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FORUM

ILL-TREATMENT, BRUTALITY, AND TORTURE: SOME THOUGHTS UPON THE "TREATMENT" OF IRISH POLITICAL PRISONERS

DAVID LOWRY*

THE RECENT abolition of civil liberties in Northern Ireland has not gone unnoticed by the American media. Many Americans are aware of the seemingly endless escalation of violence and "guerrilla warfare" that has prevailed since the Northern Ireland Civil Rights Movement began a campaign of public advocacy in 1968. The reasons for the present state of affairs are usually portrayed as based upon historical religious antipathy and entrenched bigotry by the institutions of government towards the Roman Catholic minority. Most American political commentators seem to take the view that the current crisis is merely an insoluble political problem. Because of such lack of insight, the avowed quest of the British and Northern Ireland governments for "law and order" prior to reform in the area of civil rights has been generally regarded as a desirable goal. It is submitted that the pursuit of law and order has further exacerbated the difficulties in seeking a political solution. What is not so readily apparent, however, is that the calculated use of oppression against the minority in Northern Ireland has encompassed the diminution of civil liberties in the area that is known as "due process." This essay seeks to examine the use of emergency powers in the present Irish context and, in particular, the use of detention without charge or trial and the ill-treatment of political prisoners while so detained.

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At the outset, I would state that my intention here is not to apportion "blame" as such, but rather to examine such notions as 'detention without trial' and the 'ill-treatment' of political prisoners in order to acquire information pertaining to subversion. Such an examination is timely due to the recent publication of two reports on the issue of ill-treatment that raise disturbing questions from the standpoint of law and morality.¹ Both inquiries were established by the British government in 1971 to investigate allegations of brutality and the techniques used by the security forces against persons suspected of illegal activities and incarcerated without trial. To assert that the reasoning contained in these reports is questionable is an understatement, however, the justification of state repression and violence towards its citizens cannot be divorced from the social, political and legal conditions that exist. With this in mind, I will briefly sketch the social context of the violence and repression in Northern Ireland by way of introductory comments. I will then dwell, at some length, upon the two reports on ill-treatment before analyzing contemporary theories of punishment. The concluding section of this paper will deal with the ethical problems presented when circumstances are such that the state seeks to justify ill-treatment and cruelty in its treatment of prisoners.

INTRODUCTION

All reasonable men would agree that it is tragic to witness policemen, soldiers and civilians dying in the slums of Belfast and Londonderry, but it is no less shocking that human beings should have to live in those slums. It is surely not surprising that people who exist in conditions of abject poverty eventually take to the streets in protest. It may be asserted that the conditions that existed in 1968 in Northern Ireland constitute the classic breeding ground for civil rights protest movements as developed throughout the world. If it is accepted that degrading social conditions breed anger and despair, it must be recalled that, in this context, organized religion has also served to divide the populace and foster religious intolerance. To

1. REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, CMND. No. 4823 (Chairman Sir Edmund Compton); and the REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORIZED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, CMND. No. 4901 (Chairman Lord Parker, C.J.).

see religion as the *cause* of the unrest is incorrect. I take the view that religion is more the constant irritant rather than the cause of the wound. The causes were, in fact, a rather volatile mixture of social, political and religious factors coupled with the intransigence of the government. The present chaotic state of affairs could not have occurred had the ruling Unionist (Protestant) government been even slightly aware of and responsive to the aspirations of the minority. It should be noted that the Unionist Party has been in power in Northern Ireland since 1921 when the state was created.

Northern Ireland became a province (with a high degree of autonomy) and a member of the United Kingdom as a consequence of the partition of Ireland by the British in 1920. The constitution of Northern Ireland is found in the statute of partition namely, The Government of Ireland Act, 1920,² which was later characterized as "A statutory abortion of December, 1920, sardonically entitled 'An Act to provide for the better government of Ireland'."³ The intention of the British Parliament was not to provide a constitution for Northern Ireland but merely to establish an interim system of government within both parts of Ireland and, as partition was thought of as a temporary state of affairs, it was anticipated that this constitutional statute would, ultimately, become a vehicle for the government of Ireland as a whole.⁴ In fact, this interim measure became "the constitution" and the Unionist majority successfully maintained power until the British saw fit to suspend the Northern Ireland Parliament in 1972.⁵ It is important to note that jurisdiction over the civil rights of Northern Ireland citizens was transferred to the Northern Ireland Parliament (Stormont) by the Act of 1920.⁶

Since 1921, Northern Ireland has been beset with internal strife. The fifth substantive statute enacted by the fledgling parliament was specifically designed to cope with unrest. This statute, the Civil Authorities (Special Powers) Act (N.I.),⁷ was the enactment which

2. Government of Ireland Act of 1920, 10 & 11 Geo. 5, c. 67.

3. *Cogan v. Minister of Finance*, [1941] Ir. R. 389, 402.

4. CALVERT, *CONSTITUTIONAL LAW IN NORTHERN IRELAND* 41 (1968).

5. Northern Ireland (Temporary Provisions) Act 1972, c. 22.

6. Note particularly the wording of S. 4 of the 1920 Act and see CALVERT, *supra* note 4, at 41 *et seq.*

7. The Civil Authorities (Special Powers) Act 1922, 12 & 13 Geo. 5 (N.I.) [hereinafter cited as Special Powers Act].

permitted internment of suspects and such powers have been invoked with some degree of regularity.⁸ In fact, internment has been utilized during every decade throughout the fifty-two years of the existence of Northern Ireland. This act was originally envisaged as a temporary measure and a provision was inserted whereby it had to be renewed by parliament on an annual basis. Annual renewal was carried out until 1933 when this provision was dispensed with and the act was made a permanent statute.⁹ It has remained in force to this day.

Most enlightened people regard the United Kingdom as a democratic state and so several of the provisions of the Special Powers Act may appear to be somewhat strange. For example, Section 1(1) designates the Minister of Home Affairs (a Cabinet officer) to be the "Civil Authority" referred to in the title of the act and states: "[The Minister shall] take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order." In addition to these unlimited powers, Section 2(4) of the act confers powers upon the Minister of Home Affairs that can only be thought of as a major departure from common law principles:

If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or the maintenance of order in Northern Ireland and not specifically provided for in the regulations he shall be deemed guilty of an offence against the regulations.

Such a provision is startling to say the least and is the antithesis of the long established common law principle of *nulla poena sine lege*, namely, that there must be no crime except in accordance with fixed and predetermined law.

The Minister of Home Affairs also has jurisdiction over the police and is empowered by Section 1(2) to delegate all or any of the powers contained in the act to any police officer. Detailed regulations were passed pursuant to the power conferred in this act prohibiting several forms of conduct,¹⁰ most notable of which are arrest without warrant,

8. See, e.g., Edwards, *Special Powers in Northern Ireland*, 1956 CRIM. L. REV. 7.

9. The Special Powers Act of 1922, 23 & 24 Geo. 5, § 2 (N.I.).

10. Briefly, the powers conferred under this act include the following: (1) Arrest without warrant; (2) imprisonment without charge or trial and deny recourse to habeas corpus or a court of law; (3) enter and search homes without warrant, and with force, at any hours of day or night; (4) declare a curfew and prohibit meetings, assemblies (including fairs and markets) and processions; (5) permit punishment by flogging; (6) deny claim to a trial by jury; (7) arrest persons it

search without warrant and imprisonment without trial with the denial of recourse to *habeas corpus* or court of law.

The existence and use of such powers in a democratic state constitute a paradox. Many nations have, however, seen fit to enact emergency legislation in time of war¹¹ or apprehended insurrection.¹² The difficulty lies in establishing order while at the same time minimizing the infringement of liberty. The history of the Weimar Republic is testimony to the fact that a democracy must, at times, be protected and preserved by the use of emergency powers. Use of sweeping powers such as this, however, implies a grave responsibility on the part of the state toward its citizens:

Liberty depends upon a recognition of two realities: first, that men who mean to enjoy it must run some risk for the sake of maintaining it; and, second, that through excessive zeal, or through the incorrigibly corrupting influence of power, authority is forever in danger of overstepping its boundaries.

The central problem of political science in a free society is the preservation of a rational balance between order and liberty. It is quite true, of course, that eternal vigilance is the price of liberty. But it is imperative to remember that the vigilance demanded by this maxim means vigilance against duly constituted authority—against the forces of order. A resolute containment of those forces is the price of liberty.¹³

Incarceration without trial derogates from long established notions of criminal justice. For example, the Magna Carta provides that:

No free man shall be taken or imprisoned or dispossessed or outlawed or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.¹⁴

The Special Powers Act has been used almost exclusively against members of the Roman Catholic minority in Northern Ireland. As indicated above the scope of the powers are extremely wide and permanent in nature. It is hardly surprising that the Civil Rights

is desired to examine as witnesses, forcibly detain them and compel them to answer questions, under penalties, even if answers may incriminate them. Such a person is guilty of an offense if he refuses to be sworn or answer a question; (8) do any act involving interference with the rights of private property; (9) prevent access of relatives or legal advisers to a person imprisoned without trial; (10) prohibit the holding of an inquest after a person's death; (11) arrest a person who "by word of mouth" spreads false reports or makes false statements; (12) prohibit the circulation of any newspapers; (13) prohibit the possession of any film or gramophone record.

11. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1942).

12. See Holland, 13 *CURRENT LEGAL PROBLEMS* 148 (1960).

13. BARTH, *PRICE OF LIBERTY* 193 (1961).

14. Magna Carta of 1215, 24 Edw. 1; Halsbury's Statutes (2d Ed.) 20.

Movement protested against this law in 1968 and sought its repeal. Later, when protest turned to violence, these draconian powers were used to incarcerate suspects including the leaders of the Civil Rights Movement.¹⁵

The campaign for civil rights in Northern Ireland focussed upon six issues:

1. One-man-one-vote in local elections.
2. The removal of gerrymandered boundaries.
3. Laws against discrimination by local government, and the provision of machinery to deal with complaints.
4. Allocation of public housing on a points (*i.e.*, objective) system.
5. Repeal of the Special Powers Act.
6. Disbanding of the "B Special" police force. This was a wholly protestant armed militia particularly hostile to the minority which was later disbanded and replaced by a similar creature entitled 'The Ulster Defense Regiment.'¹⁶

The government of Northern Ireland resisted the pressure for reform and countered by banning civil rights demonstrations. A Commission of Inquiry later observed that the advocated reforms were not such as would "in any sense endanger the stability of the Constitution."¹⁷ The complaints of discrimination against Catholics in public housing allocation, public employment and the allegations of gerrymandering and unequal franchise (some had several votes, others none) were substantiated and accepted by a Commission of Inquiry, reporting in 1969,¹⁸ to be the major causes of unrest. It may seem, therefore, that, of the many factors which *caused* the violence and loss of life, the major impetus was provided by legitimate calls for basic civil rights which were met by government intransigence and inept police handling of protest.¹⁹ With the closing of all avenues of protest, violence escalated on the part of both the protestors and the police, who were acting upon the orders of the Northern Ireland government.²⁰

The importance of this factual content will become relevant later during the discussion of the ethical questions involved but suffice

15. THE SUNDAY TIMES INSIGHT TEAM, NORTHERN IRELAND 264 (1972).

16. *Id.* at 49.

17. REPORT ON DISTURBANCES IN NORTHERN IRELAND, CMND. No. 532 (1969) (Chairman Lord Cameron).

18. *Id.* at 91 *et seq.*

19. *Id.* at 73.

20. REPORT ON VIOLENCE AND CIVIL DISTURBANCE IN NORTHERN IRELAND IN 1969, CMND. No. 566 (1972) (Chairman Scarman, J.).

it to say, at this stage, that *alternative* action does not seem to have been seriously considered and the *consequences* of police action were completely underestimated.²¹

Subsequent to the activation of British troops in the autumn of 1969, the civil strife increased. The principal response of the government seems to have been largely an entrenchment of repression.²² Against this backdrop, the size and prestige of the Irish Republican Army (I.R.A.) rapidly increased and much of the violence that ensued has been attributed to this source. In August of 1971, the Northern Ireland Parliament invoked the internment regulations made pursuant to powers conferred under the Special Powers Act. By December of 1971, 1,576 men had been arrested under this Act and 934 were subsequently released.²³ Those not so fortunate as to be released remained in specially prepared prisons²⁴ and were not charged with any offence nor permitted to go to trial. It may be reasonably inferred that enough evidence could not be found to sustain a criminal prosecution. This is significant due to the fact that scant evidence was required by magistrates and a soldier's testimony was invariably accepted.²⁵

Internment acted as a catalyst for the opposition to the government. It is sufficient to state that internment is particularly resented by the Catholic community of Northern Ireland for a number of deeply felt reasons. The most shocking government activity was yet to be revealed, however, and it fell to the English newspaper, the Sunday Times, to expose disturbing allegations of brutality towards "suspects" or "internees."²⁶ As a result of the widespread concern expressed in England and Ireland over the mounting allegations of torture and brutality, the British government appointed a Commission of Inquiry led by the British Ombudsman, Sir Edmund Compton.²⁷ The reasoning of the report of this inquiry led to the appointment of

21. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 50.

22. See, e.g., The Protection of the Person and Property Act 1969, c. 29 (N.I.); Public Order (Amendment) Act 1970, c. 4 (N.I.); Criminal Justice (Temporary Provisions) Act 1970, c. 22 (N.I.).

23. Hansard, 16 December 1971.

24. Hansard, 25 November 1971, col. 1581.

25. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 287-88.

26. *Id.*

27. Compton Report, *supra* note 1.

a second Committee of Inquiry chaired by the late Chief Justice of England, Lord Parker.²⁸ Both Committees acknowledged the existence of "ill-treatment" and it is the disturbing reasoning contained in these reports that is the subject of this essay.

THE COMPTON AND PARKER REPORTS

The Compton Committee was established to inquire specifically into the allegations of physical brutality inflicted upon those incarcerated on August 9 of 1971, the first day of internment. In fact, this was narrowed to the treatment of eleven men; three other cases were later referred to the Committee as a result of subsequent articles in the *Sunday Times*.²⁹ The Committee found that the allegations were true in most of the cases referred to it. The "treatment" that was found to exist included: enforced standing against a wall supported only by one finger of each hand for up to 43 1/2 hours; the use of a special chamber in which suspects were placed and subjected to continuous high pitched noise; prisoners were continually hooded, barefoot and dressed only in coveralls; suspects were deprived of sleep, food and water; prisoners were forced to run barefoot over rough ground; and they were beaten with batons to enforce compliance with these procedures.

All except one of the eleven prisoners under investigation refused to cooperate with the inquiry. In part, this was due to the fact that the Committee sat *in camera*. Legal representatives were not allowed to cross-examine witnesses and confrontation was not permitted between complainants and persons against whom the complaints were made. Legal representatives were not allowed access as of right to transcripts of evidence. The Inquiry was, therefore, unacceptable to the Northern Ireland Civil Rights Association.³⁰

The Compton Report does, however, reveal an informative account of the harsh treatment accorded to suspects. For example,

28. Parker Report, *supra* note 1.

29. The terms of reference were: "To investigate allegations by those arrested on 9 August under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 of physical brutality while in the custody of the security forces prior to either their subsequent release, the preferring of a criminal charge or their being lodged in a place specified in a detention order."

30. Brownlie, *Compton & Parker Reports: Interrogations in Northern Ireland*, 35 MODERN L. REV. 501 (1972).

the matters referred to above were characterized as "ill-treatment" but not "physical brutality."³¹ The enforced barefoot run over granite chippings may have caused some "unintended hardship."³² The wall posture was to provide "security for detainees and guards." Hooding was to "prevent identification" and continuous noise was "to prevent their overhearing." The diet of bread and water was "[to] form part of the atmosphere of discipline" while some of the enforced rigorous exercises were "devised to counteract the cold." Furthermore, the Committee examined these activities under separate headings and seemed to be oblivious to the cumulative effect of such treatment. It may be deduced that the report lacked a high degree of credibility.

Two matters are of relevance at this point, namely the definition of ill-treatment and brutality and the justification for such treatment. On the issue of physical brutality, the Compton Committee was quite specific:

Where we have concluded that physical ill-treatment took place, we are not making a finding of brutality on the part of those who handled the complainants. We consider that brutality is an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. We do not think that happened here.³³

A reasonable interpretation of this statement would be that brutality is in the mind of the perpetrator, whereas ill-treatment can be objectively measured. The law has for many years past been able to determine cruelty. The notion of *mens rea* in criminal law coupled with degrees of assault would usually suffice to differentiate conduct of this sort. In passing, one may note that "cruelty" as such has also been delineated in most jurisdictions in matters of domestic relations. It is unclear as to whether the Committee accepted affidavits from the interrogators to the effect that they did not derive pleasure from the infliction of pain. Indeed, the tone suggests that the police interrogators were inherently incapable of inflicting cruel or brutal punishment. It should be recalled that the violent and bizarre behaviour of the Northern Ireland police had been documented by previous investigations.³⁴

31. *Id.* at 502.

32. *Id.*

33. Compton Report, *supra* note 1, at para. 105.

34. See Cameron Report, *supra* note 17, and Scarman Report, *supra* note 20.

The Committee then sought to offer justification for these methods of interrogation in the following manner:

These methods have been used in support of the interrogation of a small number of persons arrested in Northern Ireland who were believed to possess information of a kind which it was operationally necessary to obtain as rapidly as possible in the interests of saving lives.³⁵

This supposition can be challenged on the facts. Revulsion to internment was so great that a virtual civil war ensued. Killing and bombing increased dramatically and the arms uncovered by the security forces as a result of information obtained remain almost constant.³⁶ Moreover, this justification was utilized to sustain conduct by the authorities against men who were not proven criminals and who were shown not to possess the knowledge sought from them.

The publication of the Compton Report and the public outrage and incredulity which ensued led to the appointment of the Parker Committee.³⁷ This committee was specifically appointed to "consider authorized procedures" of interrogation of suspected terrorists.³⁸ The Committee published a majority and a minority report on the issue of the interrogation methods disclosed in the Compton Report.³⁹ The majority rejected the view that it was impossible to justify ill-treatment of prisoners by a "civilized and humane society."⁴⁰ It implied that such methods were the only means of saving lives. Such simplistic reasoning will become relevant later when discussing the ethical issues implicit in this notion. Furthermore, the majority took the view that "discomfort and hardship" are matters that any suspect under any conditions might reasonably expect to endure.⁴¹ Discomfort, hardship, ill-treatment and torture were said to be merely matters of opinion.⁴²

The majority report then went on to note the illustrious history of the Compton Report type of "ill-treatment" techniques developed

35. Compton Report, *supra* note 1, at para. 105.

36. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 295.

37. *Id.*

38. Parker Report, *supra* note 1, at (iii).

39. The majority report was submitted by Lord Parker, C.J. and J.A. Boyd-Carpenter, Esq. The minority report was submitted by Lord Gardiner who, until 1970, was Lord Chancellor of England.

