill in the handling of the cases. The state legislature should provide for an appropriate salary.

SECTION 403. *Removal of Commissioners.*

The Governor may remove a Commissioner for neglect of duty, misconduct or disability.

COMMENT: The power to remove is given to the Governor, who can exercise it only for one of the three reasons specified. This serves to prevent undesirable political pressures.

PART V. FUNCTIONS AND PROCEDURES OF THE COMMISSION

SECTION 501. *Expedited Procedure.*

(a) The Commission may award compensation on the basis of documents submitted by the applicant. In making this determination the Commission may investigate the validity of documents and may request additional documents.

(b) The Commission shall within thirty days of application notify the applicant in writing

(1) if the application is incomplete, which additional documents are required to complete the application, or

(2) if the application is complete, of its decision. In the case of a total or partial denial of compensation the Commission shall promptly send the applicant a full written statement of the reasons for such denial.

(c) The Commission shall pay proved medical expenses even if other types of compensation claimed by the applicant have not yet been passed upon.

(d) If the applicant is dissatisfied with the determination of the Commission he may within thirty days request a hearing. The applicant may consider a request for additional documents as such a determination.

COMMENT: This section provides the basic procedure for quick settlement of claims. It is felt that in this area, unlike other compensation plans, most cases are fairly clear and can be determined without a hearing.

Section 501(a) allows a decision on the basis of documents alone. These would include copies of police reports, medical bills and other documents which would show whether or not there was a compensable crime and what expenses were actually incurred as a result. The Commission is empowered to examine the validity of the documents. At this point a full written record is required only to the extent that the applicant is denied compensation. Section 501(d) allows the applicant to request a full hearing to consider the application if he is dissatisfied with the determination on the basis of the statement of reasons.

The Commission may also request additional documents. The burden of producing evidence is placed on the applicant. He must submit the requested documents. However section 501(d) provides that the applicant may refuse to submit further documents and require a full hearing. This is intended primarily to cover the cases where the applicant finds he cannot get the additional documents because of refusal by other parties.

Section 501(b) provides that the Commission must take action within thirty days either by deciding the case or by requesting additional documents. If the Commission requests additional documents and they are submitted, then the Commission must decide the case within thirty days after the application is completed. This is in keeping with the feeling that the Commission should act quickly and in most cases can so act. If the Commission is still in doubt as to the validity of the application, it can deny compensation and the applicant can request a hearing.

Section 501(c) is intended to insure that the Commission shall pay

medical expenses as quickly as possible. This will allow prompt payment to those who treated the victim.

Section 501(d) states the time limitation for requesting a hearing. Once a determination denying compensation has been made the applicant will receive a full written statement of the reasons for the denial and will have thirty days to request a hearing. The thirty-day limitation was chosen because it was felt that this would give adequate time for due consideration and response either by the applicant or the Commission, and at the same time not prolong the procedure unnecessarily.

SECTION 502. *Hearing.*

(a) Upon written request for a hearing the Commission shall fix a prompt and convenient time and a convenient place for the hearing and shall notify the applicant.

(b) The Commission, on its own motion or at the request of the applicant, shall compel at the hearing by subpoena the appearance and sworn testimony of any person or the production of documents or objects that the Commission reasonably believes may relate to the application.

(c) The Commission shall prepare a written record of the hearing. All evidence, including records and documents in the possession of the Commission of which it desires to avail itself, shall be offered and made a part of the record of the hearing and no other information or evidence shall be considered in the determination of the application.

(d) The applicant may appear in person or by his representative. He may introduce evidence and may cross-examine witnesses.

COMMENT: This section allows the Commission both to investigate and to preside at the hearings. This, although not always a desirable arrangement, is thought to be desirable in this particular area. It is probable that the great majority of the cases will be handled under the expedited procedure. Therefore the original investigating body is given, by section 501, the power to make awards. Since this is a small Commission handling a very small area of compensation, it would be unnecessarily cumbersome and expensive to separate the functions at the hearing; and there should be no harm to the applicant since the Act does not intend to create an adversary procedure. Recourse to the courts is preserved.

However, some states have administrative procedure acts which will preclude such an arrangement. This conflict can be avoided either by dividing the Commission into prosecuting and hearing divisions, or by

requiring the hearing to be before some third agency or the courts and allowing the Commission to act as the investigative body before this third body. Another possibility is explicitly to except the Commission from the scope of the procedure act.

Section 502(a) requires the Commission, upon written request, to set a prompt and convenient time and a convenient place for the hearing. No time limits are prescribed. This imposes a more flexible standard on the Commission; in some states the Commission may have to travel to the scene or may have a backlog of cases for hearing so that it is impractical to set a fixed time within which the Commission must act. Both the time and place should be convenient to both the applicant and the Commission, and the Commission will be held to a standard of reasonableness.

