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COMMENT

DENVER LAW JOURNAL

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Member, National Conference of Law Reviews

The Law Journal is pleased to announce the election of the following editors for 1971: Michael D. Goldner, *Managing Editor;* Donald L. Cook, John A. Dates; Glenn T. Kray, David C. Miller, Richard E. Mishkin, *Editors;* Joseph R. Coyte, *Business Editor.*

From the Editor...

ONE of the most frequent criticisms leveled at law review articles is that they lack readability — they are either too turgid or too antiseptic. Subscribers are often heard to complain that the usual plethora of footnotes which every "quality" review is bound by tradition to print does not lend itself to the casual reader who wants to be informed but who does not want to be immersed in footnotes and legalese.

These types of criticisms, echoed in large part by the *Journal's* newly established Editorial Advisory Board, prompted the *Journal* Association to once again examine its publication policy. This reconsideration revealed that the *Denver Law Journal* has often been afraid of developing new formats and new approaches in presenting legal scholarship; that we have either consciously or unconsciously been bound by the "law review tradition;" and that on more than one occasion we have been guilty of contributing to what Fred Rodell of Yale has described as "the qualitatively moribound while quantitatively mushroom-like literature of the law." Being aware of these factors, the *Journal* has adopted a new publication policy.

The new policy is a compromise approach to the perennial problem of "what to print." On the one hand, it permits the *Journal* to continue publishing the traditional law review articles. While these kinds of articles are subjected to criticism as noted above, the *Journal* feels that they are nonetheless valuable contributions to legal learning and that their extensive documentation is of benefit to both legal academecians and practicing lawyers. On the other hand, the new publication policy allows the *Journal* to print scholarly articles which contain less documentation and which have a more casual style. The *Journal* feels it is important to develop an approach which will appeal to the lawman who has only a limited amount of time to read law review articles but who wants to consider new ideas and developments and to the layman who has only a slight knowledge of the formalities of the law but who wants to understand legal concepts such as due process.

To some extent, this new publication policy is reflected in this issue. The articles by Professors Donald Newman and Edgar NeMoyer, Professor John Reese, and Mr. Robert Benson are more traditional in format, offering new insights into complex legal problems and presenting the documentation which supports the observations and conclusions which are contained therein. Similarly, the student written case comment follows this more traditional approach.

The discussion on *voir dire* and the three student notes present the more casual approach. Relying on little documentation, these articles provide interesting and informative material which can be quickly read. Further, since the *Journal* is still experimenting with the kind of format which will most easily and beneficially lend itself to the casual reader, the articles in this issue present a variety of formats.

This change in publication policy marks yet another attempt by the *Journal* to broaden the scope of the publication and to expand the number of readers in various communities — both legal and non-legal — which the *Journal* serves. If you have comments, criticisms, or suggestions with respect to the new policy or any other aspect of the *Denver Law Journal*, we are most anxious to receive them so that we can continue to improve the quality of our product.

Michael G. Massey
Editor-in-Chief

DENVER LAW JOURNAL

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ISSUES OF PROPRIETY IN NEGOTIATED JUSTICE

BY DONALD J. NEWMAN* AND EDGAR C. NEMOYER**

Due in part to both the "Warren Court" and the public's conception of "law and order," a heightened interest in the field of criminal justice has recently emerged. One of the chief concerns arising from this increased interest is the propriety of plea bargaining — a practice that is probably the dominant form of non-trial adjudication in our system of criminal justice today. Professors Newman and NeMoyer discuss this practice of negotiated justice from many different perspectives. The authors accurately pinpoint the many present and potential abuses of the practice which have been justly condemned by critical observers of the criminal justice system. The authors do, however, feel that a compromise can be reached that not only will retain this admittedly efficient practice but also will solve the serious propriety concerns that now cloud the practice of negotiated justice. If the state removes the practice from the shadows within which it now operates and bases its charge and sentence concessions on the proper motivations, the authors feel that the practice of plea bargaining can continue and survive.

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INTRODUCTION

NEGOTIATED criminal convictions and the processes by which they are accomplished have recently received increased attention by courts, researchers, bar associations, and other observers of and commentators on the criminal justice system.[1] What has emerged from the research and from the kinds of cases which have reached appellate

[1] Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Pleas of Guilty* (approved draft, 1968) [hereinafter cited as ABA PROJECT]; L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE, 924-1000 (3d ed. 1969); D. NEWMAN, CONVICTION-THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) [hereinafter cited as D. NEWMAN]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, *Disposition Without Trial* (1967) [hereinafter cited as TASK FORCE REPORT].

court levels is a picture of American courtroom justice which is substantially different from that of the adversary process epitomized by the jury trial. Although the guilty plea process in general, and the negotiated plea in particular, are highly adversary processes in many cases, they operate in a manner that is *sub rosa,* largely invisible, and without the ground rules that place constraints on the formal battle of contested cases in the courtroom. The great issues and conflicts in modern American criminal law, ranging from the *Miranda* warnings to disputes over different tests of insanity, are rendered largely irrelevant by guilty pleas. Ironically, the significance of the leading criminal decisions of the Warren court may be primarily the extent to which their possible application can be threatened by a defendant attempting to reach a compromise with the State.

Plea negotiation has long been familiar to initiates of the criminal court: an elite, if you will, made up of offenders (particularly recidivists who have gone the route before), prosecuting attorneys, experienced defense counsel, and trial court judges. And the army of court attendants — clerks, bailiffs, jailers, police, and probation staff — also have been cognizant of plea negotiation in practice if not in theory. Recently, however, the world of the negotiated plea has come to the awareness of outsiders, including legal scholars, appellate court judges, sociologists, and various bar commissions and committees. This is not to say that such practices were unknown to these persons, but rather that these practices were not attended to directly and frankly or considered to be of any particular major consequence.

Yet the guilty plea, particularly where it is overtly negotiated, describes a form of criminal justice that may well be the dominant form of adjudication in virtually all jurisdictions.[2] Negotiated justice — suspects and defendants "dealing" with the state — has wide perimeters; including such practices as police exercising leniency with informants, parole board "negotiating" releases with prisoners, and probation and parole officers bargaining with their charges where revocation is possible.[3] Yet, the focus of negotiated justice and its major impact on our ideological foundations occurs at stages where

[2] ABA PROJECT, *supra* note 1, at 1, states that "in some localities as many as 95 percent of the criminal cases are disposed of in this way [pleas of guilty]"; TASK FORCE REPORT, *supra* note 1, at 9, indicates a guilty plea percentage of 87 percent in trial courts of general jurisdiction in states in which such information was available.

[3] For a general treatment of negotiation at points other than the plea of guilty see Cressey, *Negotiated Justice,* 5 CRIMINOLOGICA 5 (1968), and Scheff, *Negotiated Reality: Notes on Power in the Assessment of Responsibility,* 16 SOCIAL PROBLEMS 3 (1968). For a descriptive analysis of factors relevant to the granting or denial of parole see Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 U. WASH. L.Q. 243-85; and for an analysis of revocation discretion, see Hunt, The Revocation Decision: A Study of Probation and Parole Agents Discretion, 1964 (unpublished MSW thesis, University of Wisconsin), *partly reproduced in* REMINGTON, NEWMAN, KIMBALL, MELLI & GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION 912-19 (1969).

the prosecutor and the court are involved and where the citizen becomes the convicted offender. The protections of the criminal trial are, after all, one of our cultural hallmarks, and the propriety of bargaining for pleas of guilty where the right to trial is given up raises important questions, questions which go to the very underpinnings of criminal justice in our society.

I. THE PURPOSES OF NEGOTIATED PLEAS

Since there has been much recently written about this topic, it is perhaps unnecessary to go into great detail about the relative merits of guilty plea contracts for both the state and the accused. It is sufficient to emphasize that from the point of view of the state, the guilty plea system is by far the most efficient way of achieving and maintaining a high conviction rate. It is quick, cheap, and relatively effortless. Furthermore, it is effective in the sense that it assures conviction, a result that is always uncertain at trial no matter how carefully the state's case is prepared. Whether it is effective in larger perspective, *i.e.*, the successful rehabilitation of offenders who are so convicted, is another matter, the answer to which is not quite so clear.

For example, it has been claimed that a long range effect of bargain justice is cynicism, not reform, and that it leads to sentence disparity, not uniform treatment.[4] But from the point of view of the state, the guilty plea, whether it is negotiated or not, avoids all the sticky questions of law that have so recently confronted the Supreme Court. In most jurisdictions the plea is a waiver of all prior defects: There is no test of whether a search was legal or illegal; there is no test of whether the *Miranda* warning was properly given; and there is no test of whether the evidence gathered by the state even proves a prima facie case of guilt against the defendant, unless there is a pre-trial (pre-plea here) hearing. In most jurisdictions permitting the guilty plea, the police, the prosecutor, and, at least until the present time, the trial judge, are generally off the hook.[5]

It is important to note, however, that the advantages of the guilty plea to the state are not simply matters of efficiency and avoidance

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[4] *See* Dash, *Cracks in the Foundation of Criminal Justice,* 46 ILL. L. REV. 385 (1951). *See also* Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice,* 23 LAW & CONTEMP. PROB. 495 (1958); Remington & Newman, *The Highland Park Institute on Sentence Disparity,* 26 FED. PROB. 3 (March 1962); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence,* 66 YALE L.J. 204, 222 (1956). *See generally* Seminar and Institute on Disparity of Sentences, 30 F.R.D. 401 (1962); D. NEWMAN, *supra* note 1, at 42-44, 99-104, 210-16, 230.

[5] The chance of successfully challenging a guilty plea by appeal has traditionally been extremely remote, but today the number of potential successes of such appeals may be on the increase. *See generally* Kaufman v. United States, 394 U.S. 217 (1969); Case v. Nebraska, 381 U.S. 336 (1965); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); L. HALL, *supra* note 1, at 12; C. WRIGHT, FEDERAL PRACTICE & PROCEDURE (CRIMINAL) §§ 589-91 (1969).

of any challenge to enforcement methods and the quantum of evidence. There is potentially in every plea an element of equity that full prosecution, maximum charging, and maximum sentencing after a trial may preclude. By downgrading charges and/or by granting probation, the conscientious prosecutor and judge may act to individualize justice by making sensible distinctions between defendants who, although technically guilty of the same criminal conduct, do not deserve either the same record or the same mandatory sentence. Furthermore, plea negotiation and sentencing leniency act to support other parts of the criminal justice system. Leniency in charging or sentencing may be an effective reward for police informers or for cooperative state's witnesses without whom more serious cases could not be developed. Charge reduction and plea negotiation *may* select for the probation staff those offenders most likely to respond to treatment in the community, whereas full enforcement and maximum conviction might put inappropriate offenders in correctional institutions to their long-range detriment and at great loss to their families and the community at large. In short, the avoidance of rigidity and slot-machine justice — in addition to matters of efficiency and the avoidance of challenge to enforcement methods and quantum of evidence — constitute at least one side of the state's case in plea negotiation.

The advantages of plea negotiation from the point of view of the defendant are, of course, reasonably obvious. He receives a sentence less severe than that allocated by the legislature for his actual criminal conduct. Or, and this is a factor of independent importance, he may receive a label that is neither as harsh nor as damaging as that which would normally attach to his conduct. Having a record of conviction for a misdemeanor is almost always better than having a felony record; likewise, conviction for assault has a somewhat less negative connotation that conviction for forcible rape. Furthermore, the defendant and his family sometimes benefit or at least suffer minimum reputational harm from the relative anonymity of the guilty plea process. A defendant who goes through a trial, even if he is eventually acquitted, often finds details of his private life and allegations of his criminal proclivities spread daily throughout his community. The guilty plea, however, is quick and generally not as newsworthy as the full-scale trial where all the evidence is laid out, the case of Senator Edward Kennedy notwithstanding.

Certain defendants, particularly those who have long prior records or who otherwise are not able or eligible to be placed on bail, have still another advantage in "copping-out." The long but customary delay in scheduling trial in most jurisdictions means that these persons will

spend a relatively long period of time in detention pending trial,[6] and most offenders with any prior experience prefer to do time in a prison (a facility for convicted persons) rather than in a lock-up or jail (a facility for persons awaiting trial). Hence, where the possibility of an eventual prison sentence is fairly likely anyway, a quick arraignment and a guilty plea will move the defendant rather rapidly from the jail into the prison environment which, on the average, is more comfortable, cleaner, safer, and less given to the long weeks of idleness, characteristic of pre-trial lock-ups.

A point often overlooked is the possible benefit of wide-spread plea bargaining to those defendants who now elect to stand trial. Should plea negotiation be somehow curtailed, with a corresponding increase in the number of trials, it could well have the effect of judges and juries taking a more cavalier attitude towards the rights of defendants. A flood of trials, particularly with a greater likelihood of guilty persons demanding them since they gain nothing by a guilty plea, could well erode the presumption of innocence which is stronger if the event, namely a demand for trial, is comparatively rare.

II. TYPES OF PLEA NEGOTIATION

There are at least two major forms of plea negotiations whose propriety is of current concern. One type, the "implicit bargain," is present in practically all guilty pleas and has to do with differential sentencing leniency shown to the pleader over the defendant (perhaps with the same prior record and accused of the same crime) who has demanded trial. The pervasiveness of this practice is clear[7] and amounts to encouraging a steady flow of guilty pleas, reducing the congestion of trial calendars in metropolitan areas, and in each case, rural or urban, avoiding the effort and uncertainty of trial.

Trial judges are the chief proponents and often the sole initiates of such practices.[8] In the ordinary case the defendant has not overtly made any bargain with the prosecutor or the court but has entered his plea in hope of a sentencing break. In effect, he throws himself on the

[6] For the impact on defendants and the subsequent outcome of their cases, see Ares & Sturz, *Bail and the Indigent Accused*, 8 CRIM. & DEL. 12 (1962); LaFave, *Alternatives to the Present Bail System*, 1965 U. ILL. L. FORUM 8; Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109 (1966); Rankin, *The Effect of Pre-trial Detention*, 39 N.Y.U.L. REV. 641 (1964); Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958).

[7] CROSS, PARADOXES IN PRISON SENTENCES, 22-24 (1965); LUMMUS, THE TRIAL JUDGE (1937); D. NEWMAN, *supra* note 1, ch.4; Ohlin & Remington, *supra* note 4, at 500-07; Pilot Institute on Sentencing, 26 F.R.D. 231, 285-89 (1959); *see* Comment, *supra* note 4.

[8] While trial judges in the past have often been the sole initiates of "implicit" plea negotiation, recent legislative developments have added a new and not yet fully understood dimension to this process. Laws have been passed which provide for differing sentence alternatives, depending on whether the conviction was obtained by a full scale trial or a plea of guilty. This "implicit" plea negotiation on the part of the legislature raises not only propriety questions but also constitutional issues of the highest order. *See* § III (B) *infra*.

mercy of the court; and the court, fully attuned to its own workload and faced with the inevitable uncertainty of any trial, responds by showing mercy of a greater measurable extent to those who plead than to those who are convicted following a full-scale trial.

The other major type of bargaining and the one most commonly alluded to when the negotiated plea is discussed involves the overt trading of the guilty plea for prior concessions of charge reduction, dismissals of other charges, or sentence recommendations for leniency from the state.

Both types of negotiation, implicit and overt, have significant implications for the daily administration of criminal justice. Moreover, each raises important questions of propriety.