40. Parker Report, *supra* note 1, at para. 8.

41. Parker Report, *supra* note 1, at para. 9.

42. *Id.*

by the British since World War II. Noting that their pedigree included, *inter alia*, Palestine, Malaya, Kenya, Cyprus and Aden, the majority went further and asserted that the *purpose* of the techniques was to make the suspect "feel that he is in a hostile atmosphere and subject to strict discipline."⁴³ In a curious way, the majority concurred with the Compton Report in that it was seriously suggested that some of the techniques were for the security and safety of the prisoner.⁴⁴ Excessive use of these methods was seen as an administrative problem due to lack of manpower and "guidelines" were proposed so that man-management problems would be alleviated in the future when ill-treatment is utilized.⁴⁵ "Guidelines" were preferred over "rules" as rules implied obedience and this could be impractical.⁴⁶ That is not to suggest that the majority were unaware of the fact that the inherent "impracticability" of rules implied that broader guidelines would also prove to be impractical. In this regard it was proposed that a Cabinet Minister expressly approve future ill-treatment acting upon the advice of a small, experienced committee appointed by the Prime Minister.⁴⁷ The Committee further recommended that a senior officer be "present at the interrogation centre"⁴⁸ and that a medical doctor be present at all times in a purely advisory capacity.⁴⁹ Furthermore, it was argued that benefits would accrue if a "panel of highly skilled interrogators" were kept in being on a permanent basis.⁵⁰

The majority report also attempted to deal with the substantive issue of the law and morality of the techniques of interrogation under review. Alternative techniques used during World War II, such as "bugging" and "stool pigeons" were examined and rejected.⁵¹ As will be shown later, the fact that proven alternative methods existed is significant from an ethical standpoint and, furthermore,

43. Parker Report, *supra* note 1, at para. 11.

44. *Id.*

45. Parker Report, *supra* note 1, at para. 13.

46. Parker Report, *supra* note 1, at para. 36.

47. The majority report did not express any opinion upon the qualifications required for appointment to such a position.

48. Parker Report, *supra* note 1, at para. 39.

49. Parker Report, *supra* note 1, at para. 41.

50. Parker Report, *supra* note 1, at para. 40.

51. Parker Report, *supra* note 1, at para. 25.

the majority merely asserted that lives were saved by the methods used.⁵² In fact, killings increased significantly and cogent evidence to support their assertion was not forthcoming.⁵³ The examination of the alternatives concluded by noting that the techniques used produced evidence more "quickly."⁵⁴ It may be deduced, therefore, that alternatives did exist but *expediency* dictated the choice of options.

The majority reaffirm that they do not subscribe to the view that "the end justifies the means" and go on to qualify this by stating that the means must be "morally acceptable taking account of the conditions prevailing." This issue is characterized as "emotive" and really only a matter of degree.⁵⁵ The majority justification is based upon the assertion that "urban guerrilla warfare" puts innocent lives at risk⁵⁶ and this, coupled with the needs of safety of staff and suspects, is thought to be a higher moral value than that of ill-treating or torturing innocent people.⁵⁷ Indeed, the humanitarian provisions of the Geneva Convention relating to the Treatment of Prisoners⁵⁸ were rejected on the basis that urban guerilla tactics made it "unrealistic" and "unfair" to apply such a criteria.⁵⁹ These reasons when allied with the need for expediency were thought to dispose of the moral issue raised by the use of ill-treatment of mere suspects.⁶⁰ The moral question was said to be "dependent on the intensity with which these techniques are applied and on the provision of effective safeguards against excessive use."⁶¹ The substantive question of whether evil means could be taken to justify desired ends was, consequently, seen merely as a matter of degrees of evil. It is not surprising, therefore, that the majority approach was that of merely ensuring that evil

52. Parker Report, *supra* note 1, at para. 24.

53. Parker Report, *supra* note 1, at para. 19, 20, 21 and 22.

54. Parker Report, *supra* note 1, at para. 26.

55. Parker Report, *supra* note 1, at para. 28 and 29.

56. Parker Report, *supra* note 1, at para. 30.

57. *Id.*

58. GENEVA CONVENTION RELATING TO THE TREATMENT OF PRISONERS, art. III (1949).

59. Parker Report, *supra* note 1, at para. 32.

60. *Id.*

61. Parker Report, *supra* note 1, at para. 34.

means were efficiently applied together with the use of bureaucratic technique in instituting guidelines.

The minority report took a different approach.⁶² After reiterating the types of procedures in question, the minority report went on to note that the Irish police interrogators were, in fact, trained in April, 1971, which was three months prior to internment and that the English training officers were present during the ill-treatment of suspects in August.⁶³ Thus, "expertise" was freely available for some time prior to and during the period in question which raises questions regarding the view of expert supervision taken by the majority.

The minority report vigorously dissents from the view expressed in the Compton Report regarding the definition of brutality in which it was asserted that the perpetrator must derive pleasure from the infliction of pain:⁶⁴

Lest by silence I should be thought to have accepted this remarkable definition, I must say that I cannot agree with it. Under this definition, which some of our witnesses thought came from the Inquisition, if an interrogator believed, to his great regret, that it was necessary for him to cut off the fingers of a detainee one by one to get the required information out of him for the sole purpose of saving life, this would not be cruel and, because not cruel, not brutal.⁶⁵

The author of the minority report, Lord Gardiner, then skillfully analyzed the legality of ill-treatment and concluded that the methods "were and are illegal."⁶⁶ The legality under international law was examined, although Lord Gardiner refrained from expressing an opinion as the issue was then before the European Commission on Human Rights and the matter was deemed *sub judice*.⁶⁷

The minority report took the view that the moral issue could only be examined from the standpoint of the *effects* of ill-treatment.⁶⁸ Put another way, the use of evil means was examined from the standpoint not only of the desired end, or the end in view, but all

62. Parker Report, *supra* note 1, at 11, para. 3.

63. Parker Report, *supra* note 1, at para. 6.

64. Parker Report, *supra* note 1, at 13.

65. Parker Report, *supra* note 1, at para. 7(d).

66. Parker Report, *supra* note 1, at para. 10(d).

67. Parker Report, *supra* note 1, at para. 11(b) (iv).

68. Parker Report, *supra* note 1, at para. 12.

other significant *consequences* of the means used. The consequences were thought, by the majority, to provide a justification, but the minority report analyzed the effects under several headings in addition to the notion of "saving innocent lives." These effects were: (1) The effect on the detainees both physical and mental; (2) their effect on the obtaining of information; (3) their effect on the relation between the forces of law and order and the people of Northern Ireland; and (4) their effect on the reputation of the United Kingdom.⁶⁹ On the first issue the minority noted that the mental effects could be gauged from the opinion of medical experts. It was pointed out that the techniques in question were known to cause, *inter alia*, artificial psychosis, episodic insanity, unbearable anxiety, tension, attacks of panic and nightmares.⁷⁰ The cumulative effects of the several techniques used simultaneously against the suspects is, of course, a matter of speculation as psychiatrists have not had the opportunity to observe such procedures in the past.⁷¹

On the second issue, the minority report pointed out that, as so many people were questioned at one time, it might reasonably be anticipated that more information in quantum might be forthcoming.⁷² The dramatic increase in knowledge gained by the security forces could not, logically, be presumed to be exclusively attributable to the methods used. On the issue of urgency it was noted that during World War II (when Britain faced very grave dangers) other methods such as "stool pigeons" were found to be both effective and speedy against prisoners of war.⁷³ Furthermore, as the interrogation, planning and training had commenced several months earlier, there was in fact, ample time available to train interrogation teams in the use of the civilized and subtle methods used in World War II.⁷⁴ The minority report concluded that: "I am not persuaded that substantially as much information might not have been obtained by those methods."⁷⁵ Thus the minority took the view that not only did

69. Parker Report, *supra* note 1, at para. 13 *et seq.*

70. Parker Report, *supra* note 1, at para. 13(i) and 13(iii).

71. *Id.*

72. Parker Report, *supra* note 1, at para. 14.

73. *Id.*

74. *Id.*

75. *Id.*

alternatives exist but that the *consequences* may have been similar with regard to the "end in view."

On the third point, which may be characterized as a secondary consequence or side effect, Lord Gardiner was of the opinion that the effect on the relation of the forces of law and order and the populace depended largely upon "how far they have the sympathy of the local population against the guerillas."⁷⁶ This was deemed to be impossible to determine. It may be argued, however, that a guerilla army cannot sustain a long and expensive campaign without a high degree of approval from a significant segment of the populace. Moreover, the popularity of the I.R.A. in 1971 was positively increased by the use of internment and torture.⁷⁷ Furthermore, guerilla activities, which logically require support of many people in an urban setting, increased dramatically and this increase has been sustained.⁷⁸ It is suggested, therefore, that this effect or secondary consequence may have, in fact, frustrated the end in view as the publication of the evil means gravely exacerbated a major side effect.

On the issue of the reputation of the United Kingdom in the world at large, Lord Gardiner cited several international agreements on human rights together with recent pronouncements of world religious organizations and deduced that a secondary consequence would be that Britain's reputation and standing would indeed suffer.⁷⁹

Other observations of note in the minority report include the opinion that the majority report's panacea of ministerial supervision would be illegal and distasteful.⁸⁰ Moreover the view was expressed that neither in logic nor in morals could any limit to the degree of ill-treatment be legalized.⁸¹ Lord Gardiner capsulized his reasoning in this manner:

I do not believe . . . in emergency terrorist conditions, or even in war against a ruthless enemy, such procedures are morally justifiable against those suspected of

76. Parker Report, *supra* note 1, at para. 15.

77. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 269.

78. *Id.* at 268.

79. Parker Report, *supra* note 1, at para. 20(5).

80. *Id.*

81. *Id.*

having information of importance to the police or army, even in the light of any marginal advantages which may thereby be obtained.⁸²

It may be appreciated, therefore, that the thrust of the minority report was to question the desired end and the secondary consequences. This had the effect of putting the justification, that is the end in view, in a wider perspective. The ethical principles and analysis will be further examined later in this paper. I take the view that the minority report is to be preferred not only for its sound legal reasoning and humane approach but also because of the correct consideration of the ethical issue of an evil means justifying a desired end.

CONTEMPORARY THEORIES OF PUNISHMENT

Since August of 1971, many British and Northern Irish political and legal authorities have sought to justify the use of ill-treatment of detainees by reference to the normal use of punishment in the criminal process. Reliance has been placed upon theories of retribution, and deterrence, which, it is assumed, lie at the root of the criminal sanction.⁸³ I propose to briefly examine contemporary theories of punishment and, in particular, recent British writings in this area.

British legal philosophers have traditionally adopted a linguistic approach to the justification of punishment, and the focus of jurisprudential writing remains concentrated upon definition. Generally speaking, distinctions may be drawn between the linguistic or moralistic approaches and between utilitarian or retributive solutions. Flew has provided a definition of punishment that is not at variance with most British thinkers.⁸⁴ He characterizes the essential elements of punishment on a five point basis:

- (1) punishment must involve the imposition of suffering or deprivation;
- (2) it must involve the suffering or deprivation of an offender;
- (3) the offender must suffer for his offence;
- (4) the suffering or deprivation must be imposed by a human agency; and
- (5) the punishing agency must be authorized to impose the punishment.

It may be deduced, therefore, that ill-treatment of Irish political prisoners does not fall within headings (3) and (5) of this definition

82. Parker Report, *supra* note 1, at para. 20(1).

83. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 296.

84. FLEW, THE JUSTIFICATION OF PUNISHMENT 291 (1954).

as no offense had been committed and the authorities acted illegally. It will be assumed, but not conceded, for the sake of analysis that all those detained under the Special Powers Act were in fact "offenders" and that it was merely lack of evidence that prevented prosecution.⁸⁵ Moreover, the legality of the acts in question will be assumed at this stage.

Many British thinkers are preoccupied with differences of justification—between justifying punishment as a whole, degrees of punishment and justifying the decision to impose a given amount of punishment on a particular offender in a specific case. To some degree the reasoning of the majority in the Parker Report⁸⁶ reflected this approach. In general, philosophers lean to the view that degrees of societal response are justified on the basis of reformation and deterrence. Emphasis on deterrence is strange in the light of recent developments in psychological thinking⁸⁷ and the use by the Scandanavian Realists of psychoanalytical thinking on such issues.⁸⁸

The issue of punishment of innocent people is usually discussed in utilitarian terms. In brief, the matter is thought to be related to the fact that an innocent person may be punished to promote increased criminal deterrence. Two related questions are raised here:

- (a) is it *logically* possible to call the imposition of suffering upon the innocent "punishment" and,
- (b) is it ever *morally* justified to impose suffering upon the innocent in order to achieve a greater social good.

It must be realized that it is not necessarily improper to term suffering inflicted upon the innocent "punishment" when it is recognized that the innocent may be punished accidentally. The punishment of the innocent as the norm would mean that it would be a linguistic impossibility within the context of the generally accepted definition supplied by Flew.⁸⁹ The usual example cited when "punishment of the innocent" is discussed is that of punishment of a next of kin. As to whether such punishment could ever be justified on moral

85. On the issue of rule-breaking *see* Mabbott, *Punishment*, 48 MIND 152 (1939).

86. Parker Report, *supra* note 1, at 12 *et seq.*

87. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1954).

88. OLIVECRONA, *LAW AS FACT* 124 (1939).

89. FLEW, *supra* note 84, at 24.

grounds, opinion is divided. Some argue that such a proposition is totally unacceptable,⁹⁰ while others, notably Flew, argue that it might be permitted in exceptional circumstances.⁹¹ H.L.A. Hart takes the view that a permanent use of punishment of the innocent would develop an insecurity in the populace and thus offset any possible deterrent effect.⁹² Hart distinguishes both the utilitarian and the linguist positions on the basis that both views prevent an evaluation of

the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence.⁹³

Hart argues that legal and punitive judgements must be distinguished and that no one principle of punishment is applicable in either all cases or all stages of the punishment process.⁹⁴ The theories of deterrence, retribution and rehabilitation cannot provide a composite rationale of justification as they are in conflict. Hart states:

What is needed is the realization that different principles (each of which may in a sense be called a justification) are relevant at different points in any morally acceptable account of punishment.⁹⁵

An interesting contribution to this debate has been provided by an eminent American scholar, Professor Jerome Hall.⁹⁶ Punishment is described by Hall in the following terms:

First, punishment is a privation (evil, pain, disvalue). Second, it is coercive. Third, it is inflicted in the name of the State; it is 'authorized.' Fourth, punishment presupposes rules, their violation, and a more or less formal determination of that, expressed in a judgment. Fifth, it is inflicted upon an offender who has committed a harm, and this presupposes a set of values by reference to which both the harm and the punishment are ethically significant. Sixth, the extent or type of punishment is in some defended way related to the commission of the harm, and aggravated or mitigated by reference to the personality of the offender, his motives and temptation.⁹⁷

On first inspection Hall's definition is appealing as it attempts a degree of precision which is noticeably absent in other such treatises.

90. Mabbott, *supra* note 85, at 159.

91. FLEW, *supra* note 84, at 293.

92. Hart, *Prolegomenon to the Principles of Punishment*, 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 1 (1960).

93. *Id.* at 7.

94. *Id.* at 9.

95. *Id.* at 3.

96. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW ch. 9 (2d ed. 1960).

97. *Id.* at 310.

Hall's proposition that legality and responsibility presuppose that a definite crime has been committed would rule out any possibility of regarding the severe "treatment" of guerrilla suspects as "punishment." It must be noted, however, that contemporary society deals with anti-social behaviour in a variety of ways, including the civil commitment of narcotics addicts. Although the purpose of such "treatment" is not punitive, it may be argued that Hall's definition may be too narrow so that all modern dispositional alternatives would not be recognized.

What is readily apparent in the writings of contemporary Anglo-American penologists and legal philosophers is that the notion of punishment is dependent upon the initial goals or purpose used to justify punishment. Justification may be thought of as the key element in the debate. Much philosophical writing has an air of unreality about it due to the fact that many modes of punishment in daily use cannot, without considerable difficulty, be rationalized against the analytically determined purpose or goals.⁹⁸

It may be argued that a period of national emergency or internal crisis may legitimately place a heavier reliance on the deterrent aspect of justification of punishment. In the Irish context it may be suggested that the justificatory purpose or goal of repressive legislation and severe punishment is to bring about a fear in the mind of the potentially dangerous and thereby lead to a higher degree of social order in what is, admittedly, a near state of armed insurrection. The severity of punishment in a situation in which heavy sanctions are used as a deterrent depends, of course, upon the good sense and lack of abuse upon the part of the authorities. In a wholly calamitous situation as here envisaged it may be argued that a system of severe punishment based upon deterrence can also fulfill its purpose by punishing the innocent as well as the guilty. Thus, according to this view innocent people, or suspects, may be punished as a deterrent in order to achieve a larger social goal, namely the benefit of stability to society at large. The justificatory use of deterrence in times of emergency when legislative checks and balances are legally removed means that much of the debate which is in definitional terms is *per curiam*. In a crisis a state will respond within what it

98. One is conscious of the widespread use of such techniques as strip-cells and compulsory prison work projects in this regard.

believes to be necessary and harsh measures in order to preserve the very fabric of the state. If this is so, the definitional niceties of the philosophical debate seem inappropriate. Nevertheless, the justification of goals may be tested against ethical principles. Whether deterrence achieves its end, albeit by draconian methods as in Northern Ireland, is one question. Another and highly significant issue is whether such repressive measures, which I will characterize as "an evil means," can justify a good or socially desirable "end." It is to the ethical question that one now turns for an examination of this issue.

THE ETHICAL ISSUE: THE END JUSTIFIES THE MEANS?

Certain actions, whether performed by individuals or governments, such as those involving cruelty or torture, provoke an intuitive or spontaneous response from most reasonable men. This may be termed "moral revulsion." Such intuitive thinking in moral philosophy is illustrated by the following example from William James:

If the hypothesis were offered us of a world in which Messrs. Fourier's and Bellamy's utopias should be all outdone, and millions kept permanently happy on the one simple condition that a certain lost soul on the far-off edge of things should lead a life of lonely torture, what except a specific and independent sort of emotion can it be which would make us immediately feel, even though an impulse arose within us to clutch at the happiness so offered, how hideous a thing would be its enjoyment when deliberately accepted as the fruit of such a bargain.⁹⁹

Clearly, happiness achieved in such an unfair or unjust manner to the unfortunate individual would never be acceptable to a moralist. Furthermore, even utilitarians would probably argue against such a proposition by interpreting social utility in a broad manner. Thus a utilitarian might be expected to argue that if every human soul has an infinite value per se then utilitarian calculus will not allow the sacrifice of one for the sake of several others. The Compton¹⁰⁰ and Parker¹⁰¹ Reports are not alone, however, in purporting to justify immoral or evil actions such as cruelty by use of rational argument. Undoubtedly the most notorious attempt at justification of evil means is that of Machiavelli.

99. JAMES, *THE MORAL PHILOSOPHER AND THE MORAL LIFE* 68 (1948).

100. Parker Report, *supra* note 1.

101. Parker Report, *supra* note 1.

. . . I say that every prince must desire to be considered merciful and not cruel. He must, however, take care not to misuse this mercifulness. Cesare Borgia was considered cruel, but his cruelty had brought order to the Romagna, united it, and reduced it to peace and realty. If this is considered well, it will be seen that he was really much more merciful than the Florentine people, who to avoid the name of cruelty, allowed Pistosia to be destroyed. A prince, therefore, must not mind incurring the charge of cruelty for the purpose of keeping his subjects united and faithful; for, with a very few examples, he will be more merciful than those who, from excess of tenderness, allow disorders to arise, from whence spring bloodshed and rapine; for these as a rule injure the whole community, while the executions carried out by the prince injure only individuals. . . .¹⁰²

An example of an individual who was "ill-treated" by Cesare Borgia was his minister, one de Orco, a cruel man who had by cruel but effective means brought peace and social order to his country.