Section 502(b) gives subpoena power to the Commission and requires that it exercise it to enable the applicant to secure the evidence needed for his case. However, the Commission must restrict the use of the subpoena to evidence which relates to the matter under investigation. Of course, if it abuses this discretion there may be a basis for judicial review under Part VI of the Act.

Section 502(c) requires the decision to be based on a written record. This carries over a requirement found in many administrative procedure acts, will provide the basis for review in the courts and will require the Commission to introduce all information on which it bases its decision.

Section 502(d) allows the applicant to be represented by an attorney or other representative and makes it clear that he will be able to introduce evidence and cross examine witnesses.

SECTION 503. *Reconsideration of Decisions.*

(a) The applicant shall notify the Commission promptly in writing of any change in the victim's circumstances which might reduce the amount of compensation to which the applicant is entitled.

(b) The Commission on its own motion or at the request of the applicant may reconsider a decision denying compensation or the amount of compensation awarded. In the case of awards made under section 302 the Commission shall reconsider the award at least every two years. The reconsideration shall follow the procedures in sections 501 and 502.

(c) No amounts paid to the victim or his dependents shall be recoverable by the Commission unless such payments were procured by fraud.

(d) The right of reconsideration shall not affect the finality of a Commission decision for the purpose of judicial review.

COMMENT: The purpose of this section is to insure maximum flexibility in modifying awards on the basis of new or changed circumstances. Section 503(a) places the primary duty on the applicant to notify the Commission of any changes in the circumstances relevant to the amount of compensation. Section 503(b) states the basic rule allowing this reconsideration. The applicant can request reconsideration or the Commission can act on its own motion. Generally, reconsideration does not affect funds already paid; but if the applicant has fraudulently failed to inform the Commission of a material change in the victim's circumstances which would reduce the amount of compensation, the Commission can require restitution. In the case of awards for loss of earnings the Commission must reconsider its award at least every two years. The reconsideration must follow the procedures of sections 501 and 502.

An application once filed will toll the statute of limitations (section 203(2)) even though there is a later request to modify the award.

Section 503(d) makes it clear that this right of reconsideration will not preclude judicial review of the Commission's decision. The applicant is not required to request a reconsideration before taking an appeal. The reconsideration procedure is not equivalent to a rehearing on the original facts. It is intended to provide for changes unforseen at the time of the hearing.

SECTION 504. *Rules.*

The Commission may establish additional rules for the processing of applications.

COMMENT: This section gives the Commission a limited power to establish rules for processing applications, to decide, for example, what documents are required, the procedure for hearings and so on. The Commission is not empowered to establish regulations governing future awards or amounts of compensation. Each application is to be considered on its own merits. The Commission will, however, explain the policy basis of its decisions in the annual report required by section 507.

SECTION 505. *Subrogation.*

The Commission shall be subrogated to all claims that arise out of the compensable crime or the resulting injury up to the amount of compensation awarded under this Act. This provision shall not apply to life insurance benefits payable because of the death of the victim.

COMMENT: This section allows the Commission to recover the amount of the award made if the victim has a right of recovery as a result of crime

or injury. This places the loss on the offender or his insurance company instead of on the state.

However, the Commission is not subrogated to claims for insurance benefits which are payable because of the death of the victim. The reasons for this are that the amount of compensation to dependents will generally be insufficient and that the beneficiaries of the life insurance policy may include persons who do not qualify as dependents under section 102 (d) for recovery under section 303.

SECTION 506. *Power to Withhold Information.*

The Commission shall refuse to make public information likely to lead to the identification of the victim or the offender if

(1) the offender has not been convicted, or

(2) the Commission is satisfied that privacy is necessary to protect the interests of the victim or any dependent of the victim.

COMMENT: Section 506 requires the Commission to withhold information in certain cases. It is felt that a Commission determination that a particular person was an offender, if published, might be prejudicial in a future criminal trial. Similarly, in some cases, especially those involving rape and other sexual offenses, the harm to the victim and his dependents will already have occurred.

The New Zealand statute allows their Commission to prohibit publication. Public Act No. 134 of 1963 (N.Z.). The Model Act does not adopt this approach because of the possible conflict with first amendment rights.

SECTION 507. *Annual Report.*

The Commission shall submit to the Legislature and the public an annual report. The report shall include a statistical summary of applications and awards and an analysis of the policy basis for its decisions.

COMMENT: This section requires the Commission to submit an annual report to the legislature and the public. The purpose is to publicize the Commission's activities and to provide an opportunity for scrutiny, criticism and, if necessary, modification of the policies and procedures of the Commission. A statistical summary of awards and applications is required and should indicate the cost of the program. This will aid the legislature in preparing future budgets.

PART VI. JUDICIAL REVIEW

SECTION 601. *Appeal.*

(a) The decision of the Commission after hearing shall be final unless an appeal is filed by the applicant in the [appropriate state appellate court] within thirty days. At that time the applicant shall give notice of the appeal to the Commission and the Commission shall promptly transmit the official record of the hearing to the reviewing court.