III. Concern For the Propriety of Plea Negotiation

The guilty plea process, including both the implicit bargain and the practice of negotiated convictions, can be evaluated from a number of different perspectives. Few deny the efficiency of guilty pleas; some are bothered about their possible inaccuracy. That is, there is some concern that the administrative merits of pleading guilty are so attractive to some defendants, particularly to those who have been convicted previously, that innocent people will admit to crimes they did not in fact commit. This is one level of concern, and various states (as well as the U.S. Supreme Court) have revised rules in regard to pleading procedure.[9] Some have attempted to build certain safeguards into the arraignment proceeding, such as requiring the judge, prior to his acceptance of the plea, to investigate to the point where he becomes satisfied in his own mind that the defendant is in fact guilty of the crime charged or, assuming charge reduction, guilty of no crime *less* serious than the one to which he is pleading.[10]

Another basic concern with pleas and plea negotiation, however, does not relate specifically to whether they accurately separate the guilty from the innocent but to whether attendant practices of differential sentencing and overt bargaining for charge reduction are proper forms of justice per se. Even if it were demonstrated that all defendants who pleaded guilty were in fact guilty of criminal conduct, an independent question of the propriety of bargaining to elicit pleas remains. The issue becomes sharply drawn between those who see no distinction between inducement and coercion in negating the voluntary consent of the defendant to plead guilty and those who do see a difference.

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[9] For example, Fed. R. Crim. P. 11, as amended in 1966 requires the judge to address the defendant personally to determine if the plea is being made voluntarily and the defendant understands the consequences of his plea. It also requires the judge to satisfy himself that there is a factual basis for the plea of guilty. *See* 15 Ala. Code Tit. § 264 (1958); Va. Code Annot. §§ 19.1-192, 19.1-193 (1960).

[10] *See also* ABA Project, *supra* note 1, § 1.6.

A. *The Conflict and Its Advocates*

The basis of the conflict extends throughout the entire system of criminal justice. There are many devices and techniques for obtaining confessions which are considered improper *per se*, even if independent evidence proves the person guilty of the criminal conduct. For example, coercion or threat of coercion — the third degree — is repugnant in our ideology not only because it may lead to untrustworthy confessions, but because such brutality is intrinsically improper in a democratic society. There are, in short, enforcement procedures and techniques which, as Justice Frankfurter put it, "shock the conscience;"[11] and some, at least, are excluded on due process as well as other constitutional grounds from our law enforcement techniques. There is, however, no specific list of totally improper, as distinguished from wholly proper, enforcement methods or devices. There is a good deal of controversy and conflict about many techniques. For example, in the encouragement of crime by police (the behavior precursive to the inducement of entrapment), the majority position of most appellate courts permits such encouragement unless the police act to induce crime in an otherwise "innocent" defendant.[12] The minority position[13] is that police encouragement of crime, even in those who are not "innocent," is in itself repugnant. Questions of propriety extend to post conviction and post sentencing treatment of offenders as well and are not limited solely to eighth amendment matters of cruel or unusual punishment. There appears to be increasing awareness of prisoners' rights, including requirements for at least some degree of procedural regularity and due process in those decisions made about prisoners while under sentence.[14]

The same propriety issue is now clearly drawn in respect to inducement of pleas of guilty, either by means of traditional leniency given for the plea itself or as a result of a deal after overt bargaining. The propriety question about plea negotiation, as at many other points in the process, is whether an *inducement*-based system is any more proper than one which rests on *coercion,* which is clearly contrary to our system of government. Is a promise by a prosecutor to "recommend" probation really any different from a threat to "throw the book" at a defendant

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[11] Rochin v. California, 342 U.S. 165, 172 (1952).

[12] The majority position is stated in Sorrells v. United States, 287 U.S. 435 (1932) and also incorporated in the ALI MODEL PENAL CODE § 2.13 (proposed official draft, 1962).

[13] The minority position was stated by Justice Frankfurter in his concurring opinion in Sherman v. United States, 356 U.S. 369 (1958).

[14] Johnson v. Avery, 393 U.S. 483 (1969); United States v. Muniz, 374 U.S. 150 (1963); Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964). *See* Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted,* 45 NEB. L. REV. 669 (1966); Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response,* 14 CRIM. & DEL. 1 (1968); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CORRECTIONS, *The Legal Status of Convicted Persons,* 82 (1967); Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962).

if he pleads not guilty? Is the dropping of a charge in an indictment to a lesser count, particularly to an "illogical" lesser offense,[15] in exchange for a guilty plea a proper practice when the prosecutor, court, and defendant know that the defendant committed a more serious crime and that the evidence in fact supports conviction on the higher offense?

While as yet there are only a few identifiable members and spokesmen among those who propose and those who oppose plea bargaining, perhaps this is because it is a new conflict, relatively speaking, litigated only rarely on the appellate court level, not yet spoken to directly by the United States Supreme Court, and only recently the focus of scholarly attention. The array of opponents versus proponents, the extensiveness of case law on both sides of the issue, and well articulated arguments for or against such practices are by no means as common nor easily available as similar debates about more familiar criminal justice concerns, such as wiretapping, the consequences of the exclusionary rule, or the effects of the *Miranda* warnings. Nevertheless, battle lines about the propriety of plea negotiation are being drawn, and it might reasonably be expected to become a more common basis of dispute as more cases reach higher courts and more data is accumulated. With the vast majority of criminal cases being terminated today by guilty pleas,[16] it is an issue, the importance of which, cannot be denied.

Debate over the propriety of plea negotiation rests upon multiple considerations, but the major conflict is between those who advocate recognition (and possible control) of plea negotiation on the grounds of expediency and those who see it as a distortion of our criminal justice ideology. In the latter viewpoint, plea negotiation is intrinsically improper and, furthermore, is dangerous and corrupting in its eventual consequences. The argument that plea bargaining is efficient, even "necessary," carries no weight against the fundamental impropriety of the state "dealing" with criminals by inducing pleas.

Those who take the opposite tack, namely that such dealing is not *necessarily* improper, rest their case in good part on the administrative realities of current adjudication practices. In fact, they argue that the "sociology" of our criminal justice world makes negotiation — expressed or implicit — normative. There is good evidence that negotiation is widespread and there are many who claim that without it the criminal justice system would simply bog down (the assumption being that many more trials would result — a researchable assumption in itself).[17] Assuming this bog down and accepting negotiated justice as not simply

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[15] For a discussion of "illogical" charges, see D. NEWMAN, *supra* note 1 at 99-104.

[16] *See* note 2 *supra.*

[17] LUMMUS, THE TRIAL JUDGE 46-47 (1937); Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense,* 7 PRAC. LAW. 25, 31 (May 1961). *See also* United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).

a minor variation of American justice but a major characteristic of it, the argument goes that independent considerations of propriety are not only irrelevant but are really ridiculous. The thing to do is get with it, to recognize plea bargaining, to legitimatize the norm, to make visible what is now an invisible process, and, in short, to bring into the open, with appropriate sanctions and controls, what are presently common and indeed inevitable practices no matter how much they deviate from the hypothetical postures of our criminal justice ideals.

From this pragmatic perspective, it can be argued that the only thing bad about plea bargaining is that it is *sub rose* and uncontrolled. It is not really corruptive like bribery, nor should it act to convict the innocent or even to harm the guilty. In fact, the leniency of plea bargaining benefits both the state and the accused, and no one is threatened or hurt. Therefore, as with many conflicts between ideal and real, one can resolve the dilemma by simply recognizing the way things are and attempting to exert *proper* control over it.

Further, it can be argued that there is really nothing wrong in such an approach. Who is to say that full enforcement, maximum charging, and the full dress trial system are any better, fairer, more just, or more accurate than the system of plea negotiation as it operates in most district attorneys' offices and courtroom hallways? Indeed, perhaps it can be demonstrated that the negotiation system is in many ways more equitable and more just than its maximum implementation counterpart. Legislatures which define crimes and affix penalties to them are necessarily distant from individual defendants; and, by the nature of their tasks, they find it necessary to generalize, so that underlying the sentences in written law is the implicit assumption that all burglars are pretty much alike. Any distinctions between cases can be accommodated by whatever sentencing discretion is given the trial judge. Legislatures deal with offense and offender categories and not individual violators. They forbid forcible rape and assign a penalty to an anonymous collection of persons who may in fact be convictable of that crime. Prosecuting attorneys and judges, however, deal not in abstractions but with individual people and with single cases, all with a myriad of aggravating and mitigating circumstances. The flexibility created by charge reduction and sentencing leniency allows, or can allow, the system to operate more equitably.

The supporters of plea agreement practices generally argue control as strongly as recognition. Negotiation must be made visible, be circumscribed, and be made to follow certain practices and procedures as well as to serve the efficiency needs of the court system. There are, of course, inherent dangers in the exercise of negotiation discretion just as there are inherent dangers in any type of administrative decisionmaking. The line between the use of charge reduction to individualize justice

and the use of charge reduction to perpetuate racial or economic bias is a fine one, and one that is not tested or testable as long as the practice remains relatively invisible to the general public, higher courts, and the legislature itself. Formal recognition of the propriety of plea negotiation and close adherence to guidelines for its practice will, it is assumed, provide necessary checks on unbridled, and possibly bad, adjudicatory discretion. Supporters of recognizing and tolerating (indeed encouraging) plea agreements inevitably see distinctions between proper and improper plea negotiation practices.

It might be worth noting at this point that the dichotomous categories for opposition or support of plea negotiation are not as readily amenable to the standard labels which commonly become attached to certain other criminal justice issues. In short, it is not necessarily a battle between "liberals" and "conservatives", nor is it necessarily a dispute between pragmatists and purists. There are strange bedfellows on each side of the debate over the propriety of negotiated justice. This is not to say that the positions cannot be categorized: One is clearly pragmatically oriented and the other more idealistic. But even here the distinction is not perfectly clear cut. For example, one who argues that plea bargaining is normative, functional, efficient, and perhaps impossible to eliminate could easily be labeled pragmatic. At the same time, he may intersperse within his position the argument that within our system of justice this is the only way that equity and fairness can be built into what would otherwise be a sort of strict construction, slot-machine administration of justice. To this extent, he is idealistic. He sees plea bargaining as just, even though it deviates from some commonly expressed sentiments about conviction based on fully tested evidence which has resulted from maximum enforcement efforts, full charging, and strict adherence to the legislative intent that proscribes certain conduct and affixes certain sentences.

On the other hand, the so-called purist says, in effect, that the only proper form of justice is compliance with the legislative authority that defines substantive criminal conduct and appropriate limits of sentence. Such compliance involves a moral obligation placed on the court to be simply a fact-finder on charges accurately brought by the prosecutor — that is, charges consistent with the actual criminal conduct of the violator and supported by sufficient and appropriately obtained evidence. Although this form of strict construction appears based on an idealized image of the relationship of legislature and court, the proponent may have some pragmatic motivations. He may see the ultimate consequences of plea negotiation as developing cynicism and disrespect for law not only among those offenders who are processed by bargain justice but also among the general public. Furthermore, while disdaining plea negotiation as intrinsically corruptive, he may at the same time point

out that one of the negative consequences of differential bargaining opportunities is sentence disparity which, in turn, has serious implications for the rehabilitative efforts of correctional facilities.[18] Starting from a posture expressed in idealistic terms, *i.e.,* plea negotiation is intrinsically bad, such arguments may rapidly incorporate the negative pragmatic effects of bargaining on the long-range consequences of our system of criminal justice, both in terms of those processed through it and the image it presents to the general public.

The issue of propriety of negotiation practices cannot be resolved simply by claiming a basis of kindness and the individualization of justice any more than it can be resolved on the basis of efficiency. In and of itself, the issue remains tenacious, plaguing and somewhat unsettling in a broad view of our system of criminal justice. No matter how efficient and no matter how benevolently intended, there seems somehow to be something wrong with labeling (and sentencing) a person as a burglar or petty thief when that person is, in fact, guilty of armed robbery. Inaccurate labeling and lenient sentencing are the issues, and the hangups, that are currently confronting courts, scholars, and other observers of our system of justice.

The American Bar Association, through its Committee on Minimum Standards for Criminal Justice, has attempted to resolve the dilemma of plea bargaining. In its model draft of standards relating to *Pleas of Guilty* the committee recognized the propriety of the plea agreements:

> In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in Section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.[19]

And the committee attempted to control such bargaining by: (1) providing that "similarly situated defendants" be given equal plea bargaining opportunities;[20] (2) forbidding the trial judge from participating in initial plea discussions;[21] (3) providing bargaining only with and through defense counsel;[22] and (4) requiring the trial judge to make an explanation in the formal record of the arraignment if he departs

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[18] It is one thing for correction administrators to cope with individuals sentenced by different judges to different lengths of time for committing the same crimes; but it becomes an even more complicated and difficult thing to deal with persons under sentence when some, actually guilty of armed robbery, are serving a term for burglary whereas others, guilty of armed robbery, are serving longer terms for convictions as charged. *See generally* D. NEWMAN, *supra* note 1 at 43, 215, 230.

[19] ABA PROJECT, *supra* note 1, § 3.1(a).

[20] *Id.* § 3.1(c).

[21] *Id.* § 3.3(a).

[22] *Id.* § 3.1(a).

from previously agreed upon concessions between prosecution and defense.[23]

While the ABA Committee goes a long way toward solving the propriety issue by at least recognizing and attempting to control the practice, the issue is by no means completely settled. Because of the complexity of the process and the concerns that surround it, an examination of the specific types of plea bargaining and how they relate to the propriety issue is in order.

B. *The Propriety of "Implicit" Plea Negotiation*

An issue which has come to the forefront of judicial debate is whether or not it is proper for a trial court judge to impose a more lenient sentence on a defendant who pleads guilty than on a counterpart who is convicted after a full trial. The argument for this practice (and there is ample evidence to show that it is common[24]) is usually stated in the negative — that is, the confessing and pleading defendant is given leniency — rather than the reverse — that the defendant who demanded trial was treated more harshly. There is a sound basis for stating the issue in this manner. Judges who have threatened defendants with long prison sentences unless they pleaded guilty have had the convictions reversed and, in the process, have been chastized by appellate courts for having "coerced" the guilty plea by threats of severity.[25] The more subtle framing of the commonly stated position today is not that a defendant who demands his full constitutional rights to a trial is treated severely simply because of the effort and cost of the trial, but rather that the defendant who has "cooperated" and by his plea of guilty has shown "repentence" is a more deserving candidate for leniency.[26] Since, in any event, the maximum term imposed on the defendant convicted after trial is within statutory authorization, the practice of differential leniency falls, with some exceptions, clearly within established judicial sentencing discretion to distinguish between defendants in dispersing sentences. There is then supposedly no threat to or added punishment for the defendant who demands trial; there is merely a break for the person who has "thrown himself on the mercy of the court."

However, there seem to be clear exceptions to this rationale when dealing with "legislative plea bargaining," *i.e.*, when the legislature

[23] *Id.* § 3.3(b).

[24] *See* note 7 *supra.*

[25] Euziere v. United States, 249 F.2d 293 (10th Cir. 1957); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963), *remanded for retrial,* 377 U.S. 463 (1964). *But see* Kent v. United States, 272 F.2d 795 (1st Cir. 1959), where threats of a prosecutor were considered insufficient to void conviction by plea. *See also* Comment, *The Coerced Confession Cases in Search of a Rationale,* 31 U. CHI. L. REV. 313 (1964).