As Borgia knew that the harshness of the past engendered some amount of hatred, in order to purge the minds of the people and to win them over completely, he resolved to show that if any cruelty had taken place it was not by his orders, but through the harsh disposition of his minister. And having found the opportunity he had him (de Orco) cut in half and placed one morning in the public square at Cesena with a piece of wood and bloodstained knife by his side. The ferocity of this spectacle caused the people both satisfaction and amazement. . . .¹⁰³

Naturally Borgia's murder of de Orco and de Orco's harsh treatment of the populace strike the impartial observer as outrageous. Machiavelli takes the view, however, that such moral revulsion is neither "moral" nor "philosophical," but rather an expression of mere uninformed sentimentality. Machiavelli argues that such actions are, in fact, justified by their *consequences*, namely the ultimate social good made available to society at large. He suggests that if Borgia had been humanitarian and had not murdered de Orco then the resentment of the populace may have erupted into violence and many hundreds of innocent people may have been killed in the ensuing civil strife. Thus, it is argued that the avoidance of such an end was clearly desirable and "moral" and that "in the actions of men, and especially of princes, from which there is no appeal, the end justifies the means."¹⁰⁴

In a similar fashion the Compton and Parker Reports on the ill-treatment of Irish political prisoners sought to justify the cruel or harsh treatment admittedly performed upon mere suspects by reference to the information received and illegal arms captured directly

102. MACHIAVELLI, *THE PRINCE* 60 (1950).

103. *Id.* at 27.

104. *Id.* at 30.

resulting from the treatment. Both reports alluded to the necessity of such activities if "innocent lives" were to be saved. On the other hand the minority opinion of Lord Gardiner in the Parker Report took the opposite view, in fact the moralist position similar to James (above), when he asserted that ill-treatment of prisoners could never be morally justified.¹⁰⁵

It is suggested that Lord Gardiner's view, when seen in the context of his whole dissenting opinion, is that some actions, such as ill-treatment of suspects, are *intrinsically* wrong or, put another way, wrong whatever their consequences may be. Such a notion implies that a moral determination may be made independently of an examination of consequences. This intuitionist approach has a major disadvantage, however, in that it provides no rational method of resolving disagreements over moral issues. Thus if X does not share Y's intuitions, then Y has no recourse to any further principle by which it might be demonstrated that X is in error.

If, on the other hand, one accepts the consequentialist approach explicit in the Compton and Parker viewpoints, then rational argument about moral issues is possible and questions of rightness and wrongness of action such as ill-treatment can be reduced to a *factual* question, namely what are the likely consequences of that action. It should be noted that even if it is agreed that one may ascertain the consequences of a given act, then it is still possible to disagree in appraising the *value*, *i.e.* the goodness or badness, of those consequences. This difference is illustrated by the fact that one may disagree with Machiavelli in his opinion cited above but may find it easy to agree with him that order is good and anarchy bad.

Consequentialism means that it is possible for one to possess a rational ground for moral decision. Thus it is the duty of the state, in Northern Ireland and elsewhere, not to inflict pain upon innocent people but it is also the duty of the state to protect and foster the general good. Occasions will occur when the duties of a government will conflict and a choice will have to be made, that is, whether to inflict harm upon innocent people or harm the citizenry in general. Consequentialists would resolve such a conflict of duties by arguing that a rational approach would determine that the action proposed should be chosen from the alternatives available which, taking ac-

105. Parker Report, *supra* note 1, para. 20.

count of all available evidence, seems most likely to have the best consequences for all concerned. Such an approach is explicit in the majority view in the Parker Report wherein alternatives are evaluated and rejected.¹⁰⁶

A major argument for acceptance of the consequentialist position and for finding a way of combating Machiavelli or Parker on their own terms is that the outright rejection of consequentialism on moral grounds is at odds with the ordinary activities of everyday life. By this it is suggested that everyone performs acts in life that are *prima facie* bad but are manifestly just when viewed in the light of the end achieved. A proponent of the Parker view could, therefore, accuse an opponent of inconsistency or even hypocrisy. The accusation of hypocrisy is evident in the view of Ivanov, a character created by Koestler, who states:

The principle that the end justifies the means is and remains the only rule of a political ethic; anything else is just vague chatter and melts away between one's fingers. . . .¹⁰⁷

Ivanov uses this view to "justify" the murder of millions of Russian kulaks and, when Rubiskov remains unconvinced, he accuses him of inconsistency and hypocrisy:

'For a man with your past,' Ivanov went on, 'this sudden revulsion against experimenting is rather naive. Every year several million people are killed quite pointlessly by epidemics and other natural catastrophes. And we should shrink from sacrificing a few hundred thousand for the most promising experiment in history? Not to mention the legions of those who die of undernourishment and tuberculosis in coal and quicksilver mines, rice-fields, and cotton plantations. No one takes any notice of them; nobody asks why or what for; but if here we shoot a few hundred thousand objectively harmful people, the humanitarians all over the world foam at the mouth. Yes, we liquidated the parasitic part of the peasantry and let it die of starvation. It was a surgical operation which had to be done once and for all; but in the good old days before the Revolution just as many died in any dry year—only senselessly and pointlessly. The victims of the Yellow River floods in China amount sometimes to hundreds of thousands. Nature is generous in her senseless experiments on mankind. Why should mankind not have the rights to experiment on himself?' He paused; Rubiskov did not answer. He went on: 'Have you ever read brochures of an anti-vivisectionist society? They are shattering and heartbreaking; when one reads how some poor cur which has had its liver cut out, whines and licks his tormentor's hands, one is just as nauseated as you were tonight. But if these people had their say, we would have no serums against cholera, typhoid, or diphtheria. . . .'¹⁰⁸

Implicit in this statement is the view that if one good end justifies

106. Parker Report, *supra* note 1, para. 25.

107. KOESTLER, *DARKNESS AT NOON* 161 (1941).

108. *Id.* at 161-62.

the bad means in one instance, so it must in the other. In order to avoid the charge of inconsistency one may concede, for analytical purposes only, that their rightness or wrongness is always a function of the goodness or badness of their consequences. If such a proposition is accepted, then the moral issues become somewhat complicated and the application of the consequentialist principle comes to the fore.

A consequentialist may hold that it is good or right to cut off a man's leg in order to save his life, or even that it is right to deprive people of their freedom of movement in order to stop an epidemic, but may not agree that it is right to shoot lazy factory workers in order to increase productivity or torture political prisoners. In other words, by adopting the consequentialist approach one may argue that a bad means does justify a good end in some cases without incurring the charge of inconsistency. Naturally such a stance is only justified when *other* conditions are fulfilled.

When it is suggested that the end justifies the means the word "means" may be taken as "that which will be brought about more immediately by the contemplated act," that is, the relatively immediate results or consequences of that action while "end" may be interpreted as "any of the secondary, or relatively remote consequences of the act." It is convenient to use the term "end in view" to mean those foreseen consequences or ends for the sake of which one acts, that is, the purpose or reason for the activity. In the case of ill-treatment of suspects in Northern Ireland the immediate result, the means, was the infliction of physical pain and deprivation which is clearly evil in itself but which will in turn bring about the secondary result, the end in view, namely the saving of innocent lives and the restoration of law and order which is clearly good. The issue now turns upon a consideration of the conditions under which one may say that the good end in view counterbalances the evil of the bad means, thus justifying the action which produced both of them. It is suggested that the following three conditions must apply: (1) No less odious means are available; (2) all consequences of the means are considered and not merely the end in view; and (3) the more probable consequences are given greater "weight" than the less probable ones.

It may be seen that, just as Cesare Borgia's end might have been

achieved by merely denouncing de Orco and exiling him, there were less odious means available to the government of Northern Ireland other than internment without trial and ill-treatment. Indeed the Northern Ireland government appointed a committee which reported in 1970 that the Special Powers Act was "demonstrably despotic, and much of it meaningless or unenforcable or both."¹⁰⁹ Furthermore, the government really had little idea as to who should be the recipient of the evil means. Of the 1,500 people arrested it seems that only 120-130 were actually suspected of being "gunmen" while 300-500 were merely sympathizers. Others were arrested simply because they were active in the Civil Rights movement. Indeed the army and the police could not agree on who to arrest.¹¹⁰

It is now clear that less odious means were available to the Northern Ireland government. The British Army was opposed to internment as were the Irish police. Moreover, it seems that only the Northern Ireland government and, in particular, the Prime Minister, Mr. William Faulkner, were actively advocating the use of internment without trial.¹¹¹ The British Army proposed four alternatives: curfew, traffic searches on a large scale, sealing the border, and wholesale block searches. These were rejected largely because the commercial life of Northern Ireland would have been adversely affected.¹¹² Furthermore, it may be argued that as 100,000 firearms remained lawfully in private hands an alternative would have been to declare all possession of firearms a criminal offence and impound all weapons.¹¹³ As the vast majority of weapons were in Protestant hands, it is not surprising that this alternative does not seem to have even been considered by the authorities.

It is surely obvious, however, that the major alternative would have been the granting of civil rights to Roman Catholics. This would have entailed the extension of the franchise in local elections, the abolition of gerrymandering, the ending of discrimination in employment and housing, the reintroduction of proportional representation, the disbanding of para-military Protestant police reservists and the establishment of a liaison with the Republic of Ireland. In other

109. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 199.

110. *Id.* at 264.

111. *Id.* at 266.

112. *Id.* at 265.

113. *Id.* at 300.

words, far less odious means were present at all times and responsive government was the key to this. Means such as this, however, imply a sharing of power with the minority in the face of which the government remained intransigent, thus opting for internment.

On the specific issue of ill-treatment of suspects interned, Lord Gardiner makes it clear in his minority report that not only were other methods of interrogation available but that these alternative methods had been used to great effect during World War II when, *inter alia*, speed was of the essence.¹¹⁴

The second condition upon which consequentialism is dependent necessitates that *all* consequences of the means are considered and not merely the "end in view." What is suggested here is that, to the consequentialist, secondary consequences or *side effects* are as important, from the moral standpoint, as the end in view. One major side effect alluded to above was that there followed a large and sustained increase in killing and other guerrilla activities. Indeed, by comparison, the period *before* internment and ill-treatment now looks almost placid. One foreseeable consequence of the cruelty was that sympathy for the recipients of such treatment would increase. Thus the influence, power and manpower of the I.R.A. rapidly expanded amongst the Catholic minority.¹¹⁵ This side effect alone tended to make the evil means wholly counterproductive. Although rioting as a consequence had been foreseen, the warfare that followed may not have been envisaged. Nevertheless, the casualty figures increased by over 14 times the pre-internment rate,¹¹⁶ and the increase in repression *must* have implied an increase in killings, even to the Northern Ireland government. Moreover, as over 60 per cent of the detained suspects were rapidly released (without a charge being laid), it should have been foreseen that the innocent recipients of harsh treatment thus released would only become more embittered as would their families and friends. Internment and cruelty seems to have had the foreseeable side effect or secondary consequence of alienating the Catholic middle-class which had hitherto been a predominantly moderate and restraining influence.¹¹⁷ In this regard the net effect seems to have been the destruction of any

114. Parker Report, *supra* note 1, at para. 14.

115. THE SUNDAY TIMES INSIGHT TEAM, *supra* note 15, at 273.

116. *Id.* at 269.

117. *Id.* at 270.

possibility of a rapprochement between the Catholic "moderates" and the government. As such the evil means heralded the demise of the State.¹¹⁸

The third condition of consequentialism acknowledges that a bad or evil means to a good end in view cannot be justified if it is not in fact a means to that end in view. If some good state of affairs will not in fact be a consequence of an act it cannot be used to justify that action. Difficulties arise due to the ignorance or uncertainty as to consequences and such ignorance is often a matter of factual as opposed to moral ignorance. If one acts to bring about a result, one *predicts* that the act and result will be related as cause and effect; and statements of causal connection in a complex or crisis situation between events and predictions of the future are notoriously inaccurate.

Probability is, however, a matter of degree and the issue of remoteness is highly relevant. Thus the repressive measures of the Stalin era may "eventually" realize the dictatorship of the proletariat or a communist utopia, but such a prediction is not a matter of science but more an article of faith based upon certain "laws of history." Similarly, the use of counter-terror by the government of Northern Ireland is based upon a non-scientific probability that such actions will succeed in producing law and order without the concession that the return to the status quo is tantamount to a return to nineteenth century government in the twentieth century.

This condition of consequentialistic justification simply asserts that in any assessment of the value of the consequences of an act, the remote and therefore less probable consequences are to count less than relatively near and more probable ones. It may be deduced that the goodness or badness of the means itself is the single most important consideration which will be outweighed by the goodness of the end in view only when the prediction that the means will in fact produce that end in view is highly probable. If the immediate consequence of a proposed act is very certain and very evil, as with cruelty toward political prisoners, then it follows that a higher degree of probability that the end in view which is to justify it will in fact result.

The question then becomes, what is the goal of cruelty and counter-terrorism by the government of Northern Ireland. If the utterances

118. *Id.* at 280 *et seq.*

of the political leaders are to be believed, the goal is the attainment of "law and order" so as to provide "internal stability" in order that a state of "normalcy may be resumed." Simply stated, the aim is a return to the status quo and anything less than that will be, and is presently in the process of being, resisted by the militant factions of the majority regime. It is clear that the "end" of a diminution of terror and a return to the status quo would be unacceptable to any member of the Catholic minority who is capable of thought. The probable result, and on the facts, the actual result, of repressive measures on the part of the state including cruelty and incarceration without trial can only mean an increased response and an escalation of terrorism. The end in view, therefore, cannot be achieved. This being so, one might concur with the English newspaper, the *Sunday Times*:

Internment has been used for a political end and it does not even appear to have been well used. British soldiers have been used to support the principle of Protestant supremacy.¹¹⁹

Consequentialism, if it is to have any validity, must contain a skeptical view of any alleged causal connection between the evil means and the end in view. The Parker Report was in error, therefore, in blithely accepting the view that "innocent lives had been saved" and thus failing in its duty not to overestimate the factual knowledge available.

In much the same manner as the reasoning of Machiavelli can be rejected by a consequentialist because the above three conditions are not met, so also one may reject the Compton and Parker Reports. It is significant that the good consequences cited by the Compton and Parker Reports which, presumably, sprang from internment and cruelty were unsubstantiated by cogent evidence. This much was clearly indicated by Lord Gardiner in his minority report.¹²⁰ Compton and Parker cannot be considered skeptical and cannot be thought of as discharging their duty not to overestimate factual knowledge.

It is clear from the reasoning of both the majority and the minority opinions in the Parker Report that: (1) Less odious means were available; (2) that all consequences of the means (and not merely the end in view) were not considered; and (3) that the more probable consequences (such as sympathy for guerrillas and intensified warfare) were not properly evaluated and weighed. This being the

119. *Sunday Times*, 15 August 1971.

120. Parker Report, *supra* note 1, at para. 14.

case, the conclusions of the Reports can be met and mastered on their own terms utilizing a consequentialist approach. Moreover, a utilitarian in such circumstances as described here would have little difficulty in distinguishing the justification offered by Parker, as clearly the sacrifice of human rights and dignity via the vehicle of cruelty cannot be contemplated, especially if conditions (2) and (3) were absent exposing a high degree of "chance" in the alleged causal connection. The strict moralist would not, of course, have even entertained such an argument.¹²¹ Lord Gardiner's strength lies in his isolation of the four effects, which include side effects. Although his conclusion is a moralistic one his reasoning and analysis also support the consequentialist approach.

It is submitted that the above reasoning gives support to the following propositions: (a) The infliction of cruelty or ill-treatment upon persons merely suspected of an offence cannot properly be regarded as criminal punishment; and (b) the use of cruelty towards political prisoners cannot be justified on moral or utilitarian grounds; and (c) the ill-treatment of Irish political prisoners cannot be justified upon the basis of ethical reasoning. As was noted by Lord Gardiner, the acts in question were illegal¹²² and it is fitting to note the now famous maxim of Mr. Justice Brandeis: "Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law."¹²³

The strange affairs that continue to plague Ireland continue to be handled in an inept manner. Internment and ill-treatment is merely another chapter in a rather sorry saga. It must be recalled that the activities in question in this paper took place in 1971 and, furthermore, in the United Kingdom and not a "banana republic." It is at once disturbing and depressing that the fountainhead of the Common Law, Great Britain, should be guilty of cruel and unusual treatment of suspected dissenters. It is no less surprising that two reports (excluding the lone dissent of Lord Gardiner) should seek to justify such inhumanity on grounds which, as one may now see, range from tenuous to totally spurious.

121. See JAMES, *supra* note 99 at 30.

122. Parker Report, *supra* note 1, at para. 10(d).

123. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

THE FEDERAL ELECTION CAMPAIGN ACT OF 1971 AND POLITICAL BROADCAST REFORM

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THE FIRST political campaigns in America were relatively staid, inexpensive affairs: campaigning took the form of speeches by supporters “from stump and pulpit, of debate in the highly partisan press, of private correspondence, and of persuasive activities on election day.”¹ In 1832, Andrew Jackson’s campaign initiated the “torchlight era,” a period of campaigning characterized by organized torchlight processions and hickory poll raisings. By 1880 an increase in the number of printing presses and a decrease in the price of paper resulted in the beginning of the “era of campaign literature.” Radio became the dominant campaign medium in 1928, as eight million radios put politicians in touch with 40 million Americans.² In 1952 the era of television campaigning began.³

Today, ninety-five percent of all American homes have at least one television set—and those sets are turned on for an average of five and one-half hours each day.⁴ Sixty percent of the American

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1. A. HEARD, *THE COSTS OF DEMOCRACY* 401-06 (1960). This book is one of the most acclaimed works on campaign finance reform.

2. R. MACNEIL, *THE PEOPLE MACHINE* 127 (1968). Radio was used in the 1924 campaign, as Coolidge outspent Democrat John W. Davis, \$120,000 to \$40,000 for radio time. Radio’s dominance did not begin until 1928, however. *Id.*

3. Television’s first significant appearance was in 1948. Republican contenders Thomas E. Dewey and Harold E. Stassen participated in a broadcast debate in the Oregon primary. Television’s dominance began in 1952, however, when millions were spent on it by Dwight Eisenhower and Adlai Stevenson. It was also in 1952 that Vice-Presidential candidate Richard M. Nixon utilized television to save his spot on the ticket with his famous “Checkers” speech. *Id.* at 127-28.

4. TWENTIETH CENTURY FUND, *VOTERS’ TIME, REPORT OF THE TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA* 6 (1969).

people rely primarily on television for their news.⁵

The potency of television as a means of political communication and persuasion is unsurpassed.⁶ The use of television by presidents has increased steadily over the past twenty years because the TV has proven itself to be an incredibly effective tool in molding public opinion on national issues.⁷ Senator Edward Kennedy emphasized television's superiority over other forms of political communication:

The recent political landscape of America is strewn with the graves of incumbents and challengers, blitzed into defeat by an unlimited assault of television spending. But I know of no candidate blitzed into defeat by a similar assault of newspaper advertisements, or billboards, or mass mailings, or bumper stickers, or hats, or handbills, or lapel buttons. They simply do not have the impact of television, and every politician knows it. No amount of spending on these other media can possibly offset the role of television and the impression it makes on voters.⁸

For presidential and senatorial candidates, television is a necessity.⁹ Many congressional and local candidates campaign exten-

5. S. MICKELSON, *THE ELECTRIC MIRROR* 25 (1972).

6. Candidates who have spent large amounts of money on TV have lost. See, e.g., *NEWSWEEK*, Nov. 16, 1970, at 77. But many more have won, and the candidates who lost might have lost by greater margins were it not for TV. In addition, of course, TV can lose votes if it is used ineffectively.