(b) The taking of an appeal shall not stay the payment of any compensation awarded by the Commission at the hearing.

COMMENT: Section 601(a) allows the applicant thirty days to appeal a decision of the Commission. The appellate court of the state is the reviewing court. This provision makes it clear that the reconsideration is not a new trial on the merits. It should also avoid the need for a jury trial required by some state constitutions in all trial-court cases. The second sentence provides for notice to the Commission and requires the Commission to forward the record to the reviewing court.

Section 601(b) provides that the payment of compensation already awarded is not to be delayed by the taking of an appeal. Therefore compensation already awarded is final except in the case of fraud as provided in section 503(c).

SECTION 602. *Scope of Review.*

The decision of the Commission after hearing shall be subject to judicial review in the same manner and to the same extent as the decision of a [state trial court of general jurisdiction].

COMMENT: The scope of review is limited to the normal scope of review of trial-court decisions. It is hoped that this will avoid de novo review of the application and limit consideration of the merits to the record. The reviewing court will follow its usual procedures.

PART VII. SEVERABILITY AND EFFECTIVE DATE

SECTION 701. *Severability.*

If any provision of this Act or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

COMMENT: This section is patterned on the model severability section recommended by the National Conference of Commissioners on Uniform State Laws. It is intended to save the remaining parts of the Act in the event that a court finds part of the Act invalid.

SECTION 702. *Effective Date.*

This Act shall take effect on ....

COMMENT: The legislature can provide for any effective date that is appropriate. It is recommended that the Act become effective when approved in order to avoid the additional inequity of refusing compensation to those injured after the Act becomes law but before it takes effect.

NOTE — DIVORCE REFORM IN NEW YORK

"Then the Lord God said, 'It is not good that man should be alone . . . .'"

Genesis 2:18.

Religious, social, moral and legal issues have so complicated the topic of family break-up that a paralysis has set upon the substance of divorce law, and a stigma upon its administration. Nowhere has this been more true than in New York, where for 179 years the sole ground for legal dissolution of a marriage has been adultery[1] and where dissatisfied mates have resorted to perjury, staged hotel affairs,[2] misuse of the law of annulment[3] and costly

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1. The earliest codification of the statute was in 1828. N.Y. REV. STAT. 1828, ch. 8, § 38. It is said that the statute became New York's first divorce law when a man whose wife was unfaithful petitioned the legislature for a private act to dissolve his marriage; a committee under Assemblyman Alexander Hamilton's chairmanship instead recommended a general statute empowering chancery courts to grant divorces on adultery grounds. N.Y. LEGISLATURE, JOINT COMMITTEE ON MATRIMONIAL AND FAMILY LAWS, REPORT 21 (1966) [all reports of this committee hereinafter cited as JOINT COMMITTEE REPORT].

2. JOINT COMMITTEE REPORT 18 (1966). No precise studies or statistics are available to show how often evidence-faking, perjury and legal chicanery occurs. Still, judges and commentators assert that such practices are widespread in all the states. Mirizio v. Mirizio, 242 N.Y. 74, 87, 150 N.E. 605, 610 (1926) (Crane, J., dissenting) ("uncontested divorce cases . . . are frequently based on perjury"); Leach, *Divorce by Plane-Ticket in the Affluent Society — With a Side-Order of Jurisprudence,* 14 KAN. L. REV. 549, 555 (1966) ("nearly all uncontested divorces are collusive"); Pound, *A Symposium on the Law of Divorce — Foreword,* 28 IOWA L. REV. 179, 180 (1943) ("collusion goes on notoriously and establishment of 'extreme cruelty' involves either facile swearing amounting to perjury, or finding of facts to meet the law instead of applying law to found facts"); Note, *Collusive and Consensual Divorce and the New York Anomaly,* 36 COLUM. L. REV. 1121 (1936); Wels, *New York: The Poor Man's Reno,* 35 CORNELL L. Q. 303, 319 (1950). Attorneys who pilot fraudulent divorces through the courts degrade their profession. JOINT COMMITTEE REPORT 38 (1957). *Cf.* Bradway, *Family Dissolution — Limits of the Present Litigious Method,* 28 IOWA L. REV. 256, 262-263 (1943): "It is urged that the responsibility for experimenting in this field of domestic relations should be at the lawyer's door . . . . Failure to act may entail no unfavorable consequences . . . [but] the profession which is content to remain passive may well find the initiative passing into the hands of others."