[26] *See, e.g.,* People v. Darrah, 33 Ill. App. 2d 175, 210 N.E. 2d 478 (1965); Pilot Institute on Sentencing, *supra* note 7; King, *Criminal Procedure from the Viewpoint of the Trial Judge,* 25 CONN. B. J. 202, 205 (1951); Comment, *supra* note 4, at 209-10 (1956).

provides for the possibility of a higher penalty upon conviction after a full trial than upon conviction by a plea of guilty. This becomes a very serious and complex matter in cases where conviction after trial could result in a death sentence but where such penalty is not statutorily permitted if the defendant is convicted by a plea of guilty. The United States Supreme Court in *U.S. v. Jackson,*[27] held invalid the death penalty provision of such a statutory arrangement. In striking down the provision, Justice Stewart noted that "[t]he inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. . . . Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[28] Stewart went on to say:

> It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.[29]

Subsequently, two cases (each involving defendants who were convicted before the *Jackson* decision) reached the Court in which the appellants claimed that their respective guilty pleas were invalid because they were coerced by fear of the death penalty which could be imposed if they chose to plead not guilty and were convicted. However, in both cases, *Parker v. North Carolina*[30] and *Brady v. United States,*[31] the Court held the pleas to be valid. In an opinion that discussed at length the *Jackson* decision, the Court distinguished these pleas on the basis of other evidence that, in the Court's opinion, rendered these pleas voluntary despite the legislative punishment scheme. It seems the "impermissible burden" referred to in *Jackson* was not enough to invalidate the otherwise voluntary pleas of Parker and Brady. The Court in *Brady* commented:

> A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.[32]

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[27] 390 U.S. 570 (1968).
[28] *Id.* at 581, 582.
[29] *Id.* at 583.
[30] 397 U.S. 790, (1970).
[31] 397 U.S. 742, (1970).
[32] *Id.* at 753.

In combined dissenting (to *Parker*) and concurring (with *Brady*) opinions, however, Mr. Justice Brennen, commenting on plea bargaining as it applies to the situation in *Jackson, Parker* and *Brady,* wrote:

> The Court attempts to submerge the issue of voluntariness of a plea under an unconstitutional capital punishment scheme in a general discussion of the pressures upon defendants to plead guilty which are said to arise from, *inter alia,* the venerable institution of plea bargaining. The argument appears to reduce to this: because the accused cannot be insulated from *all* inducements to plead guilty, it follows that he should be shielded from *none.*
>
> The principal flaw in the Court's discourse on plea bargaining, however, is that it is, at best, only marginally relevant to the precise issues before us. There are critical distinctions between plea bargaining as commonly practiced and the situation presently under consideration — distinctions which, in constitutional terms, make a difference. Thus, whatever the merit, if any, of the constitutional objections of plea bargaining generally, those issues are not presently before us.
>
> We are dealing here with the legislative imposition of a markedly more severe penalty if a defendant asserts his right to jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power. No such flexibility is built into the capital penalty scheme where the government's harsh terms with respect to punishment are stated in unalterable form.[33]

Apart from death penalty cases, there is some evidence to show that this practice of differential leniency is supported by many trial judges. For example, the *Yale Law Journal* sent a questionnaire inquiring about the plea-leniency relationship to all 240 federal judges and received responses from 140 of them. Sixty-six percent of the respondents considered the defendant's plea "a relevant factor in local sentencing procedure," and the majority of them rewarded the defendant pleading guilty with a less severe sentence than his counterpart who had trial.[34] At a number of judicial sentencing institutes, particularly among federal judges, the issue of whether the guilty plea, in and of itself, should have independent significance in sentence determinations was considered. The majority viewpoint at one such conference was that the guilty plea should be considered a factor in showing leniency for a number of different reasons:[35] (1) state costs are saved by the guilty plea; (2) the chance of jury acquittal is waived by the pleading defendant, thus assuring conviction of the guilty; (3) it is necessary to encourage the practice of pleading guilty in order to efficiently process ever-increasing numbers of criminal cases; (4) "the realization of wrong-doing," evidenced by the pleading defendant, was seen as a "step toward rehabilitation" and not as a position exhibited by one

[33] 397 U.S. 790, 808-09 (1970) (emphasis by the Court).

[34] Comment, *supra* note 4, at 222.

[35] Pilot Institute on Sentencing, *supra* note 7, at 287-89.

who stood trial and who, in fact, may have perjured himself if he took the stand in his own defense and was convicted anyway.

This was not the only position taken by sentencing judges. Some said that it was simply wrong to penalize the defendant who exercised his constitutional rights to a trial as against one who waived that right. Their argument was that differential leniency, no matter how rationalized, had this effect. There was also a middle of the road position which based the propriety issue on whether or not the defendant who demanded trial entered a reasonable or a frivolous defense. If his defense were frivolous, then it was agreed that differential sentencing was proper; but if his defense were reasonable, then it was thought that he should receive a sentence no more severe than his counterpart who pleaded guilty.[36] After the conference a committee of judges composed what it called a "Decalogue of Sentencing," and one of the points made therein was the following:

> That the court is justified in giving a lesser sentence upon a plea of guilty than it would give on a plea of not guilty, upon conviction for the same offense after a trial in which the testimony of the accused is proved to be false or in which there is some other circumstance chargeable to the accused evincing a lack of good faith.[37]

One of the difficulties of getting at the propriety issue which may be inherent in differential sentencing leniency is that the practice is virtually invisible. There is no overt negotiation nor claim of it. If the person who has had trial is sentenced within proper statutory bounds, there is no cruel or unusual punishment issue involved. Since judges rarely explain such differences, equal protection arguments are hard to make.

However, a rather interesting case occurred some years ago in the United States Court of Appeals for the Seventh Circuit.[38] In this case, there were four codefendants involved in a crime, three of whom pleaded guilty; the other, Wiley, demanded trial. The defendant, Wiley, who was tried and convicted, had on the record at least, a less serious criminal background than any of his codefendants. Furthermore, his part in the crime was peripheral (he was the driver of a car) compared with his partners. However, he not only received a more severe sentence than any of his three codefendants, but the judge made it clear that the sentence was longer because he had asked for a trial. Indeed, the defendant had requested consideration of probation, but the judge stated that it was his "standing policy" to refuse probation to defendants who demanded trial.[39] In fact, he went on to say that had the defendant demanded a jury trial instead of a bench trial, his sentence probably

[36] *Id.* at 287.

[37] *Id.* at 379-80.

[38] United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[39] United States v. Wiley, 267 F.2d 453, 455 (7th Cir. 1959).

would have been even longer.[40] On appeal Wiley contended that it was error for the judge to preclude probation following trial, and the court of appeals agreed, remanding the cause for consideration of probation.[41] Then the trial judge held a hearing and denied probation; Wiley again appealed.[42] On this appeal the court of appeals threw out the sentence because the trial judge had punished the defendant for exercising, in good faith, his right to a trial.[43]

In a recent case reaching the United States Court of Appeals for the District of Columbia,[44] the propriety of plea concessions was again raised in a complicated case in which there was both overt plea negotiation and the separate issue of differential leniency shown to a pleading defendant where there was no prior agreement in this regard. In this particular case a defendant named Scott was convicted after trial for robbery and sentenced to prison for a term of five to fifteen years. A codefendant changed his plea to guilty at the completion of the government's case. The appellate court found the conviction of Scott free from error but took under consideration the events surrounding his sentencing, eventually affirming the conviction but remanding the case for resentencing.[45] The issues which gave the court pause in the sentencing procedure involved, among other things, the statement of the trial judge to Scott: " 'Now the Court didn't believe your story on the stand, the Court believes you deliberately lied in this case. If you had pleaded guilty to this offense, I might have been more lenient with you.' "[46] At this point the case looks quite similar to the issue in the *Wiley* case. However, the circuit court noted that a new tangent to the issue was raised when, during the sentencing hearing, the trial judge read a letter submitted by the appellant. The letter was from the appellant's attorney to the appellant, and it referred to a discussion the lawyer had had with the judge's law clerk. In the letter the attorney reported that in the clerk's opinion "there was only one way to get a light sentence from Judge _____ and that was to confess that you did the robbery, to apologize four or five times and to say that you were willing to turn over a new leaf."[47] The clerk was then called to the witness stand by the trial judge and stated: "It has always been

[40] *Id.* at 458.

[41] United States v. Wiley, 267 F.2d 453 (7th Cir. 1959).

[42] United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[43] *Id.* at 504. On remand, the trial judge stated that he had information outside the record which indicated that the criminal background of the defendant in question was actually more known than the evidence in the official documents showed. At resentencing, he again imposed a three-year sentence on the defendant but, bowing to the mandate of the Court of Appeals, suspended execution of the sentence. United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).

[44] Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

[45] *Id.*

[46] *Id.* at 267.

[47] *Id.*

my opinion that you view sentencing differently when someone admits guilt than maintaining innocence."[48] The circuit court noted that the judge himself then reacted to these issues by saying: "I hope sometime I hear some defendant say, 'Judge, I am sorry, I am sorry for what I did.' That is what I have in mind."[49]

In analyzing the issues involved in this particular sentencing, Judge Bazelon of the D.C. Circuit Court, who wrote the majority opinion, stated:

> The Supreme Court has offered little guidance concerning which constitutional rights can tolerate some chilling effects and which cannot. Perhaps the right to a trial, like the self-incrimination privilege but apparently unlike the right to a jury, belongs in the latter camp. But until the Supreme Court speaks, the practice of differential sentencing should be evaluated with some attention paid to the nature of the price extracted from those who plead innocent and why it is exacted.
>
> Two arguments inevitably appear whenever differential sentencing is discussed. The first is that the defendant's choice of plea shows whether he recognizes and repents his crime. One difficulty with this argument is that no court or commentator has explained why a defendant's insistence upon his self-incrimination privilege is not also evidence of a lack of repentence. Or his insistence that evidence unconstitutionally seized should not be admitted.
>
> Repentence has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentence comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.
>
> There is a tension between the right of the accused to assert his innocence and the interest of society in his repentence. But we could consider resolving this conflict in favor of the latter interest only if trial offered an unparalleled opportunity to test the repentence of the accused. It does not. There is other, and better, evidence of such repentence. The sort of information collected in presentence reports provides a far more finely brushed portrait of the man than do a few hours or days at trial. And the offender while on probation or in prison after trial can demonstrate his insight into his problems far better than at trial.[50]

At a later point Judge Bazelon commented:

> The second argument for differential sentencing is necessity. Most convictions, perhaps as many as 90 per cent in some jurisdictions, are the product of guilty pleas. Unless a large proportion of defendants plead guilty, the argument runs, the already crowded dockets in many jurisdictions would collapse into chaos.
>
> . . . .
>
> Thus, to the extent that the appellant here received a longer sentence because he pleaded innocent, he was a pawn sacrificed to induce other defendants to plead guilty. Since this is so, to consider the price he paid for the exercise of his right without regard for the process of which it is but one instance would be to ignore reality.[51]

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 270-71.

[51] *Id.* at 271, 272.

The cases of *Wiley* and *Scott* both point up the necessity for judges to explain differential sentencing in the negative: reward the pleader rather than punish the defendant who stands trial. It seems from the comments of the various sentencing institutes that this rationale is proper and will be accepted by the appellate courts. The Supreme Court has also seen fit to sanction (albeit dictum) this reward theory in *Brady v. United States*.[52]

C. *The Propriety of the Overtly Negotiated Plea*

The implicit bargain, the showing of leniency to the confessing and presumably "repenting" defendant is one thing; overt negotiation for charge reduction or a promise of sentence leniency in exchange for a guilty plea is another matter. In the first place, it is open and adversary in its own right. It is not simply a form of normative practice intrinsic to administrative efficiency. Whatever its degree of adversariness, the contest occurs out of court without whatever controls are provided by trial. Yet overt negotiation is common practice almost everywhere, particularly in those jurisdictions where there are mandatory sentences for certain classes of crimes.

The basic legal issue of propriety of overt plea negotiation is superficially simple but becomes complex when set against administrative reality. The propriety question is normally phrased as follows: whether guilty pleas which are induced by promises of state concessions in charge or sentence are any more trustworthy or any less repugnant than those engendered by threat or coercion. Some of the more specific problem areas associated with overt bargaining are discussed below.

1. The Contested Bargain

Unlike the situation with regard to alleged coercion, the general position of appellate courts reviewing cases involving induced pleas (usually on appeal from a denial of a motion to withdraw the plea) has been that they have viewed the situation as one of whether the promise made by the appropriate state official (commonly held to be either the prosecutor or the judge but normally *not* including the police or the defendant's own counsel[53]) was, in fact, honored after the defendant fulfilled his part of the bargain by pleading guilty. If the bargain was not kept — that is, if the state reneged on its promise — appellate courts have commonly allowed plea withdrawals, presumably on the grounds that the state used fraud and trickery in obtaining the guilty plea and

[52] 397 U.S. 742, 751 (1970).

[53] People v. Smith, 120 Cal. App. 2d 531, 261 P.2d 306 (1953); *cf.* Swanson v. United States, 304 F.2d 865 (8th Cir. 1962); Bryarly v. Howard, 165 F.2d 576 (7th Cir. 1948).

that these practices are not really significantly different from threat and coercion.[54]

The issue becomes sharper, though no more simple to answer, in instances of induced pleas where in fact the state honors its bargains; yet defendants challenge the "voluntariness" of their own guilty pleas on grounds of inducement. Since such defendants have presumably benefited by the contractual relationship — that is, they have received reduced charges, dismissed counts, or sentences less than the criminal court would warrant — it seems improbable that many such cases would reach the appellate level since, in effect, there is no injured party.

However, one such case did reach the United States Circuit Court of Appeals for the Fifth Circuit,[55] and the conflicts, confusions and uncertainties presented by it are still bothering American criminal justice. The petitioner, Shelton, moved to have his one-year sentence vacated on the ground that his guilty plea was induced by the promise of a one-year sentence by the prosecutor. In the first *Shelton* decision it was held that the guilty plea was involuntary because it was induced, even though it was conceded that the grounds for the inducement were fulfilled.[56] In the majority opinion, Judge Rives stated: "Justice and liberty are not the subjects of bargaining and barter."[57] However, in a dissent, Judge Tuttle distinguished between "proper" and "improper" bargaining, basing his major argument for upholding Shelton's conviction on the administrative necessity of plea negotiation. Judge Tuttle said in part:

> [A]lthough no man should be allowed to bargain away his life or liberty, it is not apparent why any innocent person would plead guilty if not subjected to or threatened with illegal pressures (including exhaustive inquisitions or threats to "frame" evidence of a more serious charge), mislead by promises not to be fulfilled, or induced by promises inherently improper, merely because he receives assurances that such a plea may lead to punishment less severe than that which he would receive if unjustly (but fairly) convicted. . . .
> . . . It is generally known that the great bulk of criminal cases are disposed of by pleas of guilty made after some discussion between the defendant and/or his counsel and the prosecuting attorney in which the latter frequently makes some commitment as to the sentence he will recommend or as to other charges or prosecutions he will drop; if this were not so, or if this court held that it may not be so, there would be few inducements for any person to plead guilty. . . .
>
> In the present case it appears from the record and from his own appearance before us that the petitioner was an intelligent man, fully able to comprehend the alternatives open to him and the value of the

[54] *See* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 876-78 (1964). *See also* Machibroda v. United States, 368 U.S. 487 (1962); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); *In re* Valles, 364 Mich. 471, 110 N.W.2d 673 (1961); FRANK, CORAM NOBIS § 3.01(d) (1953).

[55] Shelton v. United States, 242 F.2d 101 (5th Cir. 1957), *rev'd on rehearing*, 246 F.2d 571 (5th Cir. 1957), *rev'd on confession of error of Solicitor General*, 356 U.S. 26 (1958).

[56] Shelton v. United States, 242 F.2d 101 (5th Cir. 1957).

[57] *Id.* at 113.