7. According to White House statistics, during his first 18 months in office President Nixon appeared on prime-time television 14 times, a figure which surpasses the combined prime-time appearances of Presidents Johnson and Kennedy during each of their first 18 months in office. *CONG. QUARTERLY*, Jan. 29, 1972, at 205.

Public opinion polls reflect the amazing impact of television used by American Presidents. According to a Harris survey, 7 percent of the public supported the invasion of Cambodia before President Nixon's April 30, 1970, television address on the invasion; following the address, more than 50 percent approved his action. Similarly, before President Johnson's televised speech on the Gulf of Tonkin incident in 1964, less than half of the American people supported his Vietnam policy; after the speech, according to Harris, more than 70 percent approved of this Vietnam program. *Id.*

8. *Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 1st Sess., at 173 (1971) [hereinafter cited as *Hearings on S. 382*].*

9. Some candidates have been elected in recent years without relying primarily on television—most notably Sen. Lawton Chiles (D-Fla.) and Gov. Daniel Walker (D-Ill.). Both conducted extensive "walking tours" of their respective states. Even a walking campaign has to be supplemented by TV, however. As Rep. Jim Wright (D-Tex.) indicated, his campaign for the Senate in Texas proved fallacious his belief "that a determined man in good health could make up by prodigious personal effort what he lacked in finances . . . it was like trying to siphon off the Gulf of Mexico with an eyedropper. For there were then ten million people in Texas; if I worked sixteen hours a day and wasted no time, it would have taken me some twenty-eight years to talk for one minute with every citizen in

sively over television as well. However, in order to use television to communicate with the large number of viewers the medium provides, a candidate must pay a price. Television time is expensive.¹⁰

The high cost of television is not a problem *per se*: "If all of the money for political campaigning could come, let's say, from heaven, and it was that pure, we would not object to its being spent in large sums, because theoretically at least, political money is spent for candidates to reach voters. That is what democracy is all about."¹¹ The problem is how and from whom the money for television is raised.¹² The donors who provide politicians the large sums of money necessary for television are often the beneficiaries of improper influence with a congressman, senator, or president. In 1968, for example, a wealthy New Yorker informed Democratic presidential candidate Hubert Humphrey that he might receive financial assistance if he modified his views on Vietnam. The potential contributor said that he would grant Humphrey a private interview with his group:

the state." Wright, *Clean Money for Congress*, HARPER'S MAGAZINE, April 1, 1967, at 100-01.

10. For instance, a one-minute network "spot" for a presidential candidate during prime time in October, 1968, cost almost \$50,000, not including the cost of producing the spot. TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 15-16.

11. *Hearings on S. 382*, *supra* note 8, at 434 (testimony of Philip M. Stern).

12. Federal Communications Commissioner Nicholas Johnson offers some insights into the origin of campaign funds: "Who buys this time? Where does the money come from? Principally from the same corporations that buy all the other television time. Roughly 90% of the political campaign funds in the United States are provided by 1% of the people. And, for federal office, most of that 90% comes from big business (and big labor). Why?

"Suppose, for example, you represent one of the corporations that receives over \$1 billion a year in Defense Department contracts. (The top 10 defense contractors split \$10.7 billion between them.) How much would it cost you to make a modest campaign contribution to *all* elected federal officials? Let us assume a contribution of \$2,000 for every incumbent Congressman, \$6,000 for every incumbent Senator and \$100,000 for *each* of the two major parties' candidates for President. The total bill? A mere \$585,000 a year. Assume a few additional well-placed contributions of \$50,000 to those 15 Congressmen and 10 Senators who hold special power over your company—enough to bring the total to \$1 million a year. This is still an extraordinarily modest investment of 1/10 of 1% of your annual return from the federal government. In fact, of course, no one corporation needs to contribute to all Congressmen and Senators, so that the total costs would actually be much lower." *Hearings on H.R. 8627, H.R. 8628 (and related bills) Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess., at 275 (1971) [hereinafter cited as *Hearings on H.R. 8627*].

We realize that you would like to have us become contributors toward your campaign, but you should not expect an immediate decision from any of us, checkbook in hand. If we become "turned on" . . . we have the capacity to give \$1 million or more to your campaign—and raise twice or three times that amount. But we will each make our own individual judgments on the basis of how you answer our several questions and how you conduct your campaign in the coming weeks.¹³

Of course, most campaign financiers are more indirect in their attempts to influence the candidate and in their expressions of what they would like as a return on their "investment." There is no question, however, that regardless of the approach, large sums of money contributed to a political campaign chest induce a special sensitivity on the part of the candidate toward the donor. The candidate and the contributor both know that a debt has to be paid off, in one way or another, and when the special interests prosper the public interest suffers.¹⁴ Thus, the high costs of television campaigning are detrimental in two respects: (1) potential candidates are precluded from running for office because they cannot raise the money required for an effective campaign; and (2) those candidates who are successful in securing campaign funds owe political debts to their backers which often can be paid off only at the expense of the public.

In addition to the financial problems related to television campaigning, the use of the medium as a campaign tool has engendered problems of its own. The television era is best suited for candidates with certain attributes, which one commentator has described as follows:

These, then, are the qualities that the television era demands of political candidates: personality above all else—a personality not too specific and not the least abrasive, a personality which is pleasantly neutral enough to be built upon; a pleasing appearance with no features which may light unflatteringly on television; assurance—a way of comporting yourself that suggests, with modesty, that you know more about anything than anyone else and could handle any crisis; articulateness—an ability to put anything you say, even if it is "I don't know what we're talking about," in such a commanding and authoritative way that your grasp and leadership qualities will flow through into every living room. In other words, you should be an actor.¹⁵

13. Alexander and Meyers, *A Financial Landslide for the G.O.P.*, FORTUNE, March, 1970, at 187.

14. As FCC Commissioner Johnson put it, "There is *no way* to raise millions of dollars from big corporations for a campaign, and elect officials who will represent the people who are manipulated, oppressed, and employed by those corporations." *Hearings on H.R. 8627*, *supra* note 12, at 298.

15. B. MACNEIL, THE PEOPLE MACHINE 162 (1972).

Thus, candidates with certain qualities and abilities—none of which are necessarily related to his ability to perform well in the position he seeks—fare better in television campaigning than others. Nevertheless, the same can be said of each campaign era in our political history. Although the requirements for an effective television personality are different than those needed for other mediums, it has not been shown that they are more deleterious to political debate than “the bull-horn voice and chautauqua talents that prospered in another era.”¹⁶

Aside from the “television personality” problem, TV campaigning raises other questions. Since television time is limited, how should candidate access to TV be governed? Should all candidates get equal time? Should candidates be restricted in their use of the medium?

Congress recently attempted to resolve some of these questions as well as the problems resulting from the high cost of television. On February 7, 1972, President Nixon signed the Federal Election Campaign Act of 1971¹⁷ into law. After briefly examining previous campaign regulatory legislation, the Federal Election Campaign Act will be discussed. The focus of this article will be on Title I of the Act, known as the “Campaign Communications Reform Act.” The deficiencies of the Act itself will be noted, and more comprehensive proposals for campaign communications reform will be reviewed and evaluated.

I. CAMPAIGN REGULATORY LEGISLATION PRIOR TO THE ACT OF 1971

The major legislative efforts designed to prevent campaign finance abuses prior to 1971 were the Federal Corrupt Practices Act of 1925¹⁸ and the Hatch Act.¹⁹

The Federal Corrupt Practices Act required every political committee to keep an account of all contributions and expenditures and

16. A. HEARD, *THE COSTS OF DEMOCRACY* 400 (1960).

The same was true in other days, in the days of Franklin Roosevelt's radio voice, of Theodore Roosevelt's boisterous phrase-making, of Thomas Jefferson's agile pen. The types of persons equipped for successful political careers alter with the changing requirements of campaigning. *Id.* at 407.

17. Act of Feb. 7, 1972, 47 U.S.C.A. § 315 (Supp. 1973).

18. Act of Feb. 28, 1925, Pub. L. No. 506, ch. 368, § 301, 43 Stat. 1070.

19. Hatch Act, ch. 410, §§ 1-8, 10-11, 13, 17, 19-24, 53 Stat. 1147 (1939), as amended 18 U.S.C. §§ 591-613 (1970).

to file the account with the Clerk of the House of Representatives and the Secretary of the Senate 15 days before and 30 days after an election. The Act provided that the accounts were to be held open for public inspection. Under the campaign expenditure limits of the Act, Senate candidates were permitted to spend \$10,000 and House candidates \$2,500, or each could spend three cents times the number of voters in the previous election, with a maximum limit of \$25,000 for a Senate candidate and \$5,000 for a House candidate.²⁰ Another provision outlawed the direct or indirect promise of an appointment or use of influence by a candidate in return for support of his candidacy.²¹ Violations of any of these provisions were punishable by a fine of \$10,000 and two years imprisonment.²²

The Hatch Political Activity Act of 1939, as subsequently amended, contained three significant provisions: (1) persons contributing directly or indirectly more than \$5,000 in one year to a candidate for federal office would be fined not more than \$6,000 or imprisoned not more than five years, or both; (2) no political committee could receive contributions of more than \$3 million or spend more than \$3 million in one year; and (3) national banks, corporations, and labor unions were prohibited from contributing to any federal election.²³

Both acts were poorly drafted. The monetary limitations were feasible in 1925 and 1939, but the figures quickly became unrealistic, and there was no provision for increases. In addition, as President Johnson observed, the regulations were "more loophole than law,"²⁴ and the loopholes were not hard to find.²⁵

20. Corrupt Practices Act, ch. 368, § 309, 43 Stat. 1073 (1925), as amended 2 U.S.C.A. § 431 (Supp. 1973).

21. *Id.* § 310, as amended 18 U.S.C. § 599 (1948).

22. *Id.* § 314, as amended 2 U.S.C.A. § 252 (Supp. 1973).

23. Act of June 25, 1948, ch. 645, § 608, 62 Stat. 723, as amended 18 U.S.C.A. § 608 (Supp. 1973); *id.* § 609, as amended 18 U.S.C.A. § 608 (Supp. 1973); *id.* § 610, as amended 18 U.S.C.A. § 610 (Supp. 1973).

24. S. JOUR., 89th Cong., 2d Sess. 277 (1966) (message of President Johnson to Congress).

25. The definition of a political committee, for instance, includes only those committees operating in two or more states. Act of June 25, 1948, ch. 645, § 591, 62 Stat. 719, as amended 18 U.S.C.A. § 591 (Supp. 1973). Thus, a candidate had only to set up committees which functioned solely within one state to avoid

Even the loopholes were insignificant, however, because the laws themselves were not enforced. Although Congress has the power to investigate the election of its own members,²⁶ it is a power that has not been utilized.²⁷ The Justice Department has also consistently ignored campaign finance violations,²⁸ thereby assuring candidates that they may safely do likewise.

The first congressional act to regulate political broadcasts became law in 1927. The following standard was established in Section 18 of the Radio Act:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station. . . .²⁹

This section was incorporated in the Federal Communications Act of 1934³⁰ as Section 315. It was not substantially altered until 1952, when an amendment prohibited broadcasters from charging political candidates higher rates than those charged other users.³¹ Further amendments were added in 1959.³²

the limitation. Similarly, the limitation on individual contributions to a political committee could be avoided by giving \$5,000 to a variety of political committees—all, of course, channeling funds to the same candidate.

The 1970 senatorial campaign of Sen. James Buckley (R-N.Y.) is often cited as an illustration of the use of "dummy" committees. By using a multitude of separate committees, the Buckley campaign was able to conceal the identities of persons who contributed \$400,000 to his campaign. In the words of Buckley's campaign manager, David R. Vones, "We made a game out of it." *False Front Campaign Funds: How They Work*, U.S. NEWS & WORLD REPORT, Jan. 11, 1971, at 57.

26. U.S. CONST. art. I, § 5.

27. The last serious congressional challenge based on campaign finance irregularities occurred in 1927. TWENTIETH CENTURY FUND REPORT, *supra* note 4, at 48. Senate and House candidates often do not file the statements required by law, but no action has ever been taken by the Secretary of the Senate or the Clerk of the House to require compliance with the law. *Hearings on S. 382*, *supra* note 8, at 454.

28. For obvious reasons, no administration's Justice Department will enforce the law against members of its own party, and, since in future years the other party is likely to be in power, it will not enforce the law against the opposition party since reprisals would undoubtedly be forthcoming once that party came into office. Hopefully, Watergate will be an exception.

29. Radio Act, ch. 169, § 18, 44 Stat. 1170 (1927), as amended 47 U.S.C.A. § 315 (Supp. 1973).

30. Federal Communications Act, ch. 652, § 315, 48 Stat. 1088 (1934), as amended 47 U.S.C.A. § 315 (Supp. 1973).

31. Act of July 16, 1952, ch. 879, § 11, 66 Stat. 717, as amended 47 U.S.C.A. § 315 (Supp. 1973).

32. The 1959 amendments were enacted to overrule the FCC's *Lar Daly* deci-

Section 315 requires broadcasters to provide equal opportunities for all legally qualified candidates, regardless of their chances for election. Broadcasters have long urged repeal of Section 315, arguing that they cannot provide free television time to major party candidates if they must also provide free time for a multitude of minor party candidates.³³ Opponents of repeal have argued that

sion. The Commission had ruled, 4-3, that Daly, a candidate for Mayor in Chicago, was entitled to equal opportunities because Mayor Richard Daley had been televised in a film clip shown in a regularly scheduled newscast. *In re Columbia Broadcasting Systems, Inc. (WBBM-TV)*, 26 F.C.C. 715 (1959). The amendments exempted appearances of candidates on bona fide newscasts from Section 315 equal opportunities.

Section 315 presently reads as follows: "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events, (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcast station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section." Act of September 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *as amended* 47 U.S.C.A. § 315 (Supp. 1973).

33. The broadcasters' argument was made by CBS President Frank Stanton in his appearance before the Subcommittee on Communications of the House Interstate and Foreign Commerce Committee on March 4, 1963:

"A statutory device was contrived to impose on broadcasters a civic responsibility. The device backfired. Far from assuring the execution of that responsibility, it created over the years a chronic situation which has had exactly the opposite effect; it deprived broadcasters, by the unworkable, mathematically implausible and substantively self-defeating equal time requirement, of an opportunity to carry out their responsibility. By forcing them, in defiance of all dictates of relevance and significance, to give equal time to the most trivial and irresponsible candidates of the most bizarre parties, it forced them also to deny time to the busy and distinguished men and women seriously aspiring to serve their nation, their states and their communities." R. MACNEIL, *THE PEOPLE MACHINE* 282 (1972).

the section is necessary, indicating that without it the prejudices of station owners could be inflicted on unpopular candidates who would have no effective recourse.³⁴

In addition to Section 315, the Federal Communication Commission's "fairness doctrine" applies to political broadcasts. This doctrine, first enunciated in 1949,³⁵ requires broadcasters to present the basic points of view on all controversial issues of public importance. The doctrine requires only general balancing, however, and it guarantees no automatic right of reply except in cases of personal attack, endorsement of a candidate in an editorial, and time given to a political party.³⁶

II. THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

Pressure for campaign finance and broadcast reform mounted in the late 1960's,³⁷ and in 1970 both the House and Senate passed a reform bill.³⁸ The legislation was vetoed by President Nixon, however, because he favored more "comprehensive" reform.³⁹

Reform measures were again introduced in Congress, and the

34. As one political consultant stated: "It seems to me particularly perilous to leave in the hands of a station owner who frequently is the owner of a newspaper in the town and a radio station and who frequently has very strong political views of his own—to leave in his hands the decision about whether or not a candidate gets time." D. DUNN, *FINANCING PRESIDENTIAL CAMPAIGNS* 104 (1971).

35. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

36. Thus, the fairness doctrine does not require that equal amounts of time be given to the presentations of all views on a controversial issue, nor that particular spokesmen be given an opportunity to express their views.

37. The high cost of campaigning provided most of the impetus for reform. The total cost of campaigning for all offices rose from \$200 million in 1964 to \$300 million in 1968. See Alexander and Meyers, *supra* note 13, at 104.

38. S. 3637 would have permanently suspended the equal time requirement of § 315 of the Communications Act of 1934, in addition to establishing a ceiling on the amount of money candidates for federal office could spend on radio and television time. The bill also would have required stations to charge candidates at their own established lowest unit rates for comparable commercial time. S. 3637, 91st Cong., 2d Sess. (1970).

39. The President expressed the following reasons for his veto of the legislation: "S. 3637 does not limit the overall cost of campaigning. It merely limits the amount that candidates can spend on radio and television. In doing so, it unfairly endangers freedom of discussion, discriminates against the broadcast media, favors the incumbent officeholder over the officeseeker and gives an unfair advantage to the famous. It raises the prospect of more—rather than less—campaign spending." S. Doc. No. 109, 91st Cong., 2d Sess. 1 (1970).

Senate passed a finance and broadcast reform bill on August 5, 1971.⁴⁰ The House passed another version of the bill on November 30, 1971.⁴¹ Both houses agreed on a compromise bill which emerged from the conference committee,⁴² and on February 7, 1972, President Nixon signed the Federal Election Campaign Act of 1971 into law.

The Act contains four titles. Title I, known as the Campaign Communications Reform Act, is the broadcast reform section of the law. Title II amends the Hatch Act by repealing the limitations on contributions and expenditures, by strengthening the prohibitions on contributions by national banks, corporations, and labor unions, and by limiting the amount that can be spent on a campaign from a candidate's personal funds. Title III creates new standards for the disclosure of campaign funds. Title IV mandates the Civil Aeronautics Board, the Interstate Commerce Commission, and the Federal Communications Commission to promulgate regulations concerning the extension of credit, without security, by a person regulated by such Board or Commission to any candidate for federal office. Title IV also prohibits the use of funds appropriated for the Office of Economic Opportunity to finance elections or voter registration activity, and it repeals the Federal Corrupt Practices Act of 1925.

The Campaign Communications Reform Act (Title I) contains three significant provisions:

(1) During a 45 day period preceding a primary election and a 60 day period preceding a general election a broadcast station may not charge a legally qualified candidate for any public office a rate in excess of its "lowest unit charge . . . for the same class

40. S. 382 passed by a vote of 88 to 2. It would have repealed the equal time requirement for presidential and vice-presidential candidates in primary and general elections and set a spending limit of five cents times the number of the voting age population for broadcast advertising and an equal amount for non-broadcast advertising. A Federal Elections Commission would have been established under the provisions of the bill to enforce disclosure regulations. 117 CONG. REC. S. 13301-302 (daily ed. Aug. 5, 1971).

41. The House bill did not include a repeal of § 315 and the House bill did not establish an independent Elections Commission to supervise the campaign finance regulations in the law. 1 U.S. CONG. & ADM. NEWS 138-39 (1972).