3. One ground of annulment is fraud, N.Y. DOM. REL. LAW § 140(e) (McKinney 1964), and in some parts of the state this standard is interpreted very loosely. JOINT COMMITTEE REPORT 57-59 (1966); Wels, *supra* note 2, at 319. New York has an unusually large proportion of annulments in comparison to other matrimonial actions; during the 1950's New York annulments constituted almost one-third of the total in the entire United States. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 113-114 (1959).

flights to Reno, Juarez, and other liberal jurisdictions[4] in order to terminate their unhappy unions. Statutory amendments, effective September 1, 1967, will add several new grounds for divorce in New York and establish a conciliation bureau to work with the courts in the individual divorce actions.[5] This Note will outline and evaluate these aspects of New York's divorce reform.[6]

I. Substantive Reforms.

New York responded to the need for substantive reform by making all of the following grounds for divorce:[7]

> (1) The cruel and inhuman treatment of the plantiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plantiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.
>
> (2) The abandonment of the plaintiff by the defendant for a period of two or more years.
>
> (3) The confinement of the defendant to prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.
>
> (4) The commission of an act of adultery, provided that adultery for . . . [this purpose] is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plantiff and defendant.

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4. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965); Hartigan v. Hartigan, 128 So. 2d 725 (Ala. 1961); Joint Committee Report 48-52 (1966); Leach, *supra* note 2; Pilpel & Zavin, *Separation Agreements: Their Function and Future,* 18 Law & Contemp. Prob. 33, 34-35 (1953). Because the poor cannot afford the plane ticket to a liberal jurisdiction, New York's present law discriminates against them by making it more difficult for them to obtain divorce. Note, *Collusive and Consensual Divorce and the New York Anomaly,* 36 Colum. L. Rev. 1121 (1936).

5. N.Y. Dom. Rel. Law §§ 170, 211, 215-215-g (McKinney Supp. 1966) were amended or added by an act approved April 27, 1966.

6. Not discussed are certain changes in the law of separation and the policy toward divorces which New Yorkers obtain in other jurisdictions. N.Y. Dom. Rel. Law §§ 200, 230, 250 (McKinney Supp. 1966).

7. N.Y. Dom. Rel. Law § 170 (McKinney Supp. 1966). While the new law generally becomes effective September 1, 1967, the two-year periods under section 170(5), (6) may begin to run September 1, 1966. N.Y. Sess. Laws 1966, ch. 254, § 15. Adultery was not previously defined in the divorce statute. N.Y. Dom. Rel. Law § 170 (McKinney 1964). Thus the new subsection (4) will overrule cases such as Cohen v. Cohen, 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951), which held a husband's intercourse with another man was not ground for divorce. There need be no danger of misuse of the ground of "deviate sexual intercourse," because evidence in a case of this type can be taken in camera and sealed after trial. N.Y. Dom. Rel. Law § 235 (McKinney Supp. 1966).

> (5) The husband and wife have lived apart pursuant to a decree of separation for a period of two years after the granting of such decree, and satisfactory proof has been submitted by the plaintiff that he or she has duly performed all the terms and conditions of such decree.
>
> (6) The husband and wife have lived separate and apart pursuant to a written agreement of separation . . . for a period of two years . . . . Such agreement shall be filed in the office of the clerk of the county wherein either party resides within thirty days after the execution thereof.

The addition of these grounds represents a great step toward uniformity with other states' divorce laws and brings New York law closer to the realities of modern life.[8] Several major features deserve close attention.

Subsections (5) and (6) permit divorce on a showing of separation for two years. This is a fairly sophisticated notion in that its proof involves no showing that either party has been at fault, and is a justifiable and desirable ground for allowing divorce. First, as the Committee stated:[9]

> The State's interest in the welfare of its citizens is the basis for its interest in their matrimonial arrangements. If a couple demonstrates to the state that their marriage is dead, the state should then, with appropriate safeguards . . ., recognize the need for divorce . . . . One of the most convincing ways in which it can be demonstrated that a marriage is "dead" is proof that a particular couple had lived separately and apart for a continuous period of years.

Second, some people may prefer use of this ground for divorce over the bitterness of an adversary action based on fault. Third, the availability of separation as a divorce ground will relieve the parties of pleading and proving trumped-up issues.[10] Fourth,

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8. In Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3, 7 (1953), it is suggested that while the greater homogeneity of past societies tended to keep couples from seeking divorces, social pressures break down and more marriages will be dissolved when life becomes more complex, impersonal and mobile.

9. JOINT COMMITTEE REPORT 176 (1966).

10. While complaints in a majority of American divorce cases allege cruelty as the ground, divorcees, lawyers and judges list, among the "real" or "main" causes of marital trouble, finances, nonsupport, authority clashes, drinking, gambling, "helling around," incompatibility, infidelity and unsatisfactory sexual relations. FOOTE, LEVY & SANDER, CASES AND MATERIALS ON FAMILY LAW 637 (1966) (citing selected surveys).

under section 170(6) support and custody issues will be solved by agreement out of court, which may be desirable where judges are ill-trained for such matters, the non-adversary procedure is relatively amicable and orderly, and lawyers and counselors are available to give advice.[11] Finally, certain safeguards were erected to insure that this ground for divorce will not be misused.[12] The separation has to be for a two-year period, long enough, it is thought, to subject the parties to internal and external pressures which will test the wisdom of their decision.[13] And under section 170(6) the separation must be by mutual consent; thus one abandoning his partner cannot thereby lay claim to divorce rights.