> prosecutor's promises. It also appears that the prosecutor in good faith tried to live up to his commitments and to a very large extent was successful in his efforts .... Nor can it be said that any of the promises were inherently improper for the offer to help obtain the dismissal of federal prosecutions in other districts does not differ fundamentally from the usual practice whereby a prosecutor agrees to nolle prosequi all except the charges in which the plea is to be entered.[58]

In an en banc rehearing of the *Shelton* case, the minority position (of Judge Tuttle) in the first decision became the majority opinion.[59] Judge Tuttle wrote:

> In light of the full record, showing that the accused was not only willing but anixous to have his plea accepted by the court, and the present claim of involuntariness after he has fully enjoyed the benefit of the dismissal of an additional count in the Atlanta indictment and the nolle prossing of the 'more serious federal indictment' (as characterized by Shelton) in Miami — the reinstatement of which is now barred by statutes of limitations — and the imposition of the sentence *requested by him* in the principle case, cannot deprive the plea thus given of its character of voluntariness.[60]

Judge Rives joined by Judge Brown dissented, saying, in part:

> The very statement of that practice [referring to Judge Tuttle's earlier reference to the frequency and administrative importance of plea negotiation] however, concedes that such promises or commitments *are inducements* for the accused to plead guilty. Such inducements in any particular case may be sufficient to elicit an untrue plea of guilty. The prevalence of that practice demonstrates the importance, indeed the imperative necessity, for the court itself to determine that the plea is so voluntarily made as to furnish reliable and trustworthy testimony that the accused is in fact guilty. . . .
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> . . . We err greviously when we allow ourselves to be diverted by other inquiries, such as whether the accused made a good bargain and whether the bargain was kept; the sole inquiry should remain, was the plea of guilty made under such circumstances as to constitute it reliable and trustworthy evidence of the accused's guilt of the offense with which he was charged.[61]

The *Shelton* case eventually reached the Supreme Court which issued a per curiam decision, stating only "[u]pon consideration of the entire record and confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded to the District Court for further proceedings."[62] In a subsequent case, *Brown v. Beto*,[63] the Fifth Circuit considered the Supreme Court's per curiam action as neither an approval

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[58] *Id.* at 115, 116.

[59] Shelton v. United States, 246 F.2d 571 (5th Cir. 1957).

[60] *Id.* at 573 (emphasis by the court).

[61] *Id.* at 579, 580 (emphasis by the court).

[62] Shelton v. United States, 356 U.S. 26 (1958).

[63] 377 F.2d 950 (5th Cir. 1967).

nor a disapproval of either Judge Tuttle's or Judge Rives' view on plea bargaining.[64]

2. Judicial Involvement in Plea Negotiation

A question has arisen in a number of cases as to whether plea bargaining in which the sentencing judge is directly involved may be improper, even if it is conceded that bargaining between prosecutor and defense is proper.[65] In *United States* ex rel *Elksnis v. Gilligan,*[66] District Judge Weinfeld stated in part:

> [A] bargain agreement between a judge and a defendant, however free from any calculated purpose to induce a plea, has no place in a system of justice. It impairs the judge's objectivity in passing upon the voluntariness of the plea when offered. As a party to the arrangement upon which the plea is based, he is hardly in a position to discharge his function of deciding the validity of the plea — a function not satisfied by routine inquiry, but only, as the Supreme Court has stressed [citation omitted], by a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.[67]

While alluded to above, an interesting caveat to the judges "hands off" role in plea negotiation was more explicitly dealt with by Judge Bazelon in the *Scott* decision:

> In announcing the rule that the trial judge should neither participate directly in plea bargaining nor create incentives for guilty pleas by a policy of differential sentences, we must at the same time point out that the trial judge cannot ignore the plea bargaining process. A guilty plea must be not only voluntary, but also knowing and understanding. If the defendant has decided to admit his guilt because of a commitment from the prosecutor, it is essential for the validity of his plea that he have a full and intelligent understanding of the nature and extent of that commitment.[68]

The ABA standards relating to pleas of guilty attempt to correct the possibility of an attack like that in *Elksnis* by excluding the judge as a participant in the actual negotiation process.[69] The reasons given by the ABA Committee are as follows: (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and, (4) the risk of not going along with the disposition apparently desired by the judge may seem so great

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[64] *Id.* at 954.

[65] *Id.* at 956-57.

[66] 256 F. Supp. 244 (S.D.N.Y. 1966).

[67] *Id.* at 255.

[68] Scott v. United States, 419 F.2d 264, 274 (D.C. Cir. 1969).

[69] ABA PROJECT, *supra* note 1, § 3.3 (a).

to the defendant that he will be induced to plead guilty even if innocent.[70]

3. Equal Opportunity to Bargain

However the general issue of the propriety of plea negotiation is viewed, and whether one limits it by restricting the appropriate participants (such as by excluding the judge) or testing it against its fulfillment in practice, there are still other dimensions of propriety which arise and plague some appellate courts. For example, while the ABA Minimum Standards state that similarly situated defendants should be given an equal opportunity for plea negotiation,[71] some cases have recently arisen in which denial of knowledge of, or opportunity for, bargaining and, therefore, failure to benefit from such dealings were appealed on denial of equal protection grounds. In *Dorrough v. United States,*[72] the appellant contended that he did not fully understand the nature of the charges against him, because the offense with which he was charged contained a lesser included offense with a significantly lower mandatory penalty, and he claimed that it was incumbent upon the trial court to fully advise him of this fact. The majority opinion rejected this argument, but Circuit Judge Goldberg in his dissent stated:

> It would be uncandid also to fail to mention that upon learning of a lesser included offense, the defendant might announce to the prosecution that he would consent to plead guilty only to the lesser offense, in the hope that the prosecution would allow him to plead rather than go through the risk and bother of a trial. Plea bargaining, at present, must be recognized as part of our system.[73]

In *Newman v. United States,*[74] a case arising almost simultaneously with *Dorrough* but in the D.C. Circuit, the equal protection issue was more sharply drawn. The issue presented on appeal was whether it was a denial of appellant's constitutional rights for the U.S. Attorney to consent to a guilty plea tendered by appellant's codefendant for a lesser included offense under the indictment, while refusing to consent to the same plea for the appellant. Both defendants were indicted for house breaking and petty larceny. One of the defendants, Anderson, negotiated through counsel with the U.S. Attorney and obtained an agreement allowing Anderson to plead guilty to the misdemeanors of petty larceny and attempted house breaking. The U.S. Attorney, however, declined to consent to the same plea for Newman. In denying Newman's appeal, Circuit Judge Burger (now Chief Justice of the United States Supreme Court) said in part:

> To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task;

[70] *Id.* § 3.3(a) (commentary).
[71] *Id.* § 3.1(c).
[72] 385 F.2d 887 (5th Cir. 1967), *aff'd on En Banc rehearing,* 397 F.2d 811 (5th Cir. 1968).
[73] 385 F.2d 887, 898 (5th Cir. 1967).
[74] 382 F.2d 479 (D.C. Cir. 1967).

> of course, this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one has played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into or review his decision.
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> It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.[75]

How this discretion is exercised — *i.e.,* the motivation of the prosecutor in his bargaining role — is apparently an important element of the whole process. In *People v. Byrd,*[76] Judge Levin, using his concurring opinion to take to task the whole process of plea negotiation, made the following points:

> Unlike the private litigant who is encouraged to negotiate amicable adjustment of differences, the prosecutor has a duty to exercise the discretion his office vests in him strictly on the merits. The state of his or the court's docket has nothing to do with the propriety of a particular charge reduction for a particular offender. Justice is not "individualized" by making charge concessions available almost universally as long as the offender pleads guilty. The only "individualization" is that those who plead guilty do so to some other, lesser charge and those who stand trial must answer for the greater offense. To defend this on the ground it is "individualization of justice" is an obvious distortion of terms.
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> Defenders of plea bargaining cite as examples of laudable "individualization" through plea bargaining, particular cases where noxious charges have been reduced to less stigmatic ones. However, if such individualization is deemed desirable it could be achieved without exacting a plea in return for the reduction in charge, indeed, without any negotiation with the defendant. It is hard to see how such discretionary decisions are furthered by — or even how they can survive — the plea bargaining system. If the reward of charge reduction is to continue to serve as an inducement to guilty pleas, the prosecutor may but infrequently hand out such reductions, even where his view on the merits would warrant or demand it, *unless* the benefitted defendant pleads guilty.
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> I do not mean to be understood as saying prosecutors do not, in particular cases, exercise their discretion on the merits and permit accused persons to stand trial on reduced charges. But, to the extent prosecutors become dependent upon plea bargaining, and thus implicitly devoted to maintaining the bargaining system, they become less free in the exercise of their discretion.[77]

Other than questions of judicial participation and equal plea oppor-

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[75] *Id.* at 481-82.

[76] 12 Mich. App. 186, 162 N.W.2d 777 (Ct. App. 1968).

[77] *Id.* 162 N.W.2d at 784, 787 (emphasis by the court).

tunities, there is even more basic, idealistic opposition to the negotiation of justice.

4. Bargaining as Intrinsically Improper

Judge Rives' statement in the first *Shelton* case that "[j]ustice and liberty are not the subject of bargaining and barter,"[78] expresses the intrinsic impropriety issue very clearly. In a Pennsylvania case[79] the court used even stronger language. In that case, defense counsel approached the judge hoping to obtain a sentence promise prior to entry of a guilty plea for his client and, having assumed he had received such a promise, later attempted to withdraw the plea after the defendant was sentenced to death. The lawyer claimed that a bargain was made and unfulfilled. This elicited a statement from the sentencing court which, in commenting upon the practice of an attorney approaching a judge prior to the plea, referred to such conduct as "not becoming a member of the bar."[80] The appellate court agreed with the trial court's refusal to allow withdrawal of the plea, calling the defense counsel's conduct "indefensible and outrageous."[81]

There have been other sporadic expressions by appellate judges about the impropriety of plea bargaining regardless of its advantages. But by far the most detailed and elaborate recent analysis of the process, with a final conclusion that plea negotiation is inherently and intrinsically improper, was written by Judge Levin concurring in the *Byrd* decision. He said:

> The negotiated guilty plea is, nevertheless, fundamentally unsound. Besides the fact that it is inconsistent with established standards, those regarding the exercise of discretion by public officers and those surrounding the administration of justice generally, it is turning what used to be an accusatorial-adversary judicial system into an inquisitorial-administrative process. It encourages practices in which neither the profession nor the judiciary can take pride and establishes precedents which are bound to affect the administration of justice adversely in other areas. It destroys the integrity of the conviction record with the result that neither the parole board nor, upon commission of another offense, a subsequent sentencing judge knows whether one originally charged with X and allowed to plead guilty to X-1, X-2 or attempted X or Y was really guilty of the more serious charge.
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> If the negotiated charge concession is not justified by the merits, then the injury is to society. If a charge concession justified by the merits can only be obtained by waiver of a jury trial, then it is the defendant who is unjustly importuned, it is the constitutional right which is tarnished. If the concession is illusory rather than real, e.g., a reduction in charge but no reduction in sentence, the trial judge sentencing just as he would on the greater offense, then, frequently, the defendant has been misled into giving up his right to a trial.

[78] 242 F.2d 101, 113 (5th Cir. 1957).

[79] Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964).

[80] *Id.* 202 A.2d at 526.

[81] 415 Pa. 218, 228, 202 A.2d 521, 526 (1964).

A plea of guilty uninfluenced by official pressure (overt or covert) or promise (explicit or implicit) is, of course, perfectly proper. But the administration of criminal justice has become so dependent upon a large volume of guilty pleas and the profession (prosecutorial and defense) and some courts so widely encourage offenders to believe they have something to gain by pleading guilty, that it is to be doubted whether many who plead guilty do so without harboring the hope that they will receive some leniency.

The present state of affairs was brought about by willingness to reduce standards of justice to conform to the resources made available for its administration. I suggest the time has come for the judiciary to start moving in the other direction, and to insist on a return to first principles as quickly as possible. It will, of course, take years, if not decades, to accomplish the elimination of *negotiated* pleas. The necessary increase in prosecutorial staff and judicial facilities cannot be brought about within a short period of time.

The public must be made aware that, under present budgets, most felons are permitted to plead guilty to a charge substantially less than the crime of which they are guilty. We are all concerned with the significant increase in crime. Yet many who are apprehended are too soon back on the streets because of concessions that would not be considered if facilities for prosecution and adjudication were more adequate. Police officers bring in an accused person and the prosecutor is confronted with the choice of allowing him to plead guilty to a lesser offense or waiting for months and sometimes years to bring him to trial, by which time witnesses may have lost interest, memories may have faded, and for those and other reasons prosecution is difficult, if not impossible, all of which aids defense counsel in exacting concessions which otherwise would not be at all appropriate and which no prosecutor would otherwise consider.

The judiciary need not accept the inadequate budgets allowed for the administration of justice. Ours is a co-equal branch of government. Those charged with the administration of justice may properly insist on appropriations sufficient to enable prosecutors and courts to enforce the laws that the legislature and local units of government enact. I respectfully urge that we not continue to denigrate the judicial system by attempting to organize the administration of criminal justice around an ever declining prosecutorial and judicial budget per case.

The calendar problem is, of course, real. The administration of criminal justice has become so dependent upon plea bargaining that it could not be eliminated *instanter* by decree. To do so would be to inundate our presently over-taxed prosecutorial and judicial facilities. This, of course, is a matter for realistic concern — as is the fundamental soundness of a system of justice whose very ability to function is said to depend on the practices described.

The problem is not unlike that of segregated schools in that it is too ingrained to be eliminated forthwith. I suggest that we proceed to its eventual elimination.[82]

IV. DIMENSIONS OF THE CONCERN FOR THE IMPROPRIETY OF PLEA BARGAINING

Negotiation for pleas of guilty, particularly overt bargaining for a plea when there is a reasonable likelihood that the person could be

[82] People v. Byrd, 12 Mich. App. 186, 162 N.W.2d 777, 796-97 (1968) (emphasis by the court).

convicted of a higher crime or be given a more severe sentence, raises propriety concerns on a number of different levels. In addition to the concerns with respect to the overt bargain discussed above, there are larger, more far-reaching concerns about the plea negotiation process in general that must be resolved if the process is to continue to exist within our criminal justice system. These broad considerations can be classified as either concern for the proper dispensation of justice or as concern for a positive public attitude.

A. *Concern for the Proper Dispensation of Justice*

These concerns generally go to specific, undesirable side effects that may be a byproduct of plea negotiation. Included within this category are the fears that plea negotiation might increase the possibility of convicting the innocent, introduce inequalities into adjudication and sentencing practices, avoid the testing of many legal issues, and promote "quick justice."

1. Plea Negotiation Might Increase the Possibility of Convicting the Innocent

While there have been some steps taken by the United States Supreme Court in its decisions[83] and in its revision of the Rules of Federal Criminal Procedure,[84] by various states in altering their arraignment requirements,[85] and by recommendations of such groups as the ABA's Minimum Standards Committee on Pleas of Guilty[86] — all of which compel judges to inquire into the factual nature of the crime before accepting a plea — the fact remains that inducements can be so attractive to some defendants, particularly recidivisits with long prior records, that they might be willing to plead guilty in order to avoid trial on a higher charge.[87] The trustworthiness issue is not fully satisfied by the requirement of factual inquiry by the judge or even by such elaborate procedures as post plea-of-guilty hearings which are the practice in some jurisdictions,[88] and pretrial screens (such as the preliminary hearing). Even by means of carefully prescribed requirements for both the quantity and quality of evidence, it is conceivable that one who is innocent can be convicted even after availing himself of all the safeguards of the trial system. It is believed that the number of innocent persons so convicted is very small, just as it is hoped that the percentage of innocent defendants who plead guilty is also small. Either possibility is certainly reprehensible to the underlying ideology of our system of

[83] *See* notes 90, 91 *infra.*

[84] *See* note 9 *supra.*

[85] *Id.*

[86] *See* ABA PROJECT, *supra* note 1.

[87] Comment, *supra* note 4, at 220-21.