42. The conference committee agreed to strike the provisions in the Senate bill repealing § 315 and establishing the independent Elections Commission. H.R. CONF. REP. NO. 752, 92d Cong., 1st Sess. 1 (1971).

and amount of time for the same period."⁴³

(2) The Federal Communications Commission may revoke any station's license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy."⁴⁴

(3) Legally qualified candidates⁴⁵ for federal elective office may not exceed established spending limits in their use of communications media, defined as "broadcasting stations, newspapers, magazines, outdoor advertising facilities, and telephones."⁴⁶ The limit is \$50,000, or 10 cents multiplied by the voting age population of the geographical area in which the election is held, whichever is greater.⁴⁷ Furthermore, candidates may not spend more than 60 percent of their total media expenditures on the broadcast media.⁴⁸ To insure that the limits remain reasonable as inflationary price increases occur in future years, the limits will be adjusted according to changes in the Consumer Price Index.⁴⁹

III. AN ANALYSIS OF THE FEDERAL COMMUNICATIONS COMMISSION GUIDELINES

On March 16, 1972, the Federal Communications Commission released its guidelines for interpreting the provisions of Title I of the Act. The guidelines outline commission policies in four areas: (1) definition of a "legally qualified candidate;" (2) rates to be charged for use of a station by candidates; (3) certifications that stations are required to obtain from candidates; and (4) allowing reasonable access to or permitting purchase of reasonable amounts

43. Federal Election Campaign Act, 47 U.S.C.A. § 315(b)(1) (Supp. 1973), amending 47 U.S.C. § 315 (1962).

44. Federal Election Campaign Act, 47 U.S.C.A. § 312(a)(7) (Supp. 1973), amending 47 U.S.C. § 312 (1962).

45. Any person who "(A) meets the qualifications prescribed by the applicable laws to hold the federal elective office for which he is a candidate, and (B) is eligible under applicable State law to be voted for by the electorate directly or by means of delegates or electors." Federal Election Campaign Act, 47 U.S.C.A. § 801(4) (Supp. 1973).

46. *Id.* § 801(1).

47. *Id.* § 803(a)(1)(A).

48. *Id.* § 803(a)(1)(B).

49. *Id.* § 803(a)(4).

of time by candidates for federal elective office. The commission's guidelines in each of these areas will be examined to determine if congressional intent has been implemented.

A. LEGALLY QUALIFIED CANDIDATES

As defined in the Act, a legally qualified candidate is any person who "(A) meets the qualifications prescribed by the applicable laws to hold the Federal elective office for which he is a candidate, and (B) is eligible under applicable State law to be voted for by the electorate directly or by means of delegates or electors."⁵⁰

The commission's guidelines in this area are reasonable, and they effectively implement the congressional design. For example, the Act provides that a person who has made an expenditure for the use of any communications medium on behalf of his candidacy for the Presidency is a legally qualified candidate, even though no public announcement of candidacy has been made.⁵¹ A candidate, in other words, may not circumvent the law simply by delaying an announcement of his candidacy. However, the Commission has determined that the mere making of minimal expenditures does *not* entitle a person to equal opportunities under Section 315(a)—other evidence of a genuine candidacy must be presented as well. Thus, a station is not obligated to provide equal opportunities to an individual who has purchased only one \$5 ad in a newspaper unless other facts demonstrate that the candidacy is *bona fide*.⁵²

The Commission also indicates that the "lowest unit charge" provision does not apply to candidates "for nomination by a convention or caucus of a political party held to nominate a candidate."⁵³ This determination is also reasonable; the express terms of the Act are ". . . forty-five days preceding the date of a *primary* or *primary runoff election* and during the sixty days preceding the date of a *general* or *special election* . . ." ⁵⁴ (emphasis added). In addition to the fact that the Commission's interpretation complies with

50. *Id.* § 801(1).

51. *Id.* § 803(a)(3)(B).

52. 37 Fed. Reg. 5800 (1972).

53. *Id.*

54. Federal Election Campaign Act, 47 U.S.C.A. § 316(b)(1) (Supp. 1973), amending 47 U.S.C. § 315 (1962).

the clear congressional intent, it is doubtful that candidates would elect to use television in a contest determined by the relatively small groups of people participating in a caucus or convention.

B. LOWEST UNIT CHARGE

The Commission emphasizes that "lowest unit charge" means:

Candidates are entitled to discounts, frequency and otherwise, offered to the most favored commercial advertiser for the same class and amount of time for the same period, without regard to the frequency of use by the candidate. This includes discount rates not published in a rate card but provided to commercial advertisers.⁵⁵

The lowest unit charge applies to the networks⁵⁶ if the price of broadcasting time is lower on the date of use than when the contract was made; in such a situation, the candidate would get a rebate (if he had already paid) or an adjustment (if the time had not been paid for yet).⁵⁷ If a station has unsold time available on a particular date and provides a special low rate to an advertiser to insure the sale of the time,⁵⁸ that rate must be given to political candidates.⁵⁹ If a station provides for special low rates for advertisers of long-standing, those rates must apply to candidates if they are the lowest rates available.⁶⁰ If a station has "national" and "local" rates, a candidate must be charged the lower of the two rates, regardless of whether the station characterizes the candidacy as "national" or "local."⁶¹

Thus, in these examples the Commission has made determinations consistent with the congressional goal of providing access to television for as many candidates as possible. It was the intent of Congress to promote political communication over the airwaves

55. 37 Fed. Reg. 5800 (1972).

56. *Id.* at 5801.

57. *Id.*

58. Time is often sold at less than the going rate simply because it has not been filled. As one network executive indicated: "If A&P has a batch of bananas on Saturday and they aren't moving, they will lower the prices to get them out of the store. They will be stale on Monday. The same thing is true for broadcasters. If you have holes to fill on a ballgame, you get the rate down to try to get them filled, even if the price was higher two weeks before. You don't want to get into the program with unfilled time because it is lost if you do." D. DUNN, *supra* note 34, at 48.

59. 37 Fed. Reg. 5801 (1972).

60. *Id.* at 5802.

61. *Id.* at 5802-03.

rather than allow high costs to restrict such communication.⁶² However, there are four determinations in this area which, while not unreasonable, should be changed in order to more effectively implement the congressional design.

First, the Commission has determined that the lowest unit charge may vary with the day of the week on which a candidate uses a station.⁶³ Congress, however, did not specifically allow this variation, and it clearly could have done so, as it did for "class,"⁶⁴ "amount of time,"⁶⁵ and "same period."⁶⁶ To insure that candidates actually receive the lowest unit charge, distinctions based on the day of the week should be banned. As a consequence, candidates would be entitled to the lowest unit charge regardless of the day: if the lowest unit charge for time on a particular station during a particular time period occurred on a Tuesday, that same rate would be charged to candidates even if they used time on a Friday or a Saturday.

Second, the lowest unit charge provision applies only to time, according to the Commission, and it does not apply to other charges.⁶⁷ Although Section 315(b) refers to the use by legally qualified candidates "of any broadcast *station*"⁶⁸ and does not

62. This intent was manifested by both the lowest unit charge provision and by the provision requiring that stations provide candidates with "reasonable access."

63. "In computing the lowest unit charge . . . stations, in addition to taking into account the class and amount of time for the same period of the day, may take into account the day of the week, if rates of the station vary with the day of the week." 37 Fed. Reg. 5800 (1972).

64. "The term 'class' refers to rate categories such as fixed-position spots, preemptible spots, run-of-schedule and special-rate packages." *Id.*

65. "The term 'amount of time' refers to the unit of time purchased, such as 30 seconds, 60 seconds, 5 minutes or 1 hour." *Id.*

66. "The term 'same period' refers to the period of the broadcast day such as prime time, drive time, class A, class B or other classifications established by the station." *Id.*

67. "The provision applies only to charges for purchase of time. It does not cover additional charges made by a station for other services, which may be termed production oriented, such as charges for use of a television studio, audio or video-taping, or line charges and remote technical crew charges when the broadcast is to be picked up outside the station. Moreover, the provision does not apply to additional charges that might be incurred if a candidate sought to purchase full sponsorship of an existing program for which there is an established program charge in addition to a time charge." *Id.* at 5802.

68. Federal Election Campaign Act, 47 U.S.C.A. § 315(b)(1) (Supp. 1973), amending 47 U.S.C. § 315 (1962).

refer to "time," Section 315(b)(1) refers to the applicability of the lowest unit charge for "the same class and amount of *time*."⁶⁹ (emphasis added). Therefore, the Commission's determination that the lowest unit charge provision applies only to time is a reasonable construction of the Act. Nevertheless, it should be changed. The Commission could rule that candidates must also be charged the lowest unit charge for related broadcast items, such as the use of a television studio or audio or video-taping. Such a ruling would be congruent with the congressional intent, as the purpose of the lowest unit charge provision is to provide candidates with access to the media which is as inexpensive as possible. If a station is required to charge the lowest unit charge for broadcast time, but is permitted to charge inflated rates for taping or for the use of its studio, the Act is emasculated, and candidate access will be restricted rather than promoted.

Third, if a state statute sets low rates for the carrying of legal notices on broadcast stations, those low rates do *not* apply to candidates.⁷⁰ The Commission's reasoning for this deviation from the guidelines is circular: "Since the rates for legal notices are set by statute rather than by the station, they are not used for calculation of the lowest unit charge for candidates."⁷¹ Presumably the Commission is wary of establishing, as the lowest unit charge, a rate which has not been set by the station itself. However, if a state has determined that it is in the public interest to permit legal notices to be broadcast at low rates, surely the public interest would demand that candidates' "political notices" be afforded equally low rates.

Fourth, the lowest unit charge for operators of cable television will be determined by permitting the operators to "arrive at some reasonable rate structure."⁷² Although this determination concerning cable television is not crucial at the present time, it may be important in future years.⁷³ The lack of certainty as to what rates

69. *Id.*

70. 37 Fed. Reg. 5800 (1972).

71. *Id.*

72. *Id.* This assumes that the cable operator does not have an advertising rate schedule. If he does, then the schedule's lowest unit rate will apply to candidates.

73. Cable television will undoubtedly grow, and its growth will affect political broadcasting. See, e.g., S. MICKELSON, *supra* note 5, at 272-80.

cable operators may charge could have been remedied by specifying that they may not charge rates in excess of those rates charged by the broadcaster in the area with the highest "lowest unit charge." Such a guideline would have insured that candidates' access to cable television would not be impaired by higher rates than those charged by commercial broadcasters.

C. CERTIFICATION

In order to insure compliance with the spending limitations for communications media, stations and newspapers must receive a certification from a candidate indicating that an advertisement on the station or in the newspaper will not result in a violation of the expenditure limit.⁷⁴ The Commission Guidelines outline suggested procedures for stations to use in certifying the expenditures of candidates on their facilities. The suggested procedures, however, are not mandatory; the certification "need not be in any special form. It may, for example, be incorporated into a standard contract or start order."⁷⁵

There is only one section of the Commission's suggested procedures which should be changed to insure that congressional intent is implemented. That section reads as follows:

Whenever a single use of a station is by or on behalf of two or more candidates for elective office, the amount attributable to the expenditure of each candidate is the amount agreed upon by the candidates in advance of the use and shown on the certification. In such situations, a joint certification, or individual certifications showing the allocation to each candidate, should be furnished by joint users.⁷⁶

If two opposing candidates appeared jointly on a program, the candidates would simply divide the cost equally. However, the Commission's determination that candidates may decide for themselves how they will apportion costs of joint appearances may create problems if two or more candidates of the same party share broadcast time.

For example, if an incumbent President is likely to be reelected easily, but a senatorial candidate from the President's party is running in an extremely close race, under the Commission's Guidelines,

74. Federal Election Campaign Act, 47 U.S.C.A. § 803(b) (Supp. 1973),

75. 37 Fed. Reg. 5804 (1972).

76. *Id.*

the two candidates could appear jointly on a program and devote virtually all of the time to the senatorial race, although the President remains on the screen throughout the telecast as a relatively silent participant. The candidates could also agree that 90 percent of the costs will be borne by the President and 10 percent of the costs will be absorbed by the senatorial candidate. The result, of course, is that the senatorial candidate gets additional exposure which the law is intended to prohibit: the candidate might spend \$100,000 on television time and, by participating in "joint" appearances paid for by other candidates, receive \$1,000,000 worth of television exposure. His opponent, on the other hand, not fortunate enough to have other candidates subsidize him, will only be able to get \$100,000 worth of exposure.

Such a result is clearly not the intent of Congress, and a simple revision in the guidelines will minimize the problem. The section on joint appearances by candidates relating to certification requirements should be changed to read as follows:

Whenever a single use of a station is by or on behalf of two or more candidates for elective office, the cost shall be divided equally among those candidates, and equal amounts should be attributed to the expenditure certification of each candidate. Individual certifications showing the allocation to each candidate should be furnished by joint users.

By insuring that each candidate must share an equal burden of the cost of a joint appearance, this revised guideline would eliminate the potential gross abuses which could occur if candidates were permitted to apportion the cost themselves. Abuses could occur under this revised guideline (with one candidate receiving ninety percent of the exposure on a joint appearance and only paying fifty percent of the cost), but they are not serious enough to warrant an attempt to apportion costs by some complex formula based on the number of minutes a candidate appeared, or the number of minutes a candidate spoke on a particular program.

D. REASONABLE ACCESS

The Commission guidelines in this area seek to clarify the obligations that stations must meet to provide candidates with "reasonable access."⁷⁷ Most of the Commission determinations in this area are

77. Federal Election Campaign Act, 47 U.S.C.A. § 312(a)(7) (Supp. 1973), amending 47 U.S.C. § 312 (1962).

reasonable interpretations of the Act. A station which refuses to sell time for spots—ads of sixty seconds or less—may continue to maintain such a policy as long as it offers reasonable access through time periods of greater duration.⁷⁸ Charges made by non-commercial educational stations and non-profit stations must “be reasonable when viewed in the light of charges made by commercial stations in the same broadcast service licensed to serve the same community.”⁷⁹ Stations do not have to give free time to fulfill their reasonable access obligation.⁸⁰ If a station *refuses* to sell reasonable amounts of time, it “is required to give reasonable amounts of free time.”⁸¹

In its major pronouncement on “reasonable access,” however, the Commission’s guidelines are inappropriate. The key section, in question and answer format, reads as follows:

Q. How is a licensee to comply with the requirement of section 312(a)(7) that he give reasonable access to his station to, or permit the purchase of reasonable amounts of time by, candidates for Federal elective office?

A. . . . Congress clearly did not intend, to take the extreme case, that during the closing days of a campaign, stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is on our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set. The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.⁸²

It would be logical for a person reading this answer to assume that the Commission was providing guidelines for a law that *restricted* access for political candidates instead of encouraging it. While perfunctorily acknowledging the importance of an “informed electorate,” the Commission minimizes the importance of political access and emphasizes that “the public is entitled to other kinds

78. 37 Fed. Reg. 5805 (1972).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 5804-05.

of programming than political.”⁸³ The Commission’s interpretation of “reasonable access” renders the phrase meaningless: “reasonable access” will be presumed to be what a particular licensee says it is.

Congress clearly intended “reasonable access” to mean that licensees have a positive responsibility to provide broadcast time to political candidates. The FCC Guidelines should reinforce the importance of that positive obligation instead of minimizing it. The existing answer to the “reasonable access” question should be replaced with an answer similar to the following:

Congress clearly intended that political candidates be afforded access to the public airwaves prior to an election. Since an election is the single most important political event in a society governed by elected representatives, broadcast stations can serve no higher purpose than informing the electorate. Furthermore, since Federal elections only occur every two years, the demands on stations to provide access will not be unduly cumbersome. Consequently, political broadcast time should be granted liberally prior to an election. Moreover, during the days immediately preceding an election, a request for broadcast time from a political candidate will be presumed to take precedence over regularly-scheduled programming. The Commission will apply the aforementioned standard to determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.

In addition to adopting a positive approach toward reasonable access in the guidelines, the Commission should also adopt a rule which prescribes a minimum standard which must be satisfied to fulfill a reasonable access obligation under the law. The Commission’s reluctant position on this matter was outlined by FCC Chairman Dean Burch in testimony before a Senate subcommittee:

S. 956 contains a separate provision that would require the Commission to prescribe rules and regulations to insure that reasonable amounts of broadcast time be made available for political candidates. In its decisions and reports, the Commission has consistently supported, enunciated and reaffirmed the concept of a reasonable amount of time for political broadcasts as an important element of the licensee’s service to the public. We believe, however, that it would be unwise to attempt to codify this standard in rules and regulations. Rather it is better to consider the licensee’s performance in this area as one part, and an important part, of his entire programming service to the public. We believe the amount of time afforded and the campaigns to which time is devoted are matters best left to the licensee’s reasonable, good faith judgment based on his knowledge of his community’s particular needs.⁸⁴

83. *Id.* at 5804.

84. *Hearings on S. 382, supra* note 8, at 189.

The fallacy of this point of view, of course, is that broadcasters are motivated, like other businessmen, by profits. Political broadcasts do not increase profits. Thus, if one station grants more access than others in a particular area, it is "penalized" in the manner which matters most to the broadcaster—the station's profits and competitive advantage. As one New York broadcaster commented: "We do give some time. We would give more if we had some assurance that our competitor wasn't beating our brains out at the same time."⁸⁵ Thus, it is clear that access for political candidates can be insured only by adopting a rule which applies to all broadcasters. For example, the Commission might rule that each licensee must grant access in prime time in the following amounts to fulfill its minimum obligation under the "reasonable access" provision: one-half hour to each candidate for the House of Representatives,⁸⁶ two hours for each candidate for the Senate, and four hours for each candidate for President.⁸⁷ The time minimums are aggregate amounts, and candidates could divide the time into smaller periods. The time would be provided during the month preceding the election.

IV. AN ANALYSIS OF THE ACT: ITS EFFECTS AND DEFICIENCIES

It is difficult to assess the impact of the Act at this early date. The two complaints filed with the FCC under the "reasonable access" provision of the Act are circumstantial evidence of compliance with the law as interpreted by the guidelines.⁸⁸ Assuming that loopholes are not discovered, the spending limitations on communications media should result in a sizable reduction in the amount of

85. R. MACNEIL, *supra* note 2, at 286.

86. Since the number of stations per congressional district vary, one-half hour seems the highest minimum that can reasonably be imposed. See note 171 and accompanying text *infra*.

87. These would be aggregate amounts, and the stations should make reasonable efforts to allocate time blocks suitable to the candidates ranging from five minutes to one hour.

88. The FCC made two oral determinations under the Act in 1972. A candidate in New Mexico charged that a station refused to sell him any program time, alleging that it was a violation of the licensee's duty to grant reasonable access. The FCC agreed. Another candidate complained that a station would only sell him seven spots during a week and that he wanted to buy eleven spots. The FCC held that the station could limit the number of spots to seven. Interview with Milton Gross, FCC Political Broadcast Bureau, Nov. 29, 1972.

money spent by candidates on broadcasting and other media.⁸⁹ The "lowest unit charge" provision should also result in greater access for some candidates. The Act was a positive step toward campaign communications reform,⁹⁰ but its greatest deficiency is its lack of comprehensiveness. In addition, however, the Act is deficient in a number of specific respects.

Assuming that the limitation on media expenditures is constitutional,⁹¹ there are three problem areas relating to the limits. First,

89. Judging by the amounts spent by Senatorial candidates in 1970, the Act would, on the average, decrease expenditures substantially: "Comparison between actual amounts spent on broadcast media by Senatorial candidates in the 1970 general election and the permissible broadcast spending limitation applicable to Senatorial candidates under Pub. L. No. 92-225." (the Federal Election Campaign Act of 1971).

State	Individual Candidate 1970 Expenses	Pub. L. No. 92-225 1972	Change Difference
Alaska	34,006	31,290	-2,716
Arizona	85,388	63,988	-21,400
Hawaii	64,954	31,290	-33,664
Indiana	353,012	181,847	-171,165
Missouri	231,518	168,027	-63,491
Nevada	73,788	31,290	-42,498
New Jersey	391,485	261,689	-129,796
New Mexico	35,451	31,290	-4,161
North Dakota	71,491	31,290	-40,201
Utah	115,312	31,290	-84,022
Vermont	69,668	31,290	-38,378
Wyoming	47,596	31,290	-16,306

The expenditures for candidates under Pub. L. No. 92-225 were determined by use of the 50 percent allotment for broadcast advertising as allowed under § 104(a)(1) (B) and includes an additional 4.3 percent to reflect inflationary increases." Note, *Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?*, 23 CASE W. RES. L. REV. 631, 659 (1972).