The statute proposed in the Committee's report made separation a ground for divorce only if the parties lived apart pursuant to their voluntary consent.[14] It is probably fortunate, however, that the statute as enacted also contains the ground of separation pursuant to judicial decree. Where a marriage is dead and the spouses separate, but one of them obstinately refuses to sign the separation agreement, it would seem unjust if the other were denied a remedy.

New York will now have several of the traditional fault grounds for divorce — cruelty, abandonment and imprisonment, in addition to adultery. In other states the theory with respect to these grounds is that the defendant has committed a wrong and that the court's dissolution of the marriage is "a punishment for a guilty spouse and a reward for an innocent."[15] In some respects it may be valid to treat a divorce case as turning on the defendant's degree of culpability. However, the statutory fault grounds are seldom the real causes of marital disharmony; they are merely symptomatic proofs of the break-up.[16] While a party's fault may be important in determining support or alimony, de-

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11. See Pilpel & Zavin, *supra* note 4, at 33-35.

12. JOINT COMMITTEE REPORT 175-181 (1966). Because safeguards are usually present in statutory provisions like the present ones, divorce on the ground of separation for a period of years should not be called divorce "by consent" or "at will."

13. *Id.* at 180-181.

14. *Id.* at 165, 180-181. See Note, *Separation for a Period of Years as Grounds for Divorce,* 97 U. PA. L. REV. 705 (1949).

15. Rheinstein, *supra* note 8, at 4.

16. Bradway, *The Myth of the Innocent Spouse,* 11 TUL. L. REV. 377, 389-392 (1937). See *supra* note 10; McCurdy, *Divorce — A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart,* 9 VAND. L. REV. 685, 701 (1956).

sirability of dissolution usually depends on other, perhaps more subtle factors. The Committee recognized this in its report:[17]

> The time has come to recognize [these] grounds for divorce not so much as penalties for culpable behavior of husbands and wives, but, as manifestations of dead marriages, marriages that should be terminated for the mutual protection and well being of the parties. . . .

Hopefully the courts will have access to the legislative history, take these references as a key to more enlightened divorce administration and regard the proof of divorce grounds not as proof of a wrongdoing but as an objective demonstration that the marriage has failed.

One unfortunate feature in the substantive reform is that all New York divorces will not be of equal difficulty to obtain. The fraud, collusion and perjury that characterize adultery cases under the old law will probably become a part of the cruelty cases under the new. The separation-for-two-years grounds will probably be little used, simply because no one wants to or has to wait that long.[18] Just as cheap money drives out dear money, the existence of one easy ground may make others functionally useless. Perhaps the danger that this might happen could be alleviated to some extent by enforcing more strictly the sanctions available for attorneys and litigants who engage in fraud, perjury or collusion before the court. However, such measures have not been effective in the past and might make a divorce considerably more difficult to obtain.[19]

II. CONCILIATION.

A. Operation.

The most interesting reform is the provision for conciliation

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17. JOINT COMMITTEE REPORT 166, 178 (1966). *But see id.* at 175-176.

18. In Denmark decrees on the ground of "irreconcilability" are available after an eighteen-month waiting period but divorces on this ground decline while adultery decrees increase; the reason given is that Danes prefer not to wait. Institute of Family Law, Duke University, Proceedings 110-111, April 9, 10, 11, 1959. New York's experience seems to show that the existence of a strict divorce statute encourages greater reliance on annulments. See *supra* note 3.

19. In 1948 a young woman admitted to the New York County District Attorney that she was the unnamed correspondent in scores of phony divorces; an investigation and prosecution of the divorce ring followed and are credited with reducing the number of matrimonial actions in the county from 2,926 in 1948 to 1,686 in 1949. JOINT COMMITTEE REPORT 36-38 (1959).

proceedings at the state's expense.[20] Each judicial district will have a conciliation bureau headed by a Supreme Court Justice, who will appoint commissioners, counselors and special guardians (to represent the children in conciliation proceedings).[21] Commissioners and guardians must be lawyers with five years of experience. Within ten days of the commencement of an action for divorce, notice of the action must be given to the appropriate bureau and the case will be assigned to a commissioner. On a showing of good cause the commissioner may issue a certificate of no necessity, and the conciliation proceedings will terminate.[22] Absent such a showing he will schedule the first conciliation conference, at which the parties' attendance is required.

The commissioner may determine at this initial conference that the proceedings should be abandoned. But if he finds "that further conferences will be beneficial and may result in a continuation of the marriage, he may refer the parties" to a counselor.[23]

The counselor will then hold informal conferences and try to reconcile the couple or adjust or settle the issues. If no reconcilia-

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20. N.Y. DOM. REL. LAW § 215-215-g (McKinney Supp. 1966). The state's first judicial district (Manhattan) has had an embryonic counseling service for some ten years. Two counselors act on referral of cases from the Supreme Court (when parties agree to submit), and have worked almost solely with custody and separation actions; very little effort is made to reconcile unhappy couples. JOINT COMMITTEE REPORT 128-130 (1966).