[88] D. NEWMAN, *supra* note 1, at 19-20.

justice. Many judges take the position, therefore, that the possibility of an innocent person pleading guilty should be given prime consideration in arraignment proceedings. The ABA's tentative draft on standards relating to *The Prosecutor's Function* provides that "[a] prosecutor may not properly participate in a deposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court."[89] It is interesting to note that this proposed standard apparently does not preclude a prosecutor from accepting a plea of guilty, where he has evidence to substantiate to his own satisfaction of the guilt of the defendant even though the defendant maintains his innocence, provided that the court is aware of the defendant's persistence in denying guilt.

Two recent United States Supreme Court decisions, *McCarthy v. United States*[90] and the followup case of *Boykin v. Alabama*,[91] have been interpreted to make the provisions of Rule 11 of the Federal Rules of Criminal Procedure[92] applicable to all states. Among other things, these decisions are interpreted to now make it a requirement for the judge to personally address the defendant and to satisfy himself that there is a factual basis for the guilty plea. This would not eliminate the possibility of convicting the innocent pleader, but hopefully would reduce it.

2. The *Sub Rosa* Existence of Plea Negotiation Introduces Inequalities into Adjudication and Sentencing Practices

There is a question of whether it is possible to work out equal bargaining opportunities for all defendants. For example, those defendants who know of negotiation possibilities have an intrinsic charging and sentencing advantage over those who are strangers. Further, if the existence of plea negotiation is known only to a segment of the bar and if a defendant retains or is assigned counsel who is familiar with such practices, then there is a built-in inequality in the system against the defendant who is either without counsel or without counsel who is familiar with plea negotiation.

To combat such problems, a section of the ABA proposed standards, *The Prosecutor's Function*, provides: "(a) The prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea."[93] In effect, the ABA provision would require the prosecutor to give notice of the practice, so that its availability would be common knowledge to all defendants,

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[89] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *The Prosecutor's Function*, § 4.2 (tent. draft, 1970).

[90] McCarthy v. United States, 394 U.S. 459 (1969).

[91] Boykin v. Alabama, 395 U.S. 238 (1969).

[92] *See* note 9 *supra*.

[93] ABA PROJECT, *supra* note 1, § 3.1(c).

rich or poor, resident or stranger. Furthermore, the ABA proposal also requires defense counsel under certain conditions to explore the possibility of negotiation: Proposed Standard 6.1 of *The Defense Function* provides: "(b) When the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable."[94] In discussion thereafter, it is suggested that if a lawyer lacks sufficient personal experience, he should consult experienced colleagues.[95]

The negotiating skill of the attorney may also contribute to sentence disparity;[96] for perhaps a large part of sentence disparity is the result of disparity in charging and plea negotiation. This is particularly critical to both defendants and the community as it applies to the choice of probation or imprisonment. In theory, persons selected to serve their sentences in the community under supervision are chosen on the basis of characteristics which call for low risk of recidivism and a chance for successful community adjustment as law-abiding citizens. If, indeed, probation is given as payment for plea bargaining, selection is then based in part on skill in negotiation rather than on the other more acceptable criteria. Granted, it may be that few dangerous or otherwise serious offenders can actually deal for probation; nevertheless, selection by negotiation leads to an insidious corruption of the probation service.

3. The Existence of Plea Negotiations Avoids the Testing of Many Legal Issues That Are Now Cloudy

How effective is the exclusionary rule if defendants do not even raise it because they decide to plead guilty? How effective are the other constitutional rights so carefully safeguarded at trial if they are waived by as many as 90 percent of the defendants passing through the courts? How *operationally* important are such defenses as insanity or entrapment if they are rarely raised? On these grounds alone — that is, that plea negotiation avoids the articulation and refinement of legal defenses

[94] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function*, § 6.1(b) (tent. draft, 1970).

[95] *Id.* § 6.1(b) (commentary). It is suggested that Legal Aid and Public Defender offices could serve as sources of potential assistance. This points up an interesting opinion that some experienced courtroom observers have voiced, namely, that persons represented by a public defender are sometimes better off than those defended by retained attorneys. The issue, of course, is not one of superior legal skills in a formal sense, but one of savvy in the ways of the criminal courts, the prosecutor's office, and the hallways of the courthouse. It is ironic perhaps, that legal ability necessary to properly defend a client at trial is not necessarily the same as the knowledge and ability required for plea negotiation. There can be little doubt that the Public Defender's Offices in most jurisdictions are aware of plea negotiations and have a fair idea of a going rate for most charges, and therefore those lawyers are able to get their clients at least as good a deal as most other similarly situated defendants.

[96] For a discussion of the effects of sentence disparity on correctional objectives, see note 18 *supra*.

and concepts — it is considered by some to be an improper form of criminal procedure.[97] If police practice illegal searches and questioning and if the defendants, who have their rights so infringed upon, plead guilty in the majority of such instances, the police will not be as effectively deterred from such illegal acts. If wrongful enforcement practices are not brought to light and if their concomitant defenses are not used, a dynamic changing procedural law will be slow to develop.

4. Justice Can Be Too Quick

One quite proper legal and common administrative concern of criminal justice is that its wheels grind too slowly. Excessive delay in prosecution, trial, and sentencing are issues that are extremely bothersome in our system of justice and, of course, are in themselves pressures which support the plea negotiation system. Justice delayed is truly justice denied in many instances. On the other hand, while it is true that justice can be too slow, there is the inverse question of whether it can be too speedy. "Quick justice" convictions in which defendants are arrested, waive all their rights, plead guilty, and are sentenced and transported to prison all in the course of a single day, while not common, occurs frequently enough to be bothersome and are seen as intrinsically improper.[98] The guilty plea system, including plea bargaining, opens the real possibility of excessive speed in contrast to reflective and careful adjudication.

B. *Concern for a Positive Public Attitude*

The issues in this category, unlike those listed above, generally focus on the effect of plea negotiation on the public's view of our criminal justice system. These considerations involve claims that plea negotiation is inherently repugnant; that it makes a mockery of our system of justice; that it fosters disrespect for justice; and that it creates public dissatisfaction because of the relative lack of details emerging from guilty plea convictions.

1. The State Becoming Involved in Bargaining With Criminals Over Charges and Sentences Is Inherently Repugnant in a Society Dedicated to the Rule of Law

Plea bargaining provides almost unbridled discretion on the part of prosecutors and trial court judges to avoid legislative sentencing mandates, and to encapsulate the adjudicatory and charging stages of the process, so that it is simply a pro forma step in the mass production of suspects from the streets to the prisons. In addition, there are some

[97] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

[98] *See* DeMeerleer v. Michigan, 329 U.S. 663 (1947), *rev'g* People v. DeMeerleer, 313 Mich. 548, 21 N.W.2d 849 (1946); State *ex rel* Burnett v. Burke, 22 Wis. 2d 486, 126 N.W.2d 91 (1964).

prosecutors, especially those newly elected or appointed, who would prefer not to negotiate or "deal" with alleged criminals or their representatives. There are also some defense counsel who, for one reason or another, have poor relationships with local prosecutors and, consequently, are at a disadvantage in negotiating on behalf of their clients. The fact that such inequalities exist and that personalities of officials can affect uniform disposition of cases inherently detracts from a system involving widespread negotiation of pleas in a society dedicated to the rule of law and not to the rule of men.

There have been some recent allegations that plea bargaining, either implicit or explicit, is not only repugnant but also violates both the fifth and sixth amendments to the Constitution. In fact, the authors of a recent note in the *Harvard Law Review* concluded:

> Well aware of the need for legislative response to a judicial decision that invalidates plea bargaining, judges have avoided analyzing the constitutionality of the practice. The bar, which has actively participated in plea bargaining, has attempted to dress it in procedural niceties and has manufactured weak or faulty justifications for it. But neither the lack of an assured legislative response nor the bar's substantial involvement in the practice should affect the legal profession's evaluation of it. Lawyers and judges more than other citizens are under an obligation to maintain the criminal process in conformity with the Constitution. To restore the defendant's fundamental trial rights to their traditional preeminence, plea bargaining should be declared unconstitutional.[99]

2. Plea Bargaining Makes a Mockery of Our System of Justice

The facade of the typical arraignment session — where the defendant customarily denies that any promises have been made to him while all in attendance know full well that promises have indeed been made in exchange for his plea — is likely to produce a high degree of cynicism in both the participants and observers of the system. Today, however, some judges are changing their inquiries about promises or inducements, limiting their questions to whether any promises have been made to the defendant *regarding sentencing*. Sentencing promises by the prosecutor or others are apparently viewed as a possibly wrongful usurpation of the judge's powers whereas other bases of negotiation, such as charge reduction, are ignored as strictly within the ambit of the prosecutor's discretion. The issue here, as with the unhonored bargain,[100] is not inducement per se but inducement that crosses lines of authority. Yet as long as there is no recognition of the entire range of plea arrangements, but rather an avoidance of the issue, even to a pretense that

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[99] Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1411 (1970). *See also* Griffiths, *Ideology in Criminal Process or a Third Model of the Criminal Process*, 79 YALE L. J. 359 (1970). *See* note 61 *supra*, § 4.1(a).

[100] *See* § III (C)(1) *supra*.

negotiation does not occur, the in-court ritual of guilty plea arraignments will be viewed by many as a mockery of justice.

3. Because of the Intrinsic "Horse-Trading" or "Settling Out of Court" Nature of Plea Negotiation, an Aura of Disrespect For Justice and For Criminal Procedure Is Produced Not Only Among Those Involved But Also Among the Public in General

It might be paraphrased that "it is not *what* you do that determines your charge and sentence but *whom* you know." Some observers have commented that plea negotiation is really no different from a "fix" which is usually taken to mean a form of corruption involving monetary bribery or the trading of favors for bending the law to benefit certain violators.[101] The *sub rose* nature of some plea negotiation contributes to the aura of corruption that tinges this practice as it now exists. All that a defendant may know is that he has paid his attorney a certain set sum, and in return the lawyer has been able to obtain some sort of "deal" which results in a lesser charge or sentence (or both) than he expected when arrested. It has been suggested that some attorneys permit this misapprehension of a "fix" to exist in order to justify fees. In short, they do not disabuse the client of his belief that the court, police officers, and/or the prosecuting attorney have been "taken care of" in order to obtain the lesser charge or the lenient sentence.[102]

4. There Is Public Dissatisfaction with the Relative Lack of Detail Emerging from Guilty Plea Convictions, Particularly in Cases Where There Is a High Degree of Public Interest

The relatively anonymous guilty plea proceeding, with nothing but the formal words of the charge admitted, may have many advantages for the reputation of the defendant and his family and may receive general support on these grounds.[103] In cases of great public interest however, this anonymity is not necessarily viewed in the same way. Where public figures are involved, either as perpetrators or victims, there often is a demand for more information, while rumors and suspicions that there is "more than meets the eye" abound. For example, the guilty plea of Senator Edward Kennedy to the traffic charge following his automobile accident in which a young girl was killed was viewed by many Americans as an inadequate termination of the case. In fact, the pressure for further explanation was so great that the Senator went on national television to explain his position. Much the

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[101] *See* Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 395 (1951). *See also* Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957); Wight v. Rindskoph, 43 Wis. 344, 354 (1877).

[102] TASK FORCE REPORT, *supra* note 1, App. A at 12.

[103] *See* § I *supra*.

same situation applies to the apparently negotiated guilty plea entered by James Earl Ray in connection with the murder of Dr. Martin Luther King. Here again, the sparse information contained in the charge and the monosyllabic guilty plea hardly satisfied those who are more concerned about the full details of the murder of a notable public figure.

V. Compromise: Distinguishing between Proper and Improper Bargains

The grounds discussed above and probably others are commonly offered as reasons for assessing the practice of plea negotiation as an improper form of charging, adjudication, and sentencing in our system of criminal justice. Even if one agrees with any or all of the bases of the impropriety of such practices (either in general or in particular cases which might "shock the conscience"), the question remains of whether it is administratively feasible — or even whether it is at all possible — to abolish plea negotiation or, as Judge Levin put it, to "begin now gradually to eliminate plea bargaining."[104]

A position can be taken that if plea bargaining is improper per se, then there can be no compromise with it. The administrative consequences would not necessarily mean that all defendants be tried but simply that the guilty plea in itself would be an irrelevant factor in sentencing and that inducement of guilty pleas, under any circumstances, would be outlawed.[105] Those holding this position would not see it to be a question of controlling or limiting plea bargaining any more than there would be a question of controlling or limiting the third degree. In brief, if plea negotiation is equated with coercion, then no adjustment is possible.

At the present time, however, total rejection of plea negotiation and of the implicit sentence bargaining in all guilty pleas is not the majority position among commentators, including appellate courts, on nontrial adjudication. It is more common to distinguish, both factually and philosophically, plea negotiation from coercion and to at least attempt to spell out conditions under which bargaining might properly be used and conditions under which it would be considered improper *per se*. This ability to distinguish between (and control) the *proper* versus the *improper* exercise of charging and sentencing concessions to pleading defendants might well be a sensible solution to matters of propriety in plea bargaining situations.

This type of analysis is not new to criminal justice issues. For example, in the matter of search where there is insufficient evidence

[104] People v. Byrd, 12 Mich. App. 186, 162 N.W.2d at 798.

[105] Judge Levin advocated this position in *People v. Byrd*, and his comments attack the notion that a charge concession in exchange for a guilty plea is "individualization" of justice. See his comments on this subject in the text, § III (C)(3) *supra*.

to arrest a single suspect or to obtain a search warrant (as in roadblock searches), the late Supreme Court Justice Robert Jackson attempted to distinguish the relative propriety of such "collective" searches on the basis of the seriousness of the criminal conduct desired to be thwarted or prevented, *i.e.,* the motivation of the state. He stated that he would possibly tolerate a roadblock search if the life of a kidnapped child were involved but would not tolerate the same procedure if the purpose was simply the recovery of a few bottles of untaxed whiskey and the apprehension of a bootlegger.[106]

It may well be that some propriety issues in plea negotiation can be resolved on the same or similar grounds, *i.e.,* on the *motivation* for the bargain and the type of situation in which it occurs. For example, courts are sometimes confronted with cases in which charges, while technically correct, somehow seem inappropriate given the entire circumstances of the case and the characteristics of the perpetrator or the victims. For example, in a forcible rape where the victim is random, where violence is used, and where injury to the victim occurs, it would seem to be inappropriate to reduce the charge to a lesser offense simply to get a guilty plea. Not all rapes, however, follow this pattern. Sometimes a defendant is charged with rape when the victim is in fact a semiprostitute who on the particular evening in question refused to respond to advances as was her common practice. The defendant used force to obtain what he had been led to expect; and, somehow, it seems inappropriate that both his criminal record and sentence be exactly the same as the rapist in the first instance, where the victim was chosen at random, was otherwise innocent, and was injured. This type of situation in which there are significant variations in the circumstances surrounding legally identical crimes is commonly faced by prosecutors and courts, and it acts to confound the issue of the propriety of plea negotiation, by entwining it within the ambit of the discretion exercised by both prosecutors and judges, but hopefully in ways that result in a system of equitable and just charging and sentencing.

In regard to the *improper* exercise of the practice, one could also base the propriety concern on the *motivation* for plea bargaining on the part of the state. For example, it could be argued that plea negotiation is intrinsically improper if the sole purpose of the state is to induce a guilty plea under one or a combination of three conditions: (1) solely because the evidence held by the state is weak or inadmissible and conviction at trial is doubtful, (2) solely to avoid court crowding and overwork, or (3) solely because of fear on the part of the prosecutor of the skill of the defense counsel. There is some interesting evidence that these factors are relevant considerations in the state's current motivation for negotiating with defendants. The *University of*

[106] Brinegar v. United States, 338 U.S. 160, 183 (1949).