The 1972 campaign expenditures indicate that costs *have* significantly decreased: "The Presidential-Vice Presidential campaigns accounted for \$14.3 million of the 1972 total, a decline of 50% from the \$28.5 million spent (on the nation's radio and television network and stations and on cable television) in 1968. Candidates in U.S. Senatorial races spent a total of \$6.4 million in 1972, a 38% decline from the \$10.4 million spent in 1968." *FCC, REPORT ON POLITICAL BROADCASTING AND CABLECASTING, PRIMARY AND GENERAL ELECTION CAMPAIGNS OF 1972* (March, 1973).

90. Even Senator Hugh Scott (R-Pa.), one of the bill's supporters, conceded to his Senate colleagues: "Mr. President, we have not produced a great bill, but we have produced a good bill." 117 CONG. REC. S. 21634 (daily ed. Dec. 14, 1971).

91. Some would argue that such a limitation is unconstitutional on its face because: "[A] limit on what a candidate may spend is a limit on his political speech as well as on the political speech of those who can no longer contribute money to his campaign for effective use." *Hearings on S. 382, supra* note 8, at 573 (statement of Prof. Ralph Winter of Yale Law School). However, there has been a limitation in effect for the past 47 years, and although it was never enforced, neither was it ever declared unconstitutional.

“equal” spending limits are inherently unequal because of the advantage residing in the incumbent. The officeholder is able to utilize thousands of dollars⁹² in his official capacity which—even if additional purposes are served as well—serves as a campaign tool. Although a remedy for this problem is difficult to devise and probably impossible to implement,⁹³ it should nevertheless be understood that “equal” limitations serve to perpetuate incumbency.⁹⁴

Second, the spending limitations on communications media are constructed in terms of money: either \$50,000 or 10 cents multiplied by the voting age population. Since media costs vary significantly, a flat dollar limit allows candidates in some areas many times the number of television appearances as candidates in other areas. For example, a congressman from New York City could purchase six 30-second spots under the formula provided in the Act, while a congressman from Phoenix could purchase 144 such spots.⁹⁵

92. A member of the House of Representatives is entitled to about \$125,000 per year for salaries for a staff of about a dozen employees, \$5,500 worth of new or used office equipment, \$3,000 per year for stationery, supplies, and printing, 35,000 minutes of long distance telephone time, 480,000 heavy duty brown envelopes per year, \$700 worth of stamps per year, \$2,400 for annual rental of District office space, \$2,400 for District office supplies. In addition, the Congressman is entitled to free and unlimited franked first class postage, a publication allowance, the services of radio and television studios for the production of tapes at low costs, travel allowances of one round trip home per month and three additional trips—one for himself and two for staff employees. He has access to various government documents that he can mail free to constituents. These figures are for the 91st Congress; they were even higher in the 92nd. *Id.* at 648-49 (testimony of Prof. Howard R. Penniman of Georgetown University).

93. Since incumbents would be presented with “remedies” to problems which benefit them, it is not likely that they will be anxious to act. One proposal, for instance, would be to provide Congressional challengers with a franking privilege for campaign literature. Such a plan would at least partially compensate for the advantages of incumbency, and, because of that, it will not be enacted.

94. Setting limitations on campaign expenditures that apply “equally” to the incumbent and to the challenger fails to take into account the advantages of the subsidization of the incumbent and the more severe the limit the greater the handicap placed on the challenger. Money for campaigning does not assure a real contest, but tight limitations on funds may distort the democratic process by reducing the opportunity for a serious challenge to the entrenched officeholder. *Hearings on S. 382, supra* note 8, at 649.

95. As Senator Marlow Cook (R-Ky.) observed: “Thirty-second spots in New York City, for instance, cost \$4,800. In Los Angeles they cost \$2,900. In Atlanta they cost \$700. In Dallas \$550. In Phoenix, \$200.” *Id.* at 658. Thus, with a broadcast limitation of six cents per voter, a New York City Congressman could purchase only 1/24 the amount of time which could be bought by a Phoenix Congressman.

Some means should be devised to standardize the limitations in terms of broadcast time instead of dollars, thus affording all candidates similar access to the broadcast media.⁹⁶

Third, as the FCC Guidelines emphasize, the media limitations for radio and television apply to the purchase of time only; production costs are *not* included. As a consequence, costs may be hidden instead of reduced: ". . . you will get simply more and more and more sophisticated polling and tape production and so forth and the competition . . . will be in these hidden costs to the consultants and in the quality and nature of produced materials."⁹⁷ The Act should have been drafted to cover production costs as well as costs for broadcast time.

Finally, the enforcement provisions of the Act are deficient in two respects. First, since the Clerk of the House and the Secretary of the Senate supervise the reports completed by congressmen and senators,⁹⁸ the regulators are elected by those whom they presumably are to regulate. Obviously, this is not a procedure which will promote confidence in strict and impartial enforcement of the law.⁹⁹ Instead, the Act should have provided for an impartial Elections Commission to act in a supervisory capacity.

Second, to enforce the spending limitations on communications media, the Congress designed a virtually foolproof procedure: before a candidate may purchase time on television or radio, or purchase an ad in a newspaper, he must certify that the expenditure

96. Under such a plan Congressional candidates from New York City should be entitled to greater amounts of time. The danger, however, is that if the limit is very high, the costs of campaigning to the limit will also be high. Thus, the dilemma may not be resolvable without some kind of subsidization for political broadcast time.

97. *Hearings on S. 382, supra* note 8, at 618 (testimony of Prof. David Adamany of Wesleyan University).

98. Federal Election Campaign Act, 2 U.S.C.A. § 431(g) (Supp. 1973).

99. "For decades the Secretary [of the Senate] and the Clerk [of the House] have been filing officers under the existing federal statutes. In these decades a pattern has been created of accepting reports without question and simply making them available to the public. I do not believe that a change in the statutory rules will change the deeply ingrained view that the Secretary and the Clerk are mere filing officers. An Elections Commission, on the other hand, because it is freshly created, would be more likely dramatically to alter the reporting forms effectively to obtain information. It would also because of its bi-partisan composition, be more likely to investigate thoroughly and report violations in the reports." *Hearings on S. 382, supra* note 8, at 609 (testimony of Prof. David Adamany).

will not result in a violation of the law.¹⁰⁰ This certification system effectively eliminates the traditional practice of using “dummy” committees to avoid spending limitations.¹⁰¹ This is the toughest, most admirable aspect of the new Act—the certification provision was a genuine and successful attempt to plug the gaping loophole that existed in previous spending limitation laws. Unfortunately, though, the Act plugs more than loopholes. By insuring that “dummy” committees cannot be used by candidates to circumvent the limitations, Congress has simultaneously insured that *legitimate* committees and organizations are rendered mute prior to an election as well, unless a candidate is willing to have an organization’s ad costs charged to his spending limitation. In effect, the Act grants veto power to the candidate during a campaign. Even groups which support a particular candidate may be denied an opportunity to air their views, because “[t]here may be groups whose support [a candidate] would find embarrassing, either because of the composition (*e.g.*, extreme leftists) or because of the nature of their message (‘We really don’t trust him but he’s the best of a bad lot’).”¹⁰²

This problem was recognized throughout the Senate and House hearings on the Act. As Senator Pastore observed:

There are a lot of people who are interested in politics and a lot of people are interested in issues. You have all kinds of organizations. You have the broadcasting organization. You have the Chamber of Commerce. You have the National Association of Manufacturers. You have COPE. You have a lot of things.

Now, how in the world are you going to compel these people to keep silent during a campaign if they feel the welfare of America is involved? I do not see how you can do it. How can you compel them to go to the candidate and say “I want to put an ad in the paper?” How can you circumscribe a man’s fundamental right to speak out on an issue if this country is his?¹⁰³

Senator Pastore’s questions were never resolved.¹⁰⁴ Apparently realizing that the media limitations would be meaningless without a certification procedure,¹⁰⁵ Congress chose to enact a tough law de-

100. Federal Election Campaign Act, 47 U.S.C.A. § 803(b) (Supp. 1973).

101. *See, e.g.*, Federal Election Campaign Act, 18 U.S.C.A. § 591 (Supp. 1973), *formerly* ch. 645, § 591, 62 Stat. 719 (1948).

102. Rosenthal, *High-Cost Primaries*, NEW REPUBLIC, June 19, 1971, at 7-8.

103. *Hearings on S. 382, supra* note 8, at 634.

104. *See, e.g., Hearings on H.R. 8627, supra* note 12, at 105, 144, 255.

105. As Rep. Louis Frey (R-Fla.) pointed out during hearings on the legislation, there will be “. . . loopholes in the legislation if we don’t do this. Take the practical issue of the war and the differences of opinion we have today. If both

spite the existence of extremely serious first amendment problems. As a consequence, the Act's constitutionality is now being tested in the courts by the American Civil Liberties Union.¹⁰⁶

There is no totally satisfactory means of resolving this dilemma. The priorities for minimizing the influence of money in our electoral process and for encouraging the widest spectrum of speech possible during a campaign are extremely high, and yet the two goals appear to be mutually exclusive. Instead of totally abandoning either goal, however, perhaps there is a way to substantially salvage both.

The certification requirement should not apply to genuine issue committees, since it clearly abridges freedom of speech, and it does so at a crucial moment—immediately prior to an election. The problem of “dummy” committees could be diminished by insuring that candidates have the right to judicial relief: if a candidate can demonstrate that a committee has been organized on behalf of his opponent, and has been presenting “issues” only incidentally for the purpose of assisting his opponent, he should be entitled to a court injunction which places the committee's expenditures among the other media expenditures made by the opposing candidate. Free speech would not be restricted, but blatant attempts by candidates to form “issue” committees would be detected and remedied. Even so, two problems still must be acknowledged: (1) genuine issue committees may still contribute to a candidate's media exposure, giving him an edge over an opponent; and (2) sophisticated attempts by candidates to set up “dummy” committees would probably be successful.¹⁰⁷ Recognizing these two remaining problems, such

candidates A and B were limited to \$60,000 or 7 cents a vote, and I was on one side or the other, I could see organizing some groups in my area to raise money, not particularly for me, necessarily but for whatever point of view I espoused through the campaign, and doubling or tripling or quadrupling the money and hitting on that theme time after time, and in effect, doing away with a practical limitation on spending.” *Id.* at 106.

106. The ACLU filed suit in the U.S. District Court for the District of Columbia on Oct. 2, 1972, alleging that the Act is unconstitutional. The ACLU attempted to place an ad in the Sept. 20, 1972, edition of the *New York Times* to attack President Nixon's support of legislation designed to curb school busing, and listed 102 Congressmen who voted against the bill as deserving support. The *Times* rejected the ad because the ACLU failed to provide the certification documents required by the Federal Election Campaign Act, § 104(b). *ACLU Sues Over Rejection of Ad Against Nixon*, Wash. Post, Oct. 3, 1972, at A12, col. 4.

107. For instance, an incumbent Senator facing election in 6 years might

an approach is still superior to that provided in the Act, or to that which existed prior to the Act.

V. MORE COMPREHENSIVE PROPOSALS FOR CAMPAIGN COMMUNICATIONS REFORM

The Federal Election Campaign Act of 1971 was a limited reform measure. A number of proposals for more comprehensive reform have been advanced, and some of them will be examined in this section. Four basic areas of reform will be discussed: (1) Should broadcasting formats be regulated for candidates? Specifically, should spot advertisements (messages of 60 seconds or less) be banned? (2) How should broadcasting time be allocated among candidates? Specifically, should the "equal time" provision be eliminated or modified to allow broadcasters to grant time to major candidates without affording equal time to minor candidates? (3) What obligation do licensees have to provide free time for political candidates? Specifically, should candidates be granted time free of charge with the costs paid by broadcasters or the federal government (or a combination of the two)? (4) What is the best method for financing campaigns? Specifically, should part or all of candidates' campaign expenditures be financed by the federal government?

A. BROADCAST FORMAT REGULATION: SHOULD SPOTS BE BANNED?

Political candidates are not restricted in their use of television today. They may produce an advertisement of any length desired; they may choose to debate an opponent, or they may decide to show a political biography on film. They may appeal to the viewer's intellect, or they may appeal to his emotions. They may speak to the voters about the issues, or they may simply establish a desired image. They may fairly present the opponent's views, or they may distort them. Although regulating the content of political speech would clearly be unconstitutional, reformers have argued that regulating the format of such speech on television is both constitutional and desirable.¹⁰⁸ The regulation most widely called for is the prohibition

immediately establish an "issue" committee which would continue to function throughout his term, stepping up its efforts during his next campaign.

108. Because television time is a limited commodity, and since the airwaves are

of the political spot.¹⁰⁹

The spot has become the most widely used¹¹⁰ and controversial aspect of political broadcasting.¹¹¹ Since spots are messages lasting no more than 60 seconds (and often only 10), they are particularly susceptible to abuse. Many spots are simply inane, conveying no substantive information to the viewer.¹¹² However, critics are primarily concerned about spots which "employ insidious associations of images and ideas designed, like a malign post-hypnotic suggestion, to implant a lasting if irrational repugnance for the opposition."¹¹³ The most frequently cited example of such an abusive spot occurred in the 1964 Presidential campaign:

At 10 p.m. on Monday, September 7, millions of Americans were watching NBC's *Monday Night at the Movies*. There was a break for station identification; then on came a film of a pretty little girl pulling the petals off a daisy and counting them slowly. As she counted, a man's voice came in over hers, also counting: ". . . ten,

owned by the public, television is regulated in the public interest. Thus, regulating the format for television is not considered to be violative of the first amendment by reformers. Under the Federal Election Campaign Act, the amount of time, in terms of its cost, is limited. In other reform proposals, such as those made in the *Twentieth Century Fund Report*, candidates would be required to make substantially live appearances to qualify for reduced or free time.

109. FCC Commissioner Nicholas Johnson thinks the spot is immoral and should be forbidden. More surprising is the fact that the advertising agencies of Young and Rubicam and Foote, Cone, and Belding have publicly denounced spots, and refuse to produce them. According to Edward Ney of Young and Rubicam, "It is a perversion of our skills to attempt to use the techniques of a 30-second or 60-second commercial to discuss an issue or the character of a candidate for high political office. We believe that such advertising should not be allowed on the air." Navasky, *The Making of the Candidate*, N.Y. Times, May 7, 1972, (Magazine) at 84, 89.

110. "It is recognized . . . that 90 percent of the money goes to that part [spots] of advertising." *Hearings on S. 382*, *supra* note 8, at 339 (statement of Senator Vance Hartke).

The first political spot was apparently produced in 1936 and performed on radio when Republican Presidential candidate Alf Landon had an ad aired by the advertising firm of Blackett, Sample and Hummert. The controversy over spots has been most intense in recent years, however, as their use of television has become more frequent and more sophisticated.

111. *See, e.g., supra* note 109.

112. John O'Toole, president of Foote, Cone, and Belding, has produced a 20-minute presentation with samples of old political spots which say nothing at all: "J.F.K.'s 'It's Up to You' spot, which made the point that it's up to you; Nixon's 'Nixon's the One' spot, which argued that Nixon's the one; and Robert Taft Jr.'s 'One Man Who Can Win' spot, which contended that Taft was one man who could win almost as firmly as Agnew's 'My Kind of Man' spot asserts that Agnew is my kind of man." Navasky, *supra* note 109, at 89.

113. Porter, *Did You Know Ronald Reagan Shot Lincoln?*, Wash. Post, Jan. 23, 1972.

nine, eight, seven. . . ." As he finished, the scene dissolved into the explosion of a nuclear bomb and an announcer's voice urged listeners to support Johnson and the Democratic ticket.¹¹⁴

There are numerous other examples of political spots which have grossly distorted the issues and the views of opposing candidates.¹¹⁵

Moreover, spots are directed at the most uninformed, politically disinterested segment of the electorate.¹¹⁶ The mass television audience is a group with "weak political motivation and is not generally well-informed. It does not care much about politics and for that reason will believe what it is told. The audience contains that group which makes its voting decisions very late."¹¹⁷

Nevertheless, those who oppose an abolition of spots argue, correctly, that spots are not *inherently* demagogic or even superficial.¹¹⁸ In fact, intelligent, substantive spots have been produced by a number of candidates.¹¹⁹ Furthermore, spots can be utilized

114. R. MACNEIL, *supra* note 2, at 205.

115. In 1952, the Stevenson campaign committee, without the candidate's knowledge, produced the following spot: ". . . I don't like generals for President. Twenty years ago the Germans had a general for a President whose name was von Hindenburg and then Hitler moved in and took over the country. No thank you, general . . . I'll stick with a man with experience in government. I'll stick with Adlai Stevenson." Porter, *supra* note 113.

Such ads are not solely the products of Presidential candidates. In Governor Pat Brown's campaign against Ronald Reagan, "[o]ne of [his] spots even said, 'Remember, it was an actor who shot Abraham Lincoln.'" R. MACNEIL, *supra* note 2, at 215.

Usually, however, the distortion is not so obviously detectable by the average voter. In Governor Nelson Rockefeller's campaign for re-election in New York, the following spot was aired about his opponent: "Frank O'Connor, the man who led the fight against the New York Thruway, is running for Governor. Get in your car. Drive down to the polls and vote." In fact, what Frank O'Connor, then a state legislator, *had* opposed was the Republican-backed toll-road. O'Connor and the Democrats in Albany wanted a free road. *Id.*

116. According to Richard Scammon of the Election Research Center: "The Lower Middle Class make up their minds late and therefore are most subject to influence by television." According to Herbert Gans, the lower middle class *is* the mass TV audience. *Id.* at 224.

117. *Id.*

118. When a reporter asked media consultant Joe Napolitan if it was possible to make a serious and useful statement in 60 seconds or less, he replied: "If elected I will unilaterally withdraw all our troops from Vietnam within three months of election day.' 'I will go to Korea.' 'Will you marry me?' 'I love you.'" Navasky, *supra* note 109, at 89.

119. As Russell Hemenway of the National Committee for an Effective Congress testified at hearings on the Federal Election Campaign Act: "We brought a series of spot announcements down here at the invitation of Senator Pastore. Many members of the subcommittee looked at them. They included the political advertising of Senator Javits, Mayor Lindsay, Senator Robert Kennedy, and others,

to raise campaign funds, to reach voters who would not watch a longer political message,¹²⁰ and to enable a challenger to establish the name-recognition necessary to have a chance against a well-known incumbent opponent.¹²¹

Even so, spots are consistent and effective vehicles for abuse, and the political process would be improved if spots were banned—particularly if it were done in the context of more comprehensive reform.¹²² However, a total ban would raise serious constitutional questions, and there are few prospects for such a ban at the present time.¹²³ To encourage the responsible use of the airwaves without a total ban, a number of steps could be taken.

all of them designed for New York State, which included both the large concentrated metropolitan district of New York plus upstate New York which is very thinly populated.

"They all expressed amazement at the amount of content that you can put into a one-minute spot.

"Now, you can either use broadcasting intelligently, as these candidates did, or you can use it to distort an issue or a personality." *Hearings on S. 382, supra* note 8, at 208 (testimony of Russell Hemenway).