21. By placing each district's conciliation mechanism under the authority of a single judge, New York has avoided a serious problem that arose in Utah. There a conciliation statute provided that counselors would maintain close ties with the state welfare department; they were not under direct judicial control. UTAH CODE ANN. §§ 30-3-12-30-3-14 (Supp. 1957). Confusion and a lack of rapport and cooperation resulted from what the counselors seemed to view as a separation of function, and the legislature reacted by repealing the conciliation statute after four years of operation. Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure,* 7 UTAH L. REV. 443, 458-459 (1961).

22. "Good cause" is not defined. If commissioners are too easily persuaded to issue these no-necessity certificates, the conciliation proceedings will have been rendered meaningless.

23. N.Y. DOM. REL. LAW § 215-c(a)(4)(a) (McKinney Supp. 1966). Use of the word "and" may have been unfortunate and inconsistent with the declaration of section 215-c(a)(4)(b) that the commissioner "shall issue a certificate of no further necessity for conferences" if he finds "that no further purpose will be served" by continuing conciliation proceedings. There are purposes to be served other than reconciliation. Even where the parties remain adamant about the divorce the language in the text should have made clear that conferences could be continued if they appeared likely to have a "beneficial" effect on the resolution of such problems as child custody and property settlement. These issues otherwise may continue to be solved not on their individual merits but according to the bargaining power of the parties—which in turn may depend on who wants the divorce most and who has a possible defense or objection to assert or decline to assert.

tion is forthcoming, the counselor will refer the case back to the commissioner, who may then require a formal hearing with witnesses and attorneys. If on all the evidence the commissioner finds that reconciliation is still possible and in the interests of the parties and children, he may apply for an order from the judge requiring the parties to attempt reconciliation for up to sixty days. Otherwise he may submit a report to end the proceedings.

If the counselor or commissioner at any point effects a reconciliation, presumably the divorce action will fail for want of prosecution. Otherwise conciliation proceedings operate to stay the action until the commissioner files a no-necessity certificate or final report. In no event may the action be stayed more than 120 days.[24]

B. Evaluation.

New York has created an active role for government in this procedure for reconciliation. Similar attempts in other states have met with considerable success; approximately sixty percent of the cases completed in the Conciliation Court of Los Angeles in the 1960's resulted in couples remaining together, and three-fourths of these reconciliations apparently endured at least a year.[25] Even where reconciliation was not achieved, California judges note the counselors' efforts at least reduce the bitterness of the parties and the discomfort of children.[26] Conciliation efforts by courts have the general advantage of providing marriage counseling in cases where the parties either are unaware of opportunities for outside help or are not motivated to seek such aid.[27]

As various states have adopted conciliation systems, the ques-

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24. It has been held that a postponement for conciliation proceedings of a hearing on a divorce complaint deprives a litigant of due process of law. People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 524, 91 N.E.2d 588, 595 (1950). However, given the state's interest in divorce matters, where the period of postponement is ultimately limited, and where the longest possible postponement will be reached only if there appears to a conciliation counselor to be a chance of keeping the marriage together, it is hoped the result in Bernat will not obtain.

25. Burke, *The Role of Conciliation in Divorce Cases,* 1 J. FAMILY L. 209, 211 (1961).

26. Blum, *Conciliation Courts: Instruments of Peace,* 41 J.S.B. CALIF. 33, 45 (1966).

27. Furlong, *Dual Divorce Decrees and Conciliation in Contemporary Family Law,* 2 WILLAMETTE L.J. 134 (1962); Larsen, *Trends and Developments in Oregon Family Law: Court, Counsel, and Conciliation,* 43 ORE. L. REV. 97 (1964); Lawless, *Contemporary Conciliation for New York,* 14 BUFFALO L. REV. 457 (1965); McIntyre, *Conciliation of Disrupted Marriages By or Through the Judiciary,* 4 J. FAMILY L. 117, 120-121 (1964).

tion has arisen whether the procedure should be mandatory for each case.[28] In Milwaukee's Family Court the conciliation was on a selective basis from 1935 to 1960 (either on a party's request or on the judge's suggestion), but since 1960 it has been compulsory in all cases.[29] A judge from the Milwaukee family court stated his feeling that compulsory proceedings are better because often an outward appearance of irreconcilable dissatisfaction can be overcome.[30] Of course not all the reconciliations endure, but on balance it seems better not to judge a book by its cover and thus to urge upon each couple the thought of making marriage work. Further, in so far as the reconciliation proceedings must await a request of one of the parties, there is a danger that counseling will not be asked simply because neither wishes to show weakness; compulsory counseling should stand as a beneficial face-saving device.