Pennsylvania Law Review asked a group of chief prosecuting officials from various states to indicate the considerations that motivated their bargaining decision.[107] The most frequently listed consideration in striking a bargain was the lack of strength of the state's case; some 85 percent of the prosecutors who responded noted this weakness as an important factor. Some 37 percent said the volume of work was an influencing factor; only 32 percent said the harshness of the law influenced their decisions (the avoidance of mandatory sentences and the like); and 27 percent said that sympathy for the defendant was a factor.[108] On the other hand, the author of a more recent study commented:

> My impressions differ from the conclusions of the *Pennsylvania* survey. Every prosecutor I interviewed considered the strength of the case relevant and almost every prosecutor considered "sympathy" and the "workload" as well. Nevertheless, my impressions correlated with the *Law Review's* conclusions on a basic point: If tactical considerations are not the most important factor in bargaining, at least they are the factor that prosecutors are most ready to avow.[109]

If it is possible to list the primary consideration where plea bargaining would be considered *inappropriate* by the state, the opposite should also be true. That is, there should be conditions (controlled perhaps by requiring the prosecutor to present a written explanation of his reasons or the judge to write such an opinion or both) under which plea negotiation would be considered proper:

1. *When the motivation is to avoid excessive consequences of mandatory sentences when they are clearly inappropriate in a particular case.* This is simply the frank delegation of discretion to the prosecutor and the trial court to distinguish between cases about which the legislature has generalized. This is not an attempt to usurp legislative power but is merely a way to introduce equity into a system that would otherwise work some excessive hardships. Legislatures, after all, are political collectivities which, when confronted with a particular crime situation, are sometimes prone to enact excessively repressive legislation. For example, some of the narcotics laws, if universally applied to all defendants who technically fit within the descriptions of the crimes, would wreak havoc with any attempt to tailor the sanction to the total circumstances of any criminal action and to the characteristics of individual defendants. After all, while a teenager selling a single marijuana cigarette to a friend and a professional pusher of heroin may both be guilty of sale of narcotics and subject to lengthy mandatory incarceration, their cases can be distinguished on the trial court level without really violating the legislative purpose in condemning drug sellers.

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[107] Note, *supra* note 54, at 896-907.

[108] *Id.* at 901.

[109] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968).

2. *When the motive is to avoid a criminal label which would imply in the public mind that the defendant was guilty of conduct which is really not consistent with the actions that formed his criminal violation.* For example, in a case[110] in which a number of college students were having a noisy party in an apartment near their campus, the police arrested and charged the student owner of the apartment with, of all things, "operating a disorderly house." Confronted with this charge, the judge explained to the prosecutor and the arresting police officer that the connotations of such a label were so negative that he would not accept a plea of guilty even though the offense was a misdemeanor. The charge was modified (not really reduced) to disorderly conduct. The label of disorderly conduct against the male owner of the apartment was not felt to be particularly onerous or misleading. Likewise, in another case in which a girl was arrested for shoplifting and was charged with disorderly conduct, the judge refused to accept a plea to this count, pointing out that a record of disorderly conduct in a case of a young girl could be wrongfully interpreted as involving sexual misbehavior, whereas petty larceny (again not really a lesser charge) would likely be less damaging to the defendant in the long run.

3. *When there is a crime involving co-defendants of unequal culpability.* Again, this is simply a recognition of the prosecutor's discretion to distinguish what the legislature cannot do; that is, to determine the degree of involvement in a single offense on the part of multiple persons involved in the crime. The same can hold true when there are other mitigating circumstances, such as the participation of the victim in a criminal activity (*e.g.,* confidence games), or when the victim in some other way contributed to the commission of the crime.

4. *When the therapeutic benefits of alternative sentences can best be achieved by charge reduction or by awarding probation to guilty plea defendants, where normally such would not be the case.* It has been suggested by the drafters of the A.L.I. Model Penal Code that such considerations be taken into consideration *after* the plea is tendered so that the judge has the power to downgrade a charge to achieve this end without first using it to induce the guilty plea.[111] This is really an extension of sentencing discretion which, while it may achieve the same end of individualizing sentences as negotiated pleas, ignores the operational significance of a preplea bargain. This is indeed a "mercy of the court" situation which ignores the other administrative advantages of negotiation. In any case, there may be situations in which the sentencing structure is such that maximum benefit to the individual

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[110] This illustration and the one which follows are from field observations made during the preparation of the AMERICAN BAR FOUNDATION SURVEY OF CRIMINAL JUSTICE IN THE UNITED STATES (1956-58).

[111] ALI, MODEL PENAL CODE, § 6.12, *Reduction of Conviction by Court to Lesser Degree of Felony or to Misdemeanor* (Proposed Official Draft, 1962).

offender (with due consideration to the consequences for his victims) can be achieved only by charge reduction or some other state concession. If this were the primary motivation, then such reduction could well be considered proper.

5. *When charge reduction and sentencing leniency are used to support law enforcement efforts by rewarding informants, state's witnesses and the like.* This is sometimes called "trading the little ones for the big ones"; but the fact remains that unless differential court leniency is shown such persons, major cases cannot be developed. This is harder to justify on proprietary grounds if one is initially unwilling to support an informant system. If, however, one sees a relationship between the activities of the court and the activities of law enforcement in the community, then a decision must be made about the propriety of using one aspect — namely, sentencing or charge reduction — to support the activities of the other.

6. *When the ultimate sentencing consequences may be too harsh.* This situation may arise when the consequences of new conviction are excessive, because it may move a candidate closer to becoming labeled an "habitual criminal" (with the attendant consequences) when, in fact, the total circumstances of the case and the defendant's characteristics do not so indicate. This, again, is simply an adjustment of the adjudicatory sentencing process — including alternatives like revocation of parole in lieu of new prosecution — to achieve equity when full scale conviction and sentencing would be too harsh.

Without attempting to exhaust the number of situations in which plea negotiation might be considered proper, the point is that there may be a distinction in the propriety of plea negotiation depending upon the motivation of the state in engaging in the practice. When the purpose of the negotiation is to avoid simple overcrowding, to push through weak cases, or to bargain from fear, then plea negotiation is clearly improper. On the other hand, an affirmative case can be made for the individualization of justice and for the equity basis of plea negotiation on the part of the prosecutor and the court. If such a distinction can be made operational, then, of course, it must be circumscribed; it is necessary that all the controls enunciated by the ABA[112] and others are followed.

The price paid for a *motivational basis* of proper plea negotiation may be similar to that of the exclusionary rule, namely, the freeing of offenders when the constable has blundered.[113] Inevitably, there will be cases in which the state opts for a negotiated plea conviction not

[112] *See generally* ABA PROJECT, *supra* note 1.

[113] Mapp v. Ohio, 367 U.S. 643 (1961); *cf.* People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), per Judge Cardozo, "[t]he criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

from altruistic reasons but because the evidence is weak or the witnesses uncertain.[114] This risk and its attendant costs will have to be weighed against the desirability of the recognition of plea bargaining as proper or improper under certain conditions.

VI. CONTROL OF PLEA NEGOTIATION

If the basis of proper plea negotiation hinges on its purposes, then, in addition to the admonitions of the ABA Committee,[115] there must be more explicit expression of the details of the way pleas are induced and a more elaborate record of the reasons and motivations for reductions or other promises that are made. This is necessary if such practices are to become reviewable by appellate courts.

Further, an accurate record of all plea agreements should be kept, not only for purposes of review, but also so that followup studies can be made to evaluate and analyze this practice in general. For example, it would be clearly inconsistent with the equity purposes of negotiation to release dangerous persons back into the community on probation in exchange for a guilty plea. If this turned out to be a significant problem, then no matter how beneficient the negotiation motives were at the time, other controls would have to be introduced. Furthermore, allegations of discrimination would be easily testable if accurate records of demographic, as well as criminal, activities of the offenders involved in plea negotiations and those denied plea negotiation were kept by the courts. The burden of such recordkeeping should be on the prosecutor and the judiciary, much as prisons and parole boards assume obligations to evaluate their practices and their effectiveness in correctional decisions, such as release on parole and recidivism.

In addition to accurate recordkeeping, there should be limits (by court rule or statute) on the range of charge reduction, since one of the equal protection issues is not only the deal which can be made but also the *extent* of the deal. That is, the reduction of murder to manslaughter may be one thing, but the reduction of murder to disorderly conduct is quite another. Clearly, there should be no overcharging on the part of the prosecutors in order to induce pleas. Likewise, there probably should be no downgrading to "illogical" lesser offenses where the actual charge bears no relationship to the criminal conduct of the offender involved. In short, there must be some range set to permissible downgrading no matter how noble the motive of the prosecutor and the court.

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[114] Organized crime cases may fit this pattern. The prosecutor might bluff the defendant into pleading to a lesser charge when the prosecutor knows the admissible evidence is in all probability not sufficient for conviction.

[115] *Supra* note 112.

However, in each instance of plea bargaining there should be a lesser charge available for a plea. This is not always the case. For example, there is a problem now existing in the federal system because certain crimes, such as a violation of the Dyer Act (interstate transportation of a stolen motor vehicle), contain no lesser included offense to which a plea may be entered.[116] Most defendants charged under this section are teenagers, many having no prior records and no intent to permanently deprive the owner of his vehicle. The prohibition against illogical downgrading places federal prosecutors in a position of either taking a plea to the Dyer Act felony on the nose or dismissing the charge in its entirety. In most cases, some other charge — possibly a misdemeanor — would be preferable but is not available in federal courts.

Since under current conditions the burden of showing improper negotiation is entirely with the person contesting his conviction, another suggested change is that the state make affirmative statements in either agreeing or refusing to negotiate. This is evidently being done in some jurisdictions. For example, the Erie County District Attorney's Office in New York has a written form on which defense counsel submit their request for plea negotiation.[117] Attorneys are required to set forth the lesser plea they are seeking and the reasons that they believe justify their request. This document is then submitted to the District Attorney's Office for his approval or disapproval and for his comments. It is then given to the judge for his disposition and eventually filed with the court.

It would appear that such a formal procedure, well-posted and publicized, wherein negotiation matters are reduced to writing, attested to by defense counsel and a member of the prosecution's staff, and approved or disapproved by the court, is one way to move plea negotiation into the realm of visible and orderly processing. Only when this occurs, can the various facets and full dimensions of negotiated justice be subject to the tests of effectiveness and propriety which our system of criminal justice deserves.

APPENDIX

OFFICE OF THE DISTRICT ATTORNEY
CITY COURT OF BUFFALO

Date..... Docket.....

Defendant..... Charge.....

Part..... Returnable.....

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[116] 18 U.S.C. § 2312 (1964).

[117] *See* APPENDIX, p. 405 *infra.*

As attorney for the defendant, I offer a plea of guilty to a violation of.....

I submit that this would represent substantial justice and would give the Court ample latitude to deal properly with the matter.

I call the attention of the Court to the following factors:

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Attorney for Defendant

COMMENT:

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Assistant District Attorney

DATE:

.....

STATE OF NEW YORK
COUNTY COURT : ERIE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

— vs — Indictment No.....

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.....

.....

Defendant(s)

SIR:

WHEREAS, you have been retained or assigned to defend the above named defendant(s) on Indictment No.....;

PLEASE TAKE NOTICE that pursuant to an Order of the County

Court a General Calendar Call will be held on....., 1968, at.....a.m., County Court, Part.....; at which time the said indictment will be moved for trial;

PLEASE TAKE FURTHER NOTICE that the District Attorney:

(1) Demands that if alibi testimony is intended to be offered on behalf of the defendant that such information be supplied pursuant to Section 295-L of the Code of Criminal Procedure.

(2) Hereby gives notice of his intention to offer into evidence against the defendant upon the trial any and all confessions and or admissions oral or written, alleged to have been made by him/them pursuant to Section 813-F through 813-I, inclusive of the Code of Criminal Procedure and Rule XII of the Erie County Court Rules.

(3) Requests that if the defendant at the time of the commission of the crime was between the ages of 16 and 19, any application requesting Youthful Offender treatment must be processed immediately.

(4) Any application for a plea in this indictment must be made by you in writing *immediately*. This request should contain a detailed statement of the background of your client as well as any other reasons that would give merit to the considerations requested.

Respectfully,

MICHAEL F. DILLON
District Attorney of Erie County
Attorney for the People
Erie County Court Building
25 Delaware Avenue
Buffalo, New York

Dated: .....

To: .....

Attorney for Defendant

Office and Post Office Address

.....

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.....

THE FEDERAL HIGHWAY SAFETY ACT OF 1966: NHSB DRIVER LICENSING STANDARD—POWER NOT USED

BY JOHN H. REESE*

This article is concerned with the Highway Safety Act of 1966 and the administration of the provisions of that Act by the National Highway Safety Bureau (NHSB). After a discussion of the coverage of the Act, Professor Reese assesses its constitutionality along with a consideration of the pre-emptive intent of Congress as evidenced by the enactment. The focus of the article then shifts to the NHSB and its philisophical approach in administering the Act. The effects of this approach are exemplified in the "Driver Licensing Standards." Although this is only one of the NHSB's areas of responsibility, Professor Reese points out that the philosophy has led to "non-standards" in this area, partially thwarting the intent of Congress.

CONTENTS

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INTRODUCTION

TRADITIONALLY, highway safety has been viewed as a local problem, primarily subject to state authority. Some groups contended that highway safety was a local concern as a matter of "states' rights" and seemed to give little attention to analysis of the nature of the problem to determine how governments — state and federal — could best attack it.[1]

[1] *See, e.g., Foreword* to NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE (1962):

> It is generally agreed that achieving uniformity in traffic laws across the Nation is properly a task of the States, not the Federal government. Numerous national conferences on street and highway safety, many Federal and State officials, and informed laymen in the traffic safety field, have taken the position that centralization of highway traffic control in the Federal government is undesirable; that under our constitutional concepts, this control is primarily the responsibility of the States, and that uniform traffic regulation should have its foundation in uniform State laws. A basic tenet of the Uniform Vehicle Code is its approach through voluntary cooperative State action.

Id. at IV; *accord*, H.R. DOC. NO. 93, 86th Cong., 1st Sess. 2 (1959) (THE FEDERAL ROLE IN HIGHWAY SAFETY); *Hearings on S. 1467 Before the Subcomm. on Public Roads of the Comm. on Public Works — Authorization Bill for Highway Beautification and Highway Safety Programs*, 90th Cong., 1st Sess. 452 (1967) (statement of Lewis P. Spitz, Executive Director, American Association of Motor Vehicle Administrators) [hereinafter cited as *Hearings on S. 1467*]. There are those who regard the 1966 federal

However, this "local problem" premise has been rejected, and highway safety is now viewed as a national problem; for in 1966, Congress lost patience with the attempts of state governments to create effective highway safety programs.[2] After at least forty years of exhortation to cooperate and to structure uniform and comprehensive safety programs,[3] the states remained divided in their approaches to the problem. State highway safety programs were extremely diverse as to

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intervention as an improper intrusion. *See Hearings on S. 3052 Before the Subcomm. on Public Roads of the Comm. on Public Works,* 89th Cong., 2d Sess. 148-50 (1966) (statement of Charles F. Schwan, Jr., Director, Washington Office of Council of State Governments); *Compare Hearings on S. 1467 supra* referring to implied consent standard promulgated:

> The specificity of this particular standard severely limits the options available to a State legislature and practically dictates what the State legislature must do. In effect the National Highway Safety Agency is telling the state legislature what it must do in order to comply — pass implied consent legislation and also reduce blood alcohol percentage . . . I am saying here you are limiting very much the area in which a State legislature may want to operate. . . .

Id. at 288 (statement of David J. Allen, Administrative Assistant to the Governor of Indiana) *with* statement of John De Lorenzi, Managing Director, Public and Government Relations, American Automobile Association. *Id.* at 222.