120. "It is the ability of the spot to hold the audience, though, that makes it most attractive to advertising strategists. Carroll Newton once pointed out that the thirty-minute set political speeches achieved average ratings 34 percent below the programs they replaced. Fifteen-minute political programs, he added, lost an average of 24 percent, and five-minute political programs between 5-10 percent. In contrast, the 60-second commercial spot showed no loss. In view of the fact that the political campaigner must constantly try to win over the uncommitted, or supporters of the other side, the advantages of the spot are clear." S. MICKELSON, *supra* note 5, at 62.

121. Russell Hemenway of the National Committee for an Effective Congress emphasized the importance of name-recognition: "May I suggest to you again that the person against whom your suggestion [to limit or eliminate spots] would work most severely is the challenger to a political office. He is the person who must make himself known, he is the person who is unknown. You as the incumbent have tremendous advantage, the use of your office, staff, frank, all other advantages that incumbents have. Challengers don't have this. They are also mainly unknown personalities." *Hearings on S. 382, supra* note 8, at 210.

122. While distortions can obviously be made in half-hour programs as well as 10-second spots, it is much more difficult for candidates to produce longer programs without including substantive matter. It must be conceded, however, that a ban or limitation on spots would probably not result in a drastic improvement in political broadcasting if enacted without additional reforms.

123. *See, e.g.*, Memorandum of the General Counsel, Federal Communications Commission, On the Legality of Establishing Minimum Time Durations for Political Broadcasts: ". . . the proposal to limit political broadcasts to those which last at least a specified number of minutes raises serious Constitutional problems, and would probably be in conflict with the First Amendment." *Hearings on S. 382, supra* note 8, at 588-91.

"There is very little sympathy among the incumbents for disallowing spot announcements." *Id.* (statement of Russell Hemenway). In fact, Senators Hartke

First, broadcast stations should be required to make time periods longer than one minute available to candidates. The fact is that many stations only offer spots to candidates.¹²⁴ If candidates are *able* to secure longer periods of time, they may be willing to do so.

Second, financial incentives should be provided to encourage candidates to purchase time in larger blocks. One sensible proposal has been advocated by communications consultants Robert and Jane Squier:

Candidates . . . who . . . feel that their most effective way of communicating with the voters is through product-oriented advertising, should be allowed to do so. They should, in our view, have to pay the same price that manufacturers pay in order to market their products. . . . But if they make the decision to present their case in program-length appeals, we feel they should be encouraged to do this either at drastically reduced rates or free of charge. We would, in effect, be subsidizing a system which would encourage candidates to use this more responsible channel of communication.¹²⁵

Third, efforts could be made—particularly by the two major parties—to establish a political broadcasting code of ethics. Such a code should not be enacted into law, since it would pose freedom of speech and censorship problems which, if not insurmountable, would be undesirable. However, if candidates can agree among themselves to abide by a minimum set of ground rules for broadcast campaigning, the public (and the parties and candidates) would benefit.¹²⁶

and Stevenson introduced an amendment to the Federal Election Campaign Act of 1971 to ban the purchase by federal candidates of television segments less than 60 seconds in length. The amendment was quickly tabled, as most Senators shared the views of Senator Gravel (D-Alaska): "I think it is legislative arrogance to think in terms of outlawing something which is a method of communication. We are not prepared to say whether a message should not be put out in less than 1 minute. Let us have freedom to do it. It is like saying, 'Henceforth, you have to advertise only in English.' Suppose I wanted to communicate with some people in Polish. Suppose I wanted to communicate with some people in German. Why should that be legislated against? This would be an error which would become obvious 6 months or so from now." 117 CONG. REC. S. 13145 (daily ed. Aug. 4, 1971). Of course, a candidate does not have freedom now to choose numerous methods of communication, *i.e.*, a 5-second ad, or a 2-hour ad.

124. Because stations do not want to disrupt their schedules, spots are the most convenient blocks of time to sell—larger blocks tend to cut into scheduled programming. Between 1964 and 1970, the percentage of total broadcasting money by candidates used for spots of 60 seconds or less rose from 81 to 95 percent. 117 CONG. REC. S. 13141 (daily ed. Aug. 4, 1971).

125. Squier and Squier, *TV in Election Campaigns—A Call for Changes*, U.S. NEWS & WORLD REPORT, Nov. 27, 1972, at 84, 85.

126. An example of such a code was proposed by former FCC Commissioner

B. ALLOCATION OF BROADCAST TIME: SHOULD SECTION
315 BE REPEALED?

The Federal Election Campaign Act of 1971 did not alter Section 315 of the Communications Act of 1934.¹²⁷ Section 315 provides that broadcasters must afford equal opportunities to all candidates in a particular race.¹²⁸ Broadcasters have argued for many years that the section impedes their coverage of political campaigns, since the grant of time to a major party candidate is a simultaneous commitment of time to candidates of minor parties.¹²⁹ The statistics belie that contention, however; stations have not been more generous with free time in elections with only two candidates than they have been in races with a number of contenders.¹³⁰

Nevertheless, the broadcasters' view is not without some merit. In a typical presidential election year there are at least a dozen candidates, and there have been elections for the Senate with as many as

Paul Porter. In addition to banning spots, Porter proposes the following: "Broadcasters should reject all political advertising which contains film clips, pictures or tape recordings of the opposing candidate, unless such opposition candidate is given an opportunity in advance to view the material and prepare an appropriate reply to be broadcast simultaneously.

"Dramatizations of political issues should be prohibited.

"Disparaging attacks upon a political candidate should not be permitted except when personally made by an opposing candidate.

"No new political material should be accepted by any broadcaster during the last 8 hours of the campaign." Porter, *supra* note 113.

Such guidelines should not be imposed on candidates, however, because of the dangers of censorship: ". . . granting the government permission to keep from the public political appeals which it deems confusing, irrational, or irrelevant is a dangerous invitation to censorship." Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. REV. 900, 911 (1971).

127. See Communications Act ch. 652, § 315, 48 Stat. 1088 (1934), as amended 47 U.S.C.A. § 315 (Supp. 1973).

128. *Id.*

129. See, *supra* note 33.

130. For example, there were only two candidates in 20 of the 34 Senate races in 1964, and no minor candidates therefore would have been entitled to free time. Nevertheless, only 29 percent of the television stations involved in those races offered free time—the same percentage that offered time in multi-candidate races. D. ROSENBLUM, *ELECTING CONGRESS—THE FINANCIAL DILEMMA* 78 (1970).

In 1968, only 34 percent of the stations in areas serving election contests with only two candidates offered free time. In the seven states with multi-candidate races, however, 45 percent of the stations gave free time. FCC SURVEY OF POLITICAL BROADCASTING—PRIMARY AND GENERAL ELECTION CAMPAIGNS OF 1968, at 3 (1969).

71 candidates.¹³¹ Providing free time to such large numbers of candidates is concededly a demanding task, and one which the broadcasters do not wish to bear. Consequently, numerous proposals for the repeal or alteration of Section 315 have been advanced. The stated purpose of such proposals is to encourage and allow for increased amounts of time for major party candidates. There are seven basic types of proposals.

1. *Repeal Section 315 for all elections.*

This proposal is a simple one, calling for the total repeal of the equal opportunities requirement. If Section 315 were to be repealed, individual broadcasting stations would have complete discretion in providing time for candidates.¹³² There would be no assurance of fair treatment for all candidates.¹³³ Even assuming that local stations would be scrupulously fair with Democratic and Republican candidates (a dangerous assumption),¹³⁴ it is probable that the stations would snub legitimate minor party candidates as well as any candidates thought to have little chance of winning.¹³⁵ The fair-

131. *Hearings on H.R. 8627, supra* note 12, at 250. There are often numerous candidates for minor offices as well. In 1952, for instance, there were 72 candidates for Milwaukee County Sheriff. *Hearings on Communications Act Amendments Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 84th Cong., 2d Sess. 74, 189 (1956).*

132. *See* note 34 *supra*.

133. In many Western states, statewide candidates need the protection of § 315, according to Senator Ted Stevens (D-Alaska): "We have local candidates, people from city council, mayor, county, or borough governments, State legislatures, everyone using the air media on these isolated stations that are not statewide. If it were not for the equal time provision, the statewide candidates wouldn't be able to buy any time." *Hearings on S. 382, supra* note 8, at 176.

134. *See* note 34 *supra*.

135. The records of the free time that national radio and television networks granted to minor party presidential candidates during the last four general elections partially substantiate the fear that suspending Section 315 would reduce the amount of time received by those candidates. Between 1956 and 1960 the amount of time granted minor party candidates fell dramatically. Of course, these office seekers fared no better in 1964, when Section 315 was operative, than they did in 1960, when it was not. But they did receive more time in both 1956 and 1968, when the equal time rule prevailed, than they did in 1960. There is thus a high probability that broadcasters would provide less time to Presidential and Vice-Presidential candidates representing minor parties if Section 315 were suspended than they would when it is operative. D. DUNN, *supra* note 32, at 102.

The situation is compounded by the fact that minor party candidates are ignored by the newspapers and refused by others—such as printers and billboard dealers—and have no means of access to voters *but* television. *Id.* at 104.

ness doctrine would not offer such candidates adequate protection,¹³⁶ and even if it did, there would be no effective way for the FCC to monitor the thousands of stations and thousands of races involved.¹³⁷ In short, "the potential for abuse makes the risk too great to take."¹³⁸

2. *Repeal Section 315 for Presidential elections only.*

The National Committee for an Effective Congress supports this proposal, believing that "the high visibility of presidential candidates minimizes the risk of unfair treatment."¹³⁹ That is undoubtedly true—for the major party candidates. The risks of abuse are substantially less when repeal is confined to one national, highly-publicized contest than when repeal extends to all races and candidates; the major networks would undoubtedly grant equal opportunities to the Democratic and Republican nominees even without a legal requirement to do so. The problem would be the networks' and stations' treatment of third, fourth, and fifth party candidates: indeed, the repeal of Section 315 is advocated for the express purpose of allowing broadcasters to ignore minor party candidates.

Thus, the two major parties would get national exposure at the expense of other parties. Yet minor parties have had considerable impact on American political history; minor party platforms frequently become major party platforms within several decades. It is the minor party candidates who most need television to communicate their programs—often radically different from those advanced

136. As Rep. Torbert MacDonald (D-Mass.) indicated in floor debate on the Act: ". . . anybody who tries to pull a rabbit out of the hat and say that the fairness doctrine is going to protect candidates for office just does not understand the fairness doctrine. In the first place, 315, the equal time provision, is law, and the fairness doctrine is merely a rule. The fairness doctrine does not go to political debates. It covers controversial issues." 117 CONG. REC. H. 11435 (daily ed. Nov. 29, 1971).

137. "Presidential contests are unique. They engage the attention of the entire country, and are subject to the scrutiny of a national constituency which would be quick to rise at any indication of unfair treatment. Candidates in intrastate campaigns lack such protection, and by virtue of their sheer numbers—468 House and Senate races alone—would pose a herculean, and probably impossible, task for any watchdog agency. Such candidates would inevitably be more subject to the whims of individual stations and local pressures." *Hearings on H.R. 8627, supra* note 12, at 140 (testimony of Mrs. Susan King).

138. *Id.*

139. *Id.*

by the major party candidates. As Chief Justice Warren stated in *Sweezy v. New Hampshire*:

All political ideas cannot and should not be channelled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted The absence of such voices would be a symptom of grave illness in our society.¹⁴⁰

Since the repeal of Section 315 for presidential candidates would inevitably stifle the voices of minor party candidates, this proposal should be rejected.

3. *Add an additional exemption to Section 315.*

Under this proposal, a fifth exempt category would be established for Section 315: "bona fide news programs in which at least two candidates appear in debate or back-to-back discussion of issues to be specified by the licensee."¹⁴¹ Individual stations would have wide discretion in choosing the candidates who appear as well as the format of the program. Similar to the two proposals previously discussed, this proposal is undesirable because it places too much authority in the hands of the licensee and provides no assurance to minor party candidates that they will be afforded access.

4. *Restrict the applicability of Section 315 to a limited period prior to the election.*

Except during an eight-week period prior to a general election and a four-week period prior to a primary election, Section 315 would be repealed.¹⁴² During those time periods, however, 315 would be fully applicable. If campaigns are begun prior to this period, "broadcasters will have the opportunity to give major candidates additional coverage, thus supplying the public with beneficial information."¹⁴³ This proposal would provide minor party candidates with protection during the final weeks of a campaign, and in that respect is superior to the three previously examined. Nevertheless, during

140. 354 U.S. 234, 250-51 (1957).

141. See Geller, *Political Broadcasts—A Few Short Steps Forward*, 20 CATH. L. REV. 449, 454 (1971).

142. See *Campaign Radio-TV \$40 million*, BROADCASTING, NOV. 2, 1964, at 23.

143. Derby, *Section 315: Analysis and Proposal*, 3 HARV. J. LEGIS. 257, 275 (1966).

the periods when Section 315 is not applicable, minor party candidates would have no protection.¹⁴⁴ In addition, major party candidates would undoubtedly campaign more heavily during the period when Section 315 is not applicable, thus increasing the length of campaigns.

5. *Suspend Section 315 during a limited period prior to the election.*

This proposal is the reverse of the previously examined plan: minor party candidates would be protected *except* during the final weeks of the campaign. This proposal would encourage the shortening of campaigns, since the major party candidates would use broadcast time only during the period in which Section 315 does not apply. However, the equal opportunities requirement is removed at the most crucial time for candidates and parties—the time prior to the election, when most Americans are more receptive to political messages and political persuasion.¹⁴⁵ Thus, minor party candidates would not have an opportunity to communicate during the time when communication is vital.

6. *Repeal Section 315, and require equal opportunities for major party candidates and "proportionate" opportunities for minor party candidates.*

One of the proponents of this concept, Dr. Herbert Alexander of the Citizens' Research Foundation, explains the proposal:

I am in favor of a formula for "differential equality of access" in which major candidates get "equal time," minor candidates get "equal time," but minors get less than majors. This formula could be applied to candidates for other offices as well as President, and would protect all candidates, major and minor.¹⁴⁶

Such a formula is more appealing than the previously examined proposals in that minor party candidates are guaranteed *some* access.¹⁴⁷ In fact, it is argued that minor parties might be amenable

144. See note 137 *supra*.

145. See note 117 *supra*.

146. *Hearings on S. 382, supra* note 8, at 645 (testimony of Dr. Herbert E. Alexander).

147. However, not even all minor party candidates would be guaranteed some access—certain standards would have to be satisfied to receive minimal access. See note 146 *supra*.

to proportionate time requirements.¹⁴⁸ Nevertheless, the dangers inherent in such a plan are manifest in the specific proposals for proportionate amounts of time: only the Democratic and Republican parties are deemed "major," and minor parties receive only a small percentage of the time allotted to major parties.¹⁴⁹ A party is deemed to be major only if it can indicate substantial support. Thus, there is "Catch 22" embedded in the plan: a minor party cannot receive a significant amount of time unless it can demonstrate "broad support," and it cannot very easily attract such support without television exposure to inform the masses of its existence and its program.

Such objections diminish as the percentage of time allotted to minor party candidates increases beyond 50 percent of that granted to

148. Norman Thomas indicated his amenability toward a proportionate time requirement in testimony before a Senate committee in 1952. *Hearings on Proposed Amendments to the Federal Corrupt Practices Act Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 82d Cong., 1st and 2d Sess. 192-93 (1952).

Some minor parties would strenuously object to a proportionate time requirement, however. Among them is the Socialist Labor Party: "The Socialist Labor Party of America declares that the real question comes down to this: Do the American people have the right to hear all sides of the throbbing social, political, and economic issues of the day? We hold that they do, and that, indeed, they must hear all sides if they are to vote and act intelligently. The opponents of section 315(a) [who support suspending or modifying it] say, in effect, that they do not have this right. Their contentions amount to saying that the American people have the right, or the need, to hear only the candidates of the major parties; candidates, that is to say, who hold substantially identical views on all the vital social, political, and economic questions of our age." *Hearings on Equal Time Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th Cong., 1st Sess. ser. 29, at 148 (1963).

149. Under one proposal, to receive equal time a party must have received 20 percent of the total votes cast in the preceding election or submit petitions with signatures of persons totaling 8 percent of the vote cast in the preceding election. Otherwise, a party and candidate only are able to qualify for the proportionate time. A candidate will receive one-sixth of the amount of time received by the major parties if his party polled between one and five percent of the total votes cast in the previous election, or if petitions are submitted containing the names of one-half of one percent of the electorate. Derby, *supra* note 143, at 320.

Under another proposal, a party would have had to have received 10 percent of the votes cast in the previous election to get equal time. Otherwise, it would receive one-twentieth of the time allotted to the major parties, unless it received votes in the previous election, in which case its time would be computed by the percentage of the ratio of the minor party's votes to the votes received by the lowest vote-getter of all major party candidates. Scott, *Candidate Broadcast Time: A Proposal for Section 315 of the Communications Act*, 56 GEO. L. J. 1037, 1047 (1968).

major party nominees.¹⁵⁰ Most proponents of proportionate time, however, envision it as a plan to provide equal time for major party candidates while purposefully granting only a fraction of that time to other candidates.¹⁵¹

7. *Repeal Section 315, and require equal opportunities for candidates from all parties meeting some minimal standard of significance.*

This proposal would provide for equal opportunities for all candidates who can meet some minimal standard of significance. It differs from the existing Section 315 only in that it attempts to eliminate equal opportunities for frivolous candidates. Setting a minimal standard to also insure that no serious candidates—regardless of their chances of winning—are denied an equal opportunity is a difficult and delicate task. However, broad parameters can be envisioned. For instance, third party presidential candidates such as Theodore Roosevelt, Henry Wallace, Strom Thurmond, and George Wallace would certainly qualify for equal opportunities. On the other hand, a presidential candidate whose name is on the ballot only in Idaho, and who is campaigning only in Pocatello, Idaho, would not qualify for equal opportunities on nationwide television (though he might qualify for equal opportunities within the State of Idaho).

Developing a standard to apply to all candidates in all situations is much more demanding than examining extreme cases. The Federal Communications Commission has proposed one plan¹⁵² which would require that a candidate appear on the ballot in 34 states and that the candidate's party have received at least two percent of the popular vote in the last election, or, if the party was not entered in

150. One proposal would maintain an equal time requirement for the two major parties, and provide a specific fixed percentage of time to all other candidates, whatever their support or party. The percentage suggested was 50 percent. That plan is better than those which provide minor candidates with only a fraction of the time allotted to the major candidates, but the percentage is still somewhat low. Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 MD. L. REV. 221, 249 (1967).

151. It is not surprising that Senator Scott's proposal, note 149 *supra*, creates an advantage for the major parties. The Senator is the minority leader in the U.S. Senate and has an obvious interest in maintaining only a two-party system.