One argument against compulsory counseling is that it is a waste of time and resources since most couples who are forced to counsel will not be reunited anyway; it is better to concentrate on those cases where the parties still show some positive interest in their marriage. However, the trained counselor should in a fairly brief time be able to determine the chances for reconciliation in individual instances. New York's statute recognizes this and provides that proceedings can be stopped short when they reach the point of futility. The extent to which a conciliation bureau's resources are being strained will become one of the factors for a commissioner to consider when deciding how much conciliatory effort is justified and desirable throughout its case load. Another argument against compulsory counseling is that it will violate the personal dignity of the parties; the diagnostic and therapeutic counseling will mandate "psychoanalytical exploration and personality transformation."[31] Under a realistic view of the conciliation proceedings, this argument is similarly unpersuasive. Initial conferences will probably not submit the man or woman to very searching inquiries, but will rather seek to discover the essential outline of the marital difficulty; if the couple resists the commissioner's approaches, very likely the proceedings will not be allowed to continue.

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28. See Rheinstein, *The Law of Divorce and The Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

29. JOINT COMMITTEE REPORT 83-84 (1966).

30. *Ibid.*

31. Rheinstein, *supra* note 28, at 640.

Although the conciliation procedures appear sound in principle, the statute is deficient in several respects. The notice to the bureau of a divorce action and the conciliation proceedings which hinge on that notice do not come until the action has been commenced.[32] The action is commenced by service of summons; no complaint may be served until 120 days have passed, unless conciliation proceedings are terminated within a shorter period.[33] Thus the parties have a cooling-off period before the complaint hurls the formal accusations and draws the battle lines; counselors can try to work out underlying difficulties while the dissention is still private.[34] However, this procedure for initiating conciliation is unsatisfactory in two respects. In general it would seem that if the parties could seek reconciliation on their own motion at any time, even when litigation was not pending, the chances of preventing marital break-up would have been increased.[35] Further, public record must be made when parties separate with a view to divorce (either by a decree of separation or filing a copy of a separation agreement),[36] but the conciliation still awaits the service of summons two years later. It seems that if the man and woman have had such a long period to accustom themselves to existence without one another, and to find new companions, reconciliation will be all but impossible.

More broadly, it would have been better if all the divorce mechanisms, including conciliation, could have been integrated into a single system — ideally the Family Court — with other family matters.[37] The Family Court in Ohio, especially the Toledo court under Judge Paul Alexander, has achieved a remarkable reputation as a sociologically oriented, non-punitive and therapeutic organ to which people may come for long- or short-term counseling regardless of whether any litigation is involved.[38] It handles divorce, separation, delinquency, dependency, neglect and other family problems.[39] The family court strives for effi-

32. N.Y. DOM. REL. LAW § 215-c(a) (McKinney Supp. 1966).

33. *Id.*, § 211.

34. See McIntyre, *supra* note 27, at 128.

35. The Conciliation Court in California is available even though no action has been filed. CAL. CIV. PRO. CODE § 1761 (1954).

36. N.Y. DOM. REL. LAW § 170(5), (6) (McKinney Supp. 1966).

37. New York has a Family Court. N.Y. CONST. art. 6, § 13. While it does embody certain procedures for conciliation (not in connection with divorce actions), most counties in the state have declined to make use of them. JOINT COMMITTEE REPORT 130-132 (1966).

38. *Id.*, at 69-79. See generally Alexander, *Legal Science and the Social Sciences: The Family Court—An Obstacle Race?* 19 U. PITT. L. REV. 602 (1958).

39. JOINT COMMITTEE REPORT 72 (1966).

ciency and recognizes that there are problem families as well as family problems. A couple on its way to divorce may drive a child to delinquency, and one tribunal, appropriately staffed, can more effectively treat these related problems. There is less duplication of effort in a unitary system, and previous contact with the family members, or a file of information concerning them, may be invaluable in solving their next difficulty.

While New York's fragmented jurisdiction is a part of its constitutional scheme,[40] still the legislature might have taken some remedial steps. A constitutional amendment could have been proposed.[41] And at least there could have been provision for an exchange of information between the existing Family Court and the conciliation bureau.

An exchange of information seems especially desirable in view of the fact that the conciliation bureaus will have no facilities for investigation.[42] It is not anticipated that the commissioner, an experienced lawyer, will have to accept the parties' bland allegations of "cruelty"; the fraudulent cases will become obvious to him without any need to resort to outside investigation. Nonetheless, routine inquiries among personal and neighborhood informants might provide insights into family background, habits, reputation and finances,[43] which in turn would have been useful

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40. The New York Family Court has jurisdiction over support, neglect, juvenile delinquency, paternity and related matters, but it is not given jurisdiction over separation or divorce. N.Y. CONST. art. 6, § 13(b). Notably the Supreme Court can refer to the Family Court support and custody questions arising in connection with a divorce action. N.Y. CONST. art. 6, § 13(c). This provision presents a clear example of a confusion and duplication of functions between the Family Court and the conciliation bureau, since presumably these support and custody issues may be raised by conciliation commissioners, too. On the one hand, if conciliators do concern themselves with custody and support, the Justices may not need to refer to the Family Court for help. But if the procedure for reference exists, the conciliators may question whether they are supposed to confront these matters.