[2] The congressional attitude is subtly revealed in the *Hearings on S. 3052 Before the Subcomm. on Public Roads of the Comm. on Public Works,* 89th Cong., 2d Sess. (1966) [hereinafter cited as *Hearings on S. 3052*]. It is stated, for example: "Our survey of present highway safety efforts throughout the Nation clearly shows that Federal, State, and local efforts have proceeded separately with little or no coordination and that major gaps and weaknesses exist in present programs. *Id.* at 7 (statement of John T. Connor, Secretary of Commerce). More specific is H.R. REP. No. 1700, 89th Cong., 2d Sess. (1966) (Highway Safety Act of 1966):

> The Committee on Public Works maintained diligent contact with the Department of Commerce, anxious to learn what progress the Secretary was making in his conferences with the States for the development of standards for the voluntary highway safety programs the amended section 135 encouraged the States to establish. [Baldwin Amendment] There was no real prograss. . . . For 40 years the various safety-related organizations, both public and private, have been trying to persuade the several State legislatures to adopt at least minimum uniform regulatory statutes, with lamentable lack of success.

Id. at 4, 6.

[3] H.R. REP. No. 1700, 89th Cong., 2d Sess. 6 (1966) (Highway Safety Act of 1966). It should also be noted that when he was Secretary of Commerce, Herbert Hoover called a large number of interested groups to attend a National Conference on Street and Highway Safety. Eight study committees were at work on the problem for six months in advance of the Conference. Findings and a consolidated report were prepared by the Conference after its deliberations. In 1926, the Conference was convened again to consider interim work of committees. The 1926 Conference approved a suggested model for a "uniform vehicle code," which had been prepared by the Committee on Uniformity of Laws and Regulations. This "code" consisted of three separate acts covering (1) registration and certificate of title, (2) licensing of operators and chauffeurs, and (3) rules governing the operation of vehicles on highways. The three acts were recommended to the states for adoption. These documents were later combined into a UNIFORM VEHICLE CODE, likewise recommended to the states. It has been maintained and amended through the years and is currently in the custodianship of the National Committee on Uniform Traffic Laws and Ordinances. It was last revised in 1968. H.R. DOC. No. 93, 86th Cong., 1st Sess. 12-13 (1959) (THE FEDERAL ROLE IN HIGHWAY SAFETY). In the interim, in 1926 the National Conference of Commissioners on Uniform State Laws approved the act covering licensing of operators and chauffeurs under the title "Uniform Motor Vehicle Operators' and Chauffeurs' License Act" and recommended it to the states. It was revised in 1930. However, in 1943 the Conference of Commissioners declared it "obsolete" and "no longer recommended for adoption." HANDBOOK OF THE NATIONAL CONFERENCE 69 (1943). For its text, see 11 UNIFORM LAWS ANNOTATED 75-97 (1938).

areas of coverage; and where coverage was similar, standards were often different.[4]

In his 1966 Transportation Message to the Congress,[5] the President described motor vehicle accident losses in lives, personal injury, and property damage as a national problem, second in magnitude only to the Viet Nam War.[6] His characterizations seemed to provide the catalyst which quickly produced a congressional consensus that the federal government should intervene. Congress recognized that it was fallacious to perceive highway accidents as merely local problems and concluded that the existing piecemeal methods of regulation were not a sensible manner in which to attack the highway safety problem, even if the problem is arguably local in nature.[7] Hence, Congress concerned itself with developing legislation which would combine two premises: (1) that highway safety is a national concern and (2) that all facets of the highway transportation system having a safety implication must be dealt with systematically. Therefore, vehicle, roadway, and driver would receive attention in terms of their relation to the safety aspects of "highway transportation."[8]

I. THE HIGHWAY SAFETY ACT OF 1966

The most extensive federal involvement in the highway safety field occurred with the passage of the Highway Safety Act of 1966.[9]

[4] The diversity as to both coverage and standards is apparent upon cursory examination of the volumes in the series entitled TRAFFIC LAWS ANNUAL, published by the National Committee on Uniform Traffic Laws and Ordinances. *See also* H.R. REP. No. 1700, 89 Cong., 2d Sess. 2 (1966) (Highway Safety Act of 1966).

[5] N.Y. Times, Mar. 3, 1966, at 20.

[6] *Id.; accord, Hearings on S.* 3052, *supra* note 2, at 82 (statement of Howard Pyle, President, National Safety Council).

[7] H.R. REP. No. 1700, 89th Cong., 2d Sess. 6 (1966) (Highway Safety Act of 1966); S. REP. No. 1302, 89th Cong., 2d Sess. 3, 6, 7, 15 (1966) (The Highway Safety Act of 1966); *accord,* H.R. DOC. No. 93, 86th Cong., 1st Sess., 11, 142, 145 (1959) (THE FEDERAL ROLE IN HIGHWAY SAFETY).

[8] *Id. See also Hearings on S.* 3052, *supra* note 2, at 63-64 (statement of Herbert J. Bingham, Executive Secretary, Tennessee Municipal League); 65 (statement of J.O. Mattson, President, Automotive Safety Foundation); 81-82 (statement of Howard Pyle, President, National Safety Council); 116 (statement of William G. Johnson, General Manager, National Safety Council); 162-63 (statement of William Randolph Hearst, Jr., Chairman, The President's Committee for Traffic Safety); 233 (statement of Senator Randolph, Committee Chairman).

[9] 23 U.S.C. § 402 (Supp. 1970). At the federal level, the Bureau of Public Roads has for years participated in creating and prescribing standards of highway design and construction for federal-aid highways (initiated by the Federal Road Aid Act of July 11, 1916, ch. 241, 39 Stat. 355). However, its historical responsibility does not include control of human factors; hence, its operations are not to be considered. According to 49 U.S.C. § 1652(f)(4) (Supp. 1970), the Federal Highway Administrator is also made Director of Public Roads. As such he controls human factors to the extent he exercises the authority transferred to him from the Interstate Commerce Commission to promulgate qualifications requirements of motor carrier operators. Until this transfer, the Bureau had no human factors control power.

The Beamer Resolution of 1958 (Act of August 20, 1958, Pub. L. No. 85-684, 72 Stat. 635) constituted advance Congressional consent to the creation of interstate compacts between States in the field of highway and traffic safety, including driver

This Act vests authority in a federal administrative agency to assert control over human factors relevant to highway accidents.[10]

A. *Powers of the Secretary of Transportation and the National Highway Safety Bureau*

The provisions of the Act are to be administered by the Secretary of Transportation acting through the National Highway Safety Bureau (NHSB).[11] Although the Highway Safety Act deals with roadway and driver factors, it does not confer upon the Secretary direct regulatory authority over individuals who operate motor vehicles. His power is directed to the states as political entities.[12] Thus, the Secretary and the NHSB do not engage in issuing or withdrawing drivers' licenses. As will be seen, however, the manner in which the statutory program is structured and the available sanctions imply that the Secretary's power will be felt ultimately by individual licensees.

The essence of the Secretary's authority is contained in the following expression:

> Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary.[13]

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licensing and human factors research. However, this was essentially an enabling act to permit states to act in concert using the compact device. Congressional approval is required by the UNITED STATES CONSTITUTION, art. I, § 10.

The Roberts Act of 1964 (Act of August 30, 1964, Pub. L. No. 88-515, 78 Stat. 696) is not included in this analysis because it dealt with vehicle safety devices and not human factors. Furthermore, although it did transfer power to the Administrator of General Services, his authority to prescribe motor vehicle safety devices was limited to vehicles purchased by GSA for government use.

The House version of the Baldwin Amendment (Act of August 28, 1965, Pub. L. No. 89-139, 79 Stat. 578) to the Federal-Aid Highway Act of 1965 (23 U.S.C. 101 (Supp. 1967)) came close to transferring power to the Secretary of Commerce to cut off federal highway funds to states which did not have approved highway safety programs. However, this provision of the House Bill was stripped down to a statement that state highway safety programs "should be in accordance with uniform standards approved by the Secretary," as the bill was finally passed by the Congress (23 U.S.C. 135 (1964)). Obviously, the power of the Secretary to cut off all highway funds to non-conforming states was effectively eliminated.

The National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. §§ 1381-1425 (Supp. 1970)) is also not included. Although it builds on the theory of the Roberts Act and transfers power to the Secretary of Transportation to prescribe minimum motor vehicle performance standards for all motor vehicles manufactured for sale or introduced or delivered for introduction into interstate commerce in the interest of public safety, it does not confer power of control over human factors to the NHSB.

Although there are other illustrations of federal government intervention in the field of highway safety, this sampling should suffice to describe the sort of intervention with which this analysis will *not* be concerned. This study constitutes an attempt to evaluate the sort of involvement, which gives some organ of the federal government power to devise the "law", *i.e.*, the actual program policies which are brought to bear directly or indirectly on individuals who operate motor vehicles.

[10] 23 U.S.C. § 402 (Supp. 1970).

[11] 49 U.S.C. § 1652(f)(2) (Supp. 1970).

[12] 23 U.S.C. § 402(a) (Supp. 1970).

[13] *Id.*

Acting through the NHSB, he is further directed to address the "uniform standards" to these goals:

[A] [T]o improve driver performance [including but not limited to education, testing, examinations, and licensing and]

[B] [t]o improve pedestrian performance."[14]

More specifically the uniform standards are to include, but are not limited to:

[1] [A]n effective record system of accidents (including injuries and deaths resulting therefrom),

[2] accident investigations to determine the probable causes of accidents, injuries and deaths,

[3] vehicle registration, operation, and inspection,

[4] highway design and maintenance (include lighting, markings, and surface treatment),

[5] traffic control,

[6] vehicle codes and laws, [and]

[7] surveillance of traffic for detection and correction of high or potentially high accident locations . . . ."[15]

Although these goals have been legislatively determined, the Secretary's (NHSB) power to promulgate uniform standards on any subject believed to be relevant to highway "safety" may render these goals, in fact, illusory. To illustrate: There is abundant commentary indicating that current highway "safety" knowledge is based upon research which is nonempirical, or out-of-date, or both.[16] Therefore, it is submitted that the word "safety" is not precise and can mean many things to many people. It is essentially a normative term which is defined administratively, according to the NHSB's sense of values and its conception of how much safety restriction is compatible with efficient movement. If this analysis is correct, the NHSB effectively determines the *goals* of the legislation as well as the *standards* by which they are to be achieved.

In addition to the Secretary's authority to promulgate uniform standards, he is empowered to "amend or waive standards" on a "temporary basis" for the purpose of evaluating new or different programs instituted by one or more states on an "experimental, pilot, or demonstration basis" if he finds that such amendment or waiver

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[14] *Id.*

[15] *Id.*

[16] For a sample of such comments, examine H.R. Doc. No. 93, 86th Cong., 1st Sess., 8, 121, 141, 142, 147 (1959) (THE FEDERAL ROLE IN HIGHWAY SAFETY):

> Through enlargement and orderly refinement of the body of fundamental knowledge concerning highway accidents will come opportunities for deeper insight, for formulation and testing of accident causes by hypothesis, and for practical development of means for safer street and highway travel.

H.R. REP. No. 1700, 89th Cong., 2d Sess. 26 (1966) (Highway Safety Act of 1966); S. REP. No. 1302, 89th Cong., 2d Sess. 3, 6, 14, 15 (1966) (Highway Safety Act of 1966); *Hearings on S.* 3052, *supra* note 2, at 7, 8, 10, 50, 85, 104, 111, 131, 142, 222; *Hearings on S.* 1467, *supra* note 1, at 180, 205, 328, 332, 335.

would serve the "public interest."[17] The lack of descriptive content in the subjective phrase "public interest" means the Secretary (NHSB) may approve or disapprove experimental, pilot, and demonstration programs without running afoul of the statute.

The Secretary (NHSB) is given yet another power, one involving the expenditure of federal highway safety funds. To insure that local (urban) highway safety programs would not suffer at the expense of the state programs, the Congress provided that at least 40 percent of all federal safety funds apportioned to a state for any fiscal year would be expended by the political subdivisions of the state on such programs, if the local program is approved by the governor of the state and if it is in accord with the promulgated uniform standards.[18] However, the Secretary is given the power to waive the 40 percent requirement in whole or in part for a fiscal year for any state.[19] The only control on this authority is the requirement that the Secretary determine that "there is an insufficient number of local highway safety programs to justify the expenditure" of 40 percent of federal funds locally during that year.[20] He decides how few local programs are an "insufficient number," and he determines what is a justified expenditure of federal funds.

B. *Limitations on the Power of the Secretary of Transportation and the National Highway Safety Bureau*

Despite the broad power grants to the Secretary (NHSB), the Congress did provide some effective limitations in its legislation. These limitations take the form of threshold requirements which must be met by the states. In evaluating state highway safety programs, there are certain program requirements over which the Secretary (NHSB) has no control and, hence, no power of choice. Specifically, a state highway safety program *must*: (1) provide that the governor of the state is responsible for its administration; (2) authorize political subdivisions of the state to carry out local highway safety programs as part of the state program, if they are approved by the governor and meet the Secretary's uniform standards; (3) provide that at least 40 percent of the federal funds received will be expended on local programs, subject to waiver of this requirement by the Secretary; (4) provide that the aggregate expenditure of state and local funds for such programs will be maintained at a level equal to the average level of such expenditures for the two fiscal years preceding enactment of the statute; (5) provide for comprehensive driver training programs including

[17] 23 U.S.C. § 402(a) (Supp. 1970).
[18] *Id.* §§ 402(b)(1)(B)-(C).
[19] *Id.* § 402(b)(2).
[20] *Id.*

driver education in schools, training of qualified school instructors, appropriate regulations of other driver training schools, adult driver training programs and retraining programs for selected drivers, and development of practice driving facilities, simulators, and similar teaching aids.[21]

C. *Sanctions Applicable to Noncomplying States*

As one sanction applicable to noncomplying states after December 31, 1968, the statute provides that "the Secretary shall not apportion any [safety] funds . . . to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section."[22] Further, after January 1, 1969, states not "implementing" an approved program will lose 10 percent of the federal-aid highway funds they otherwise would have received, until such time as they are implementing an approved program.[23] The responsibility to determine what constitutes "implementing" is in the Secretary (NHSB).[24] Furthermore, whenever he determines it to be in the "public interest," the Secretary may suspend — for such periods as he deems necessary — the application of this 10 percent reduction of federal-aid highway funds.[25] Apparently, he has almost complete authority to waive this sanction, for the vague term "public interest" does not limit his discretion and there is no statutory control on the time period which he might deem "necessary."

Such potentially powerful financial sanctions put the Secretary and the NHSB in a persuasive position vis-a-vis recalcitrant states. They have available "carrot and stick" techniques to secure compliance with the uniform standards. However, the existence of this awesome power to secure compliance by the withholding of funds does not necessarily mean that it should or will, in fact, be used.[26]

II. The Federal-State Power Balance

The authority of the NHSB to establish driver performance standards and grant exceptions, to approve or disapprove state programs, and to impose financial sanctions on noncomplying states suggests the NHSB program may result in a modification of the current power balance between the state and federal governments in an area in which

[21] *Id.* §§ 402(b)(1)-(2).

[22] *Id.* § 402(c).

[23] *Id.* Federal-aid highway funds are administered under authority of the provisions of 23 U.S.C. § 104 (1964).

[24] This arises from the fact that the statute does not provide any suggestion as to how "implementing" should be interpreted. The Secretary (NHSB) must, therefore, make the determinations on whatever basis he deems appropriate.

[25] 23 U.S.C. § 402(c) (Supp. 1970).

[26] *Safety Hassle,* The Wall Street Journal, June 17, 1969, at 1, wherein Secretary Volpe indicated he might withhold funds from recalcitrant states.

power has been traditionally left to the states. This thought leads to a consideration of both the legality and the extent of the federal involvement in the field of highway safety.