152. See *Hearings on S. 382, supra* note 8, at 186 (testimony of FCC Chairman Dean Burch). See also Geller, *supra* note 141, at 459.

the last election, that a candidate file petitions bearing signatures equal to at least one percent of the total vote cast in the preceding election to receive equal opportunities. Presidential candidates could qualify for equal opportunities on a state-by-state basis.¹⁵³

Candidates for offices other than President would receive equal opportunities if: (1) they have been nominated by political parties whose candidates in the preceding general election received at least two percent of the total popular vote for such offices; or (2) they are supported by state validated petitions signed by eligible voters numbering at least one percent of the vote cast for such offices in the preceding general election.¹⁵⁴

The FCC plan is generally a good one, but it is too restrictive. To receive equal time on nationwide television, a candidate from a new party running for President would have to qualify for a position on the ballot in 34 states and, in addition, he would have to file petitions bearing about 700,000 names.¹⁵⁵ A more equitable plan would establish only one requisite for equal opportunities for a presidential candidate: if a candidate's party received less than one percent of the vote in the previous election, the candidate would have to secure a place on the ballot in any number of states whose aggregate electoral votes comprise a majority of the votes in the Electoral College. This plan would insure that the candidate seriously intends to offer his programs to a majority of the American people.¹⁵⁶ There should be no further requirement for petitions. All states require that a candidate register prior to an election by some specified date in order to secure a position on the ballot. Furthermore, in all general elections all states require some minimal demonstration that a candidacy is bona fide, such as a nomination by a recognized party or submission of petitions signed by a specified number of voters.¹⁵⁷

153. See *Hearings on S. 382, supra* note 8, at 186.

154. *Id.*

155. The number of names required is based on the 1968 vote total of 73,198,223. *THE WORLD ALMANAC* 703 (1971).

156. Since each state's electoral votes are computed on the basis of Senators (two per state) and Representatives (the number based on the state's population), the electoral vote is a reasonably accurate reflection of the state's voting age population.

157. Derby, *supra* note 143, at 274.

Candidates for offices other than President would automatically receive equal opportunities if nominated by a party which received more than one percent of the vote in the previous general election for a particular office. If a candidate is a nominee of a party which did not receive one percent of the vote in the last election for any reason, the candidate should be required to submit petitions numbering at least one percent of the vote cast for such office in the previous election. However, if a state requires a petition with at least one percent of the total votes cast for the office in the previous election to qualify for a place on the ballot, the petition requirement for equal opportunities shall be deemed fulfilled. If a state requires fewer than one percent of the votes in the previous election, a candidate need secure only the number of names necessary to total one percent.¹⁵⁸ Presidential candidates could also qualify for equal opportunities on a state-by-state basis by fulfilling the conditions that a senatorial candidate in the state would have to meet.

This plan is only a slight modification of the existing Section 315, and therefore it would include all candidates serious enough about campaigning and presenting their views that they make an effort to secure a place on the ballot. Yet the modest alteration of Section 315 would abolish equal opportunities for totally frivolous candidates who can now demand equal opportunities.

C. THE COST OF POLITICAL TIME: SHOULD CANDIDATES HAVE TO PAY?

During the Senate hearings on campaign reform legislation in 1971, the following exchange occurred between former FCC Chairman Newton Minow and Senate Subcommittee Chairman Pastore:

MR. MINOW. Mr. Chairman, I think you ought to take a serious look at what is being done in other countries. The United States, believe it or not, is the only country in the world where political candidates purchase time on television to take their case to the people.

158. In Tennessee, for instance, a candidate can secure a place on the ballot by securing the names of 25 voters on a petition. TENN. CODE ANN. § 2-1206 (Supp. 1964). To qualify for equal opportunities, candidates would be able to apply those 25 names to the rest of the names he secures (which must total one percent of the vote cast in the previous election). In Ohio, on the other hand, a petition with seven percent of the electorate's names must be provided to get on the ballot. Thus, a candidate on the ballot in Ohio would automatically satisfy the requirements for equal opportunities. OHIO REV. CODE ANN. § 3513.258 (Page 1960).

THE CHAIRMAN. Say that a little louder.

MR. MINOW. The United States is the only country in the world where political candidates purchase time to take their case to the electorate, and I think a very serious study of the system that is used in Great Britain and in Canada and in Germany and in Japan and in other countries is very much in order for this country, because I think there is a lot to be learned.¹⁵⁹

Mr. Minow's observations do need to be said "a little louder," because the uniqueness of political candidates paying for time to utilize airwaves owned by the people is generally not realized.

The approaches to political broadcasting vary in other countries. While these approaches cannot be analyzed within the confines of this paper,¹⁶⁰ it should be noted that in several respects the broadcasting approaches in Britain, Germany, Italy, Sweden, and Japan are similar:

There are two principal threads which run through all five countries. Time for candidate presentations is provided to the candidate without charge. The burden is assumed either by the network in question or by the government through subsidy. Program production is a responsibility of the candidates or parties and except for special debate or discussion features, not of the distributing network. The parties have essentially the same freedom to operate that they have in the United States, but they have avoided the enormous burden of television time costs which have become so important a factor in American campaigning.¹⁶¹

Although there are vigorous opponents of plans to provide television time to candidates at no cost, especially among incumbents,¹⁶² the concept has won many adherents among political reformers. The two principal advantages of free TV time are that: (1) the costs of campaigns would be reduced substantially; and (2) all candidates, regardless of their financial resources, could communicate with voters over television.

Because the concept of free television time is so appealingly simple, a number of commentators have called for its implementation in the following terms:

The best solution, as always, is the simplest and most direct. Prohibit all candidates from buying any TV time. Give every candidate public TV time. That's it. Clear, clean-cut, easily accomplished, and easily policed.

159. *Hearings on S. 382*, *supra* note 8, at 402.

160. For a discussion of the details of political broadcasting in other countries, see S. MICKELSON, *supra* note 5, at 134-38, 252-54.

161. *Id.* at 131.

162. Senator Edward Kennedy (D-Mass.), for instance, opposes plans to have the federal government pay for candidates' broadcast time. *Hearings on S. 382*, *supra* note 8, at 174 (testimony of Sen. Edward Kennedy).

How much time? How long before the elections? For how many candidates, local or national? Any FCC Commissioner or member of the prestigious Fair Campaign Practices Committee should be able to work out an acceptable formula between breakfast and the trip to the office. Or if they can't, some sixth grader could work it out as surely, as fairly, and as instinctively as Solomon.¹⁶³

The problems involved in devising an "acceptable formula" for providing candidates with broadcast time at no cost cannot be resolved that easily. But those problems are not insurmountable either.

The best known proposal is the Voter's Time concept advocated by the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era. The Voter's Time plan would apply only to presidential elections. Six one-half hour simultaneous broadcasts on every radio station, television station, community antenna system and educational station in the country would be provided for candidates during the 35 days prior to an election. The time would be paid for by the voters: the federal government would buy the time at half-price from the broadcasters. The total cost would be "less than sending a penny postcard to each voter in America."¹⁶⁴

There are two broad requirements which must also be met in utilizing Voter's Time: (1) the programs should be live, or involve a substantial live appearance of the candidate; and (2) the format should be designed "to promote rational political discussion, to illuminate campaign issues, and to give the audience insight into the abilities and personal qualities of the candidates."¹⁶⁵ The time would be allocated on a proportionate basis, with the Democratic and Republican candidates¹⁶⁶ receiving two or three times the amount of time provided to minor party candidates.¹⁶⁷

163. *Now Is the Time for All Good Men*, AMERICA, July 11, 1970, at 6-7.

164. *Hearings on S. 382*, *supra* note 8, at 399 (testimony of Newton Minow).

165. *Id.* at 400.

166. In the legislation the parties are not referred to by name, but the language is clearly a euphemism for Democrats and Republicans: ". . . any political party whose presidential candidacy finished first or second in popular votes in at least two of the three most recent presidential elections." *See, e.g.*, H.R. 14804, 92d Cong., 2d Sess. (1972).

167. In H.R. 14804, the major parties would receive 6 one-half hour segments of time, and parties receiving at least 12½ percent of the vote in the previous election would receive 2 one-half hour segments. Candidates with their names on the ballots in 39 states would receive 1 one-half hour of time. H.R. 14804, 92d Cong., 2d Sess. (1972).

In H.R. 5090, 92d Cong., 1st Sess. (1972), major parties would get 6 one-half hour segments, candidates whose parties received at least 15 percent of the vote

While the Voter's Time plan is unquestionably a desirable reform of the existing system, it suffers from three shortcomings. First, free time is provided for presidential candidates only.¹⁶⁸ The best plan would provide free time for all federal candidates, for it is congressmen and senators who need free time the most: their budgets are much smaller than those of presidential contenders, and they are less well-known than presidential contenders.

The principal objection to providing Voter's Time for all federal candidates is that "television signals and political districts have no correspondence at all."¹⁶⁹ It is true that the contours of broadcasting stations do not coincide with political boundaries, but that is not sufficient reason for only permitting free time at the presidential level. In many areas, a broadcasting station serves a major portion of a congressional district, and candidates from that district could use that station even though all of the viewers would not be constituents. In major urban areas the number of congressional candidates requesting time on the city's stations would be large—but not prohibitive. Even in the New York City market—which contains 36 congressional districts—Voter's Time could be provided for two candidates for each House seat, for the Senate, and for the Presidency by having each station air one-half hour of political broadcasting a night during the 35 days prior to the election.¹⁷⁰ All other markets, of course, would require even less time allocated by individual stations.

Second, the Voter's Time plan unfairly discriminates against minor party candidates, and, in so doing, deprives the public of an opportunity to fully evaluate minor party programs. Minor party candidates get only a fraction of the free time allocated to the Democrats and Republicans under the proposal, and yet minor party candidates can least afford to buy time and are most in need of exposure. Some argue that granting Voter's Time to candidates of minor parties in amounts equal to that received by major parties will disrupt and per-

in the previous election would get 2 one-half hour segments, and a candidate with his name on the ballot in 30 states would get 1 one-half hour segment.

168. This is the recommendation of the TWENTIETH CENTURY FUND REPORT. However, some of the Voters Time bills introduced would provide Voters Time for all federal candidates. See, e.g., H.R. 5090, 92d Cong., 1st Sess. (1971).

169. *Hearings on S. 382, supra* note 8, at 403 (statement of Newton Minow).

170. See *Hearings on H.R. 8627, supra* note 12, at 82 (Table on Voters Time Allocations in Major Metropolitan Areas).

haps destroy the two party system. That is unlikely. But even if such a prediction should prove to be true, it is not a justifiable rationale for limiting the free time granted to minor party candidates. If the two party tradition can be maintained only by denying sufficient exposure to other parties then its death can only be welcomed. Nevertheless, a more probable scenario is that additional exposure received by minor party candidates would more quickly infuse the two major parties with new ideas and policies and have little effect, if any, on the traditionally dismal chances for third party electoral success.

Third, the Voter's Time proposal provides that the federal government will pay for the free time, although stations will only be able to charge half the price that a commercial advertiser would be charged. While this proposal is politically realistic,¹⁷¹ it is theoretically absurd. Since the public owns the airwaves, it should not be forced to "buy" a minimal amount of time on those airwaves from the broadcasters in order to provide the public service of presenting political candidates on television prior to an election. Broadcasters should pay the costs of political broadcasting time by simply providing it to candidates free of charge. Special provisions could be made for that extremely small number of stations that would suffer a financial burden by providing free time; such stations, for instance, might be permitted to deduct the costs and perhaps lost profits as well from their taxable income.¹⁷²

171. The broadcasting industry is influential in Congress, and any plan to require broadcasters to give time would be lobbied against—undoubtedly successfully—by the industry: "The industry's interest in political broadcasting is bolstered by resources that give it great weight in the debate on campaign finance. Stations operate in every state and most Congressional Districts. Their managers and owners are respected in their local communities. They also dispense favors to elected officials. Many feature a senator or representative in a regular 'Report from Washington.' Officeholders, in addition, frequently feel, rightly or wrongly, that friendly relations with stations foster more favorable treatment on news shows and aid in buying more favorable time slots for spot advertising during campaigns. Broadcasters consequently have a friendly hearing in the halls of government." D. DUNN, *supra* note 34, at 69.

172. See Geller, *supra* note 141, at 451. The ability of stations to contribute free time is difficult to determine with accuracy, since the FCC has refused to make data on individual stations available to the public. Many stations, however, would apparently be able to contribute time without undue hardship; in 1971 (the last year for which overall data is available), 113 stations (out of 602 reporting) had pre-tax profits of \$1 million or more, and 36 stations had profits of more than \$3 million.

Testimony of Commissioner Nicholas Johnson, Federal Communications Com-

Thus, the Voter's Time plan should be altered to provide time for all federal candidates, to provide equal amounts of time for all candidates meeting a minimal standard of significance, and to provide that broadcasting stations absorb the costs of the time granted to candidates. The simultaneity provision should be maintained, and an aggregate number of hours should be provided to candidates¹⁷³ to divide into any combination of blocks of time of five minutes, 15 minutes, or 30 minutes.¹⁷⁴ Such a plan would benefit the candidates and, most importantly, benefit the public.

D. TOTAL CAMPAIGN FINANCE: SHOULD THE GOVERNMENT PAY FOR CAMPAIGNS?

The proposals to subsidize candidates' broadcast time have already been discussed. Similar proposals have been advanced for the subsidization of other means of campaign communication. It has been suggested that the government pay for quantities of brochures for political candidates,¹⁷⁵ and that political challengers be provided with the free mailing privileges available to incumbent congressmen and senators.¹⁷⁶ Another suggestion is that the government provide funds to the Corporation for Public Broadcasting for the explicit purpose of developing an alternative to present network coverage of political campaigns.¹⁷⁷ All of these suggestions have merit—and all ultimately lead to a proposal for total government funding of political campaigns.¹⁷⁸ The attractiveness of such a plan, of course, is that

mission, *Hearings on Broadcast Renewal Legislation Before the Subcomm. on Communications and Power of the House Interstate and Foreign Commerce Comm.*, March 14, 1973, at 12 (release copy of testimony; hearings are not yet in print).

173. For instance, four hours for Presidential candidates, two for Senatorial candidates, and one for House candidates.

174. The implementation of Voters Time would thus be an excellent means of eliminating spots: the free time granted political candidates should not be available in segments shorter than 5 minutes.

175. A. HEARD, *supra* note 1, at 439.

176. D. DUNN, *supra* note 34, at 146.

177. *Id.*

178. The suggestion that campaigns be totally subsidized by the government is not new. Theodore Roosevelt is generally regarded as the first proponent of such a plan; he urged such a system in 1907. A. HEARD, *supra* note 1, at 431.

Colorado enacted a statute in 1909 which banned private campaign contributions and gave each party 25 cents for each vote cast for its nominees for governor in the preceding election. *Colorado Session Laws*, c. 141 [1909] (repealed 1921). But in 1910, the state supreme court declared the law unconstitutional without written opinion. *People ex rel. State Chairman v. Galligan*. Bot-

it would totally eliminate the undue influence acquired by large campaign donors while removing the financial barriers to candidacy that now permit only the wealthy to run for election.

A partial step toward federal funding of campaigns was taken on December 10, 1971, when the Presidential Election Campaign Fund Act¹⁷⁹ was signed into law. This legislation—known as the tax checkoff—permits a taxpayer to designate one dollar of his annual income tax to be paid to a Presidential Election Campaign Fund. Candidates from major and minor parties would be able to receive payments from the Fund to conduct campaigns.¹⁸⁰ However, the law is not applicable until the 1976 election, and perhaps not even then. Payments into the Fund can be made only if money is appropriated by Congress; if no money is appropriated before the 1976 elections, no parties will receive payments. That is probably what will happen. President Nixon opposes the plan and has promised that it will never be implemented.¹⁸¹

Thus, new legislation will be required if partial or total federal financing of campaigns is to be initiated. Many politicians, however, sense that the public might not approve of federal financing. "The big question," observed Senator Pastore, "is whether the taxpayers of this country are willing to pay taxes to have every Tom, Dick and Harry run for every office that is up for election."¹⁸²

The taxpayers just might be willing.¹⁸³ According to one pro-

tomly, *Corrupt Practices in Political Campaigns*, 30 BOST. U.L. REV. 331, 380 (1950).

There is, however, a working American precedent in Puerto Rico. Candidates receive as much as \$150,000 in an election year from the government for campaign expenditures. A. HEARD, *supra* note 1, at 433.

179. Presidential Election Campaign Fund Act, 26 U.S.C.A. §§ 9001-9013 (Supp., 1973).

180. Major party candidates, defined as candidates of parties which received 25 percent of the popular vote in the preceding election, would receive considerably more than minor or new parties. *Id.* § 9004(a)(1-3).

181. See Wash. Post, Dec. 3, 1971, at 1, col. 8.

182. *Hearings on S. 382, supra* note 8, at 440 (statement of Sen. Pastore).

183. ". . . [t]here is enormous public feeling and recent surveys by the Roper and Gallup people show it, enormous distrust in the way in which we presently finance campaigns." *Id.* at 620 (statement of Prof. David Adamany).

After a recent airing of "The Advocates" television program, viewers were invited to send in their views on the issue in the form of votes. The audience responded to the following question: "Should the federal government subsidize all campaigns for federal office?" Responses were received from 2,708 persons, 76 percent of whom answered 'Yes.' *Id.* at 440.

ponent, the cost of funding a Presidential campaign and House and Senate campaigns in both primaries and general elections would be \$93 million annually, or about 69 cents per person of 18 or over in the United States.¹⁸⁴ For 69 cents a year, the taxpayer would receive the comfort that wealthy interests no longer have the opportunity to so directly influence legislators—and Presidents. The tendency of government officials might be to act in the public interest instead of for the monied interests. As Senator Philip Hart (D-Mich.) exclaimed after listening to a federal financing proposal at a Senate subcommittee hearing:

It is hard to understand what you have been saying, it is so foreign to our experience. But as I listen to you, it is precisely what we should do. Wouldn't it be great if you didn't have to have a single dime identifiable from any living being? It would be great for the incumbent, it would be great for the public. They might be just as stupid, but they wouldn't suspect venality. Why not try it?¹⁸⁵

Senator Hart's inclination to "try it" is not shared by his colleagues. As Senator Pastore remarked at the same hearings, the idea "is 10 years ahead of its time, at least."¹⁸⁶

Since total federal funding does not appear to be politically feasible,¹⁸⁷ reform efforts might be directed toward achieving partial federal funding. For instance, the federal government could provide matching grants to candidates, and, in so doing: (1) assist in minimizing the amounts candidates raise; and (2) encourage the development of small contributors. The federal government would match each contribution of \$50 or less, dollar-for-dollar, thereby providing candidates with incentives for raising funds from small contributors.¹⁸⁸ Such a plan would be a large step toward total financing of campaigns.

Total federal financing does pose problems. Will there be a drastic increase in the number of candidates for political office, simply because people would like to spend "free" money to advertise themselves?¹⁸⁹ Will candidates be able to spend more than opponents

184. *Id.* at 442.

185. *Id.* at 375.

186. *Id.*

187. *Id.*

188. Such a plan would enable the parties to continue to use fund raising as a means of developing interest in and support of the parties, and yet it would encourage specifically the *small* contributors.

189. The problem of sham candidates is one which is frequently alluded to

through hidden items, such as "volunteers" who are actually being paid by a large donor or corporation? These problems, however, are not as severe as those posed by the continuation of a system of campaign finance that places a premium on wealth and offers the rich an opportunity to purchase influence. Such problems will be resolved if and when public indignation over the existing campaign financing scandal transforms itself into pressure for change. Unfortunately, as one reformer wisely observed: "As a practical matter, no major election reform is likely in the absence of a 100-megaton campaign scandal."¹⁹⁰ The recent Watergate revelations have produced the 100-megaton scandal. Whether they will produce reform as well remains to be seen.

by opponents of free broadcast time or total subsidization of campaigns: "One thing that worries me about free time is that every lawyer who doesn't have much business on hand is going to be inclined to run for public office if he knows he can get free television coverage. By the nature of the profession, they can't advertise. If we provide free time where they can get up on a podium and get free television. [sic] Here, we are going to be attracting people to take demagog [sic] positions, or anything, to gain attention." *Hearings on H.R. 8627, supra* note 12, at 165 (statement of Rep. James Collins).

190. *Hearings on S. 382, supra* note 8, at 456 (statement of Philip Stern).

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