41. The Committee suggested consideration of the integration of jurisdiction for family cases by the forthcoming constitutional convention. JOINT COMMITTEE REPORT 213 (1966).

42. It should be noted that each bureau may employ such "officers, employees and clerical assistants as it may deem necessary . . . ." N.Y. DOM. REL. LAW § 215-b(e) (McKinney Supp. 1966). While it is arguable that investigators can be appointed under this language, still there is no explicit provision for investigatory operations, and in the context of court litigation between private parties, state investigation might be viewed as an interference not to be presumed without clear legislative authorization. However, there are judicial expressions of the notion that the state itself is a party to every divorce action, see, *e.g.*, Fearon v. Treanor, 272 N.Y. 268, 272, 5 N.E.2d 815, 816 (1936), and this might serve as an argument for greater state participation in the proceedings.

43. Ohio requires such investigations in certain cases. OHIO REV. CODE ANN. § 3105.08 (Page Supp. 1966).

in solving problems of property settlement, custody, support, reconciliation and other issues.

It is thought that insufficient attention has been given the criteria for bureau appointments. The statute declares that each commissioner and guardian must be an attorney with at least five years of experience, but the judges set the standards for counselors.[44] Without definite, uniform standards the appointment of all employees — by judges who are elected officials[45] — may degenerate into a political patronage operation; this would seriously impair the efficacy of the conciliation proceedings which will necessarily deal with intimate, human problems and require the services of skilled personnel.[46] However, even if the judges appoint as counselors competent professionals with advanced degrees in social work, these people may not get the opportunity to put their skills to work on the deeply intimate problems they know best. The commissioners see the parties first and may determine that counseling shall be at an end.[47] New York lawyers who serve as commissioners will have duties which would better lie in the hands of other professional personnel.

The reform on its face has a fairly attractive provision for the use of outside agencies in the counseling procedure. The Appellate Division is given power to promulgate rules for the appointment of counselors and may provide for the use of "public, religious and social agencies."[48] Since a couple may be ordered by the judge to appear at a scheduled conference,[49] the quoted language raises the possibility that it may be forced to meet with officials of a religious faith. If so, freedom of religion may have been violated.[50]

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44. N.Y. DOM. REL. LAW § 215-b(c) (McKinney Supp. 1966).

45. N.Y. CONST. art. 6, § 6(c).

46. Since the statute recites that the commissioners, counselors and guardians are to be paid "fees," and since no term of office is specified, appointments will presumably be made on a case by case basis. Thus there is no chance that a conciliator could be appointed by one judge for a term to extend independently of the judge's term or will. This makes the patronage danger even greater. Militating against the danger is the fact that the judge's terms are long (fourteen years); politics is thus less a pressure on them than it might be. N.Y. CONST. art. 6, § 6(c).

47. N.Y. DOM. REL. LAW § 215-c(b)(2) (McKinney Supp. 1966).

48. *Id.*, § 215-b(c). Further, under § 215-c(e) counselors may, "with the consent of the parties, recommend or make use of the assistance of physicians, psychiatrists or clergymen of the religious denomination to which the parties belong."

49. *Id.*, § 215-c(b)(2), (3).

50. People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 525-526, 91 N.E.2d 588, 596 (1950) held that compulsory conciliation with representatives of a religious faith is a violation of free-exercise guarantees, and suggested that there might be a further violation of the establishment clause.

III. Conclusion.

New York has finally updated a divorce statute that has not met the needs of the state for several years. While the legislature now has captured the trend of American divorce law, New York's system will still be less than ideal. A final irony may be that the legislature, in attempting to liberalize the law, may have made it more difficult for New Yorkers to terminate their marriages.[51] It has been observed that divorce will become very easy if commissioners issue pro forma certificates of necessity and thus render useless the conciliation services. But on the other hand, an experienced commissioner may see through a weak or phony case of abandonment or cruelty and single-handedly, or by reporting his findings to the judge, greatly discourage both the litigants and their attorneys from carrying the divorce action through. And the judge might be unwilling to grant a final decree in any case where a commissioner or counselor places on the record a finding that reconciliation is still possible or that divorce is not in the interests of the children.

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51. The fear that New York divorce would now become more strict was expressed shortly after the statute was passed, and was based in part on a view of the section (not discussed in this Note) limiting New York courts in their recognition of divorces granted in other jurisdictions. N.Y. Times, April 29, 1966, p. 34, col. 2; *id.*, May 1, § 4, p. 6, col. 2. See N.Y. Dom. Rel. Law § 250 (McKinney Supp. 1966).