A. *Constitutionality*

There is little doubt that the Congress possesses, on several grounds, the authority to assert itself in the area of driver control. The evolution of the Commerce Clause as a power base from *Gibbons v. Ogden*[27] through *Champion v. Ames*[28] to *Darby Lumber Company*,[29] *Wickard v. Filburn*,[30] *Heart of Atlanta Motel*,[31] and *Katzenbach v. McClung*,[32] need not be described in detail. The United States Supreme Court's broad reading of the Commerce Clause — as demonstrated in these cases — lays to rest any serious doubt that the Court would not sustain highway safety legislation based on the commerce power. Furthermore, the Court impliedly recognized latent power in Congress in the highway safety area in the early case of *Hendrick v. Maryland*.[33] It was held therein that the State of Maryland had the authority to require a District of Columbia resident temporarily using its highways to register his vehicle or secure permission to operate it as a non-resident. In the course of its opinion, the Court suggested the existence of a paramount but unexercised power of Congress to enter the field: "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles — those moving in interstate commerce as well as others."[34] By this language the Court implied not only power in Congress to legislate but also power to pre-empt the area and supplant the regulations of the various states with its own.[35] However, unless the Congress acts affirmatively, state regulation is permitted so long as its measures do not unduly burden[36] or discriminate[37] against interstate traffic.

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[27] 22 U.S. (9 Wheat.) 1 (1824).

[28] 188 U.S. 321 (1903).

[29] United States v. Darby, 312 U.S. 100 (1941).

[30] 317 U.S. 111 (1942).

[31] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[32] 379 U.S. 294 (1964).

[33] 235 U.S. 610 (1915).

[34] *Id.* at 622. The Court reaffirmed this position in Kane v. New Jersey, 252 U.S. 160, 167-68 (1916).

[35] Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524n.5 (1959); *cf.* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960); Southern Pac. Co. v. Arizona, 325 U.S. 761, 769 (1945). *See also* Cooley v. Board, 53 U.S. (12 How.) 299 (1851).

[36] *Id.*

[37] South Carolina v. Barnwell Bros., 303 U.S. 177 (1938); *cf.* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520, 524 (1959). *See also* Cooley v. Board, 53 U.S. (12 How.) 299 (1851).

Congress may rely upon, in addition to the Commerce Clause, other constitutionally granted powers to intervene in the field of highway safety. For example, Congressional power to spend for the general welfare has been approved by the United States Supreme Court in such broad, unlimited terms as to allow comprehensive federal programs in a multitude of areas of national concern.[38] The only limitation on this power is that its use must relate to some national, as distinguished from local, purpose or problem.[39] Congress could also use the technique of attaching conditions to federal grant-in-aid funds, so long as the conditions bear a relation to a national purpose or problem;[40] and the power to "establish post offices and post roads,"[41] might also be employed by implication to support federal highway safety legislation.

In summary, it is reasonable to assume that any one or a combination of these formal Congressional power bases would indeed support federal legislation injecting the national government into the highway safety field.

B. *Federal Pre-emption in Law*

If the federal involvement of 1966 is assumed to be legitimate, the next question is whether the legislation has, in fact, changed the federal-state power balance in the field of highway safety. If some change in the balance is presumed, the extent of the change should be considered. The most extensive change would occur if the legislation had the effect of pre-empting the field as was implied to be permissible in *Hendrick v. Maryland*.[42]

1. General Pre-emption

Congressional hearings, committee reports, presidential statements, and later testimony of officials indicate reservations on the part of Congress to entirely supplant the states as policy makers in the field of highway safety. There are several statements to the effect that the

[38] Helvering v. Davis, 301 U.S. 619, 640-41 (1937); *see* Steward Machine Co. v. Davis, 301 U.S. 548, 593-98 (1937); United States v. Butler, 297 U.S. 1, 67 (1936); U.S. CONST. art. I, § 8. "The Congress shall have Power: (1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ." *Id.*

[39] Helvering v. Davis, 301 U.S. 619, 641 (1937); Steward Machine Co. v. Davis, 301 U.S. 548, 593-98 (1937); United States v. Butler, 297 U.S. 1, 67 (1936).

[40] Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). Despite an argument that such legislation violated the Tenth Amendment, the Supreme Court upheld withdrawal of a portion of Oklahoma's share of federal highway funds for failing to remove from office a member of the State Highway Commission who took an active part in political activities. His actions constituted a violation of the Hatch Act, 5 U.S.C.A. § 7324 (1967), which forbade political activities financed in whole or in part with federal funds. *Id. See* Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936) (Stone, J., dissenting opinion).

[41] U.S. CONST. art. I, § 8.

[42] 235 U.S. 610 (1915).

federal government is to supply "leadership" in the field and "help" the states develop adequate highway safety programs.[43] While there are also several expressions of demand for *specific* uniform standards in *specified areas* of highway safety action policies,[44] these latter expressions may signify only that Congress desired federal "leadership"[45] to take the form of pre-emption in the designated areas, as opposed to general pre-emption. Perhaps the words "cooperation" and "leadership" were used to make some limited form of pre-emption more palatable to the Congress and the states. In any event, whether "leadership" means limited pre-emption or merely federal guidance, the legislative history of the Act would not appear to support an argument of general pre-emption of the safety field.

2. Interstitial Pre-emption

As indicated above, if there is pre-emption intent in the Act, it might take a limited form which could appropriately be termed "interstitial" pre-emption. That is, Congress may have desired to provide leadership in highway safety generally — and thus have intended no complete pre-emption — and, at the same time, it may have determined that the working safety policy should be made at the federal level and applied uniformly, where there are expressions of a desire for something more than "leadership".[46] The fact that the precise federal policies would be made by an administrative agency (NHSB) instead of the Congress is of no moment, for this has presented no difficulty in cases involving pre-emption by the regulations of other administrative agencies.[47]

Driver licensing is one of those facets of the highway safety prob-

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[43] *Hearings on S.* 3052, *supra* note 2, at 5, 6-7, 42, 131, 151.

[44] *Id.* at 131; H.R. REP. No. 1700, 89th Cong., 2d Sess. (1966) (Highway Safety Act of 1966).

[45] *Hearings on S.* 3052, *supra* note 2, at 5, 6-7, 42, 131, 151.

[46] For instance, House Report No. 1700, refers to the Baldwin Amendment of 1965 (23 U.S.C. §135 (1965)) which provides that states "should" adopt highway safety programs in accord with uniform standards promulgated by the Secretary of Commerce. The Report concludes that the Secretary got nowhere in conference with the states and that "[t]here was no real progress." H.R. REP. No. 1700, 89th Cong., 2d Sess. (1966).

At another point the Report refers to the fact that for forty years various safety organizations "have been trying to persuade the several State legislatures to adopt at least minimum uniform regulatory statutes, with lamentable lack of success." *Id.* at 6. However, the Report does recognize what it calls a "paramount" role for the states since states register automobiles, license drivers, educate the children, police traffic and enforce statutes. Nevertheless, any desire to leave these traditional state functions in state hands is not necessarily inconsistent with the pre-emption argument, for each of these functions could continue to be performed and applied uniformly by all states according to standards adopted federally. The Report speaks of the insufficiency of most state programs and concludes that a "mandatory program" (*id.* at 7) insisted upon by the Congress may save more lives.

[47] Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926). *See also* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Maurer v. Hamilton, 309 U.S. 598 (1940).

lem where there is reason to believe that Congress may have acted to pre-empt interstitially. House Report No. 1700[48] addresses this area:

> The wide variation from State to State, and the failure to achieve any semblance of control or uniformity, bespeak pressures and adherence to customs long out of date. Driver licensing is apparently more a source of revenue than a safety control. A person licensed to drive in one State, however, is in fact licensed to drive anywhere. State lines are not barriers to drivers in our highly mobile society, nor would anyone want them to be. But strict uniform licensing and renewal procedures must be developed and adopted, covering minimum age limits, mandatory physical and eyesight examinations, competent skills tests and written or oral examinations on traffic laws, varieties of traffic conditions, and emergency situations that arise in the operation of an automobile.[49]

Like the House Committee Report, the report[50] accompanying the Senate Bill provides: "The value of uniformity is clear in such matters as standards for driver training and education and periodic re-examination of drivers."[51]

If genuinely sought, the "strict uniformity" mentioned in the House Report can come about *only* through *uniform* federal licensing standards. In our form of federalism, only a "senior partner" sovereign (the federal government) possesses the necessary power ("leadership") to force ("lead") "strict uniformity" of licensing upon state sovereignties. If expressed in precise terms, such standards will have the effect of pre-empting the states in the area of driver licensing.

3. Minimum Standards Pre-emption

Within either form of pre-emption — general or interstitial — an alternate form exists by which the Secretary (NHSB) may take action. Rather than establishing comprehensive uniform standards, the Secretary (NHSB) may promulgate minimum standards to be applied uniformly. To illustrate: It is plausible to read the federal legislation as involving driver licensing pre-emption only to the extent requiring *minimum* levels of uniformity. This approach would recognize continuing power in the states to adopt driver licensing standards higher than the minimum requirements imposed by the NHSB. On the other hand, state standards not meeting the federal minimum would be supplanted by the federal standards.[52]

This form of pre-emption raises issues inherent in the higher-lower standards dichotomy. That is, when federal action is characterized as a requirement of minimum uniformity, a different licensing standard

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[48] H.R. REP. No. 1700, 89th Cong., 2d Sess. (1966) (Highway Safety Act of 1966).

[49] *Id.* at 9.

[50] S. REP. No. 1302, 89th Cong., 2d Sess. (1966) (Highway Safety Act of 1966).

[51] *Id.* at 5.

[52] The distinction between the pre-emptive effect of *minimum* standards and *uniform* federal standards is described in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-52 (1963).

established or proposed by a state may be viewed in one of two ways: It may be considered to relate to the imposition of further controls to prevent driver failure, or it may be viewed as necessary to protect individual freedom of travel.[53] Thus, what is "higher" in terms of safety is also more restrictive, *i.e.*, "lower," in terms of free travel. Likewise, a control which is "lower" in terms of safety is less restrictive, *i.e.*, "higher" in terms of protecting free travel.

It is important to recognize that, at some point, the goal of increased highway safety must yield to demands for social efficiency. Hence, Congress is probably not to be understood as justifying higher standards of safety to the extent of completely disregarding the impact of safety policies on the need to travel, with a driver's license serving as a primary means of expressing that need.[54] Such an interpretation would permit the states to adopt any sort of repressive control measure which could be shown to contribute to highway safety and to justify the controls in terms of the National Highway Safety Act. Absolute safety on the streets and highways cannot be expected; the corresponding loss of efficiency in transportation would not be worth the social cost.

4. Determination of the Pre-emption Issue

Of course, the decision as to whether there is legal pre-emption of the driver licensing field would be provided by the courts. This result is apparent from the fact that a body of court-created doctrine has been developed.[55] Hence, the above comments are only speculative, for as yet the courts have not confronted the question. However, there is sufficient material available on which to base a plausible pre-emption argument. No doubt such an argument could prove useful to the person whose license is withdrawn under a state statute or regulation believed to be inconsistent with uniform standards promulgated by the NHSB.

C. *Federal Pre-emption in Fact*

Whether there has been pre-emption in law by Congress in the area of highway safety may be an academic question for the reason that there may be pre-emption in fact. This follows from the political and economic leverage over the states which is enjoyed by the federal gov-

[53] The right to travel has been accorded Constitutional protection. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Guest, 383 U.S. 745, 757-59 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Kent v. Dulles, 357 U.S. 116, 125 (1958); Edwards v. California, 314 U.S. 160, 162-63 (1941); *see* Zemel v. Rusk, 381 U.S. 1 (1965); *cf.* Hague v. CIO, 307 U.S. 496 (1939); United States v. Wheeler, 254 U.S. 281 (1920); Williams v. Fears, 179 U.S. 270 (1900); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

[54] The importance of the motor vehicle as a mode of expressing mobility in American society is amply demonstrated in the APPENDIX *infra*.

[55] *See generally* S. Doc. 39, 89th Cong., 1st Sess., 282-94 (1964) (THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION).

ernment. The states may have no real choice other than to comply with the federal mandates in the field of highway safety.

The key to the federal "leadership," "partnership," or "cooperation" with the states — however labelled — is simply money! State governments need federal grants-in-aid to accomplish the many social programs which they pursue. What makes possible pre-emption in fact is the legal doctrine which permits Congress, in the exercise of its spending power, to fix the terms on which allotments of federal funds will be made.[56] The doctrine is such that a state which receives "offers of seductive favors"[57] from the federal government is expected to submit to the terms on which the favors are offered or "adopt 'the simple expedient' of not yielding to what she urges is federal coercion."[58]

However, given the shift of economic power to the federal government through the income tax and other federal funding measures, is it realistically possible for states to refuse federal grants-in-aid, despite distasteful conditions which are imposed? The "simple expedient"[59] of refusing to be coerced is a simplistic answer in a society which, in fact, depends on economic adjustments to be made by the federal government no matter what form they may take.

Hence, Congress, well aware of the limited or nonexistent choice available to states, has created many federal spending programs to which conditions are attached. Relevant to highway safety, the interstate system of highways and the federal-aid systems are two examples of such programs. While both of these projects are the combination of many years of state-federal "cooperation" in this field,[60] the Federal Highway Administration[61] promulgates the detailed specifications which must be met by state programs, and it approves state project proposals which are to be federally funded in part.[62] These programs have been successful in securing more highway mileage of higher quality than would have been built if states had been forced to go it alone, and the states have come to depend on such grants-in-aid.

The relevance of such programs to the highway safety program lies in the power of the NHSB to refuse to approve a state safety program.[63] With a broad base of transferred power — supported by the authority to impose financial sanctions on recalcitrant states — and

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[56] *See* Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

[57] Steward Machine Co. v. Davis, 301 U.S. 548, 599 (1937) (McReynolds, J., dissenting opinion).

[58] Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143-44 (1947).

[59] *Id.* at 143.

[60] 23 U.S.C. §§ 103, 107, 111, 113, 115, 127 (1966).

[61] *Id.* § 109.

[62] *Id.* § 106.

[63] *Id.* § 402 (a) (Supp. 1970): "Each State shall have a highway safety program approved by the Secretary . . . ." *Id. See* text accompanying notes 22-26 *supra.*

given the economic position of the states, it appears that the NHSB can, indeed, provide the "leadership" necessary to inspire the states to adopt highway safety programs in accord with its uniform standards. In the final analysis there may be pre-emption of state power in *fact,* if not in *law.* In either case the federal role in highway safety will ultimately become dominant. This will follow *if* the NHSB makes efficient use of its standard setting and sanctioning authority.

III. NHSB PHILOSOPHY REGARDING STANDARDS

As his explanation of the approach taken by NHSB to its initial standards, former Federal Highway Administrator Lowell Bridwell stated:

> I should point out that a policy choice was involved in our adoption of the new standards. If all States were to be required to meet every portion of every provision of the standards by the end of next year, [December 31, 1968] this course would have called for adopting standards with a fairly low level of performance.
>
> Alternatively, the standards could reach much higher levels if they were to specify high but realistic goals to which the States could aspire in their programs. For that reason, the policy was adopted of setting goals as the only feasible method of procedure. The standards are therefore phrased in broad terms, permitting some variation in State regulations and allowing for a degree of flexibility between the States in experimenting with different program approaches to produce more effective results.[64]

Dr. William Haddon, Jr., then Administrator of NHSB echoed Mr. Bridwell as follows:

> If the programs of all States were required to meet all aspects of all standards by the end of 1968, this would necessitate standards approaching the lowest common denominator of present State and community programs. If, on the other hand, the standards were to set goals which the States could work toward, they could be set at much higher levels. This latter alternative was adopted as the only one which would adequately satisfy the purposes of the Act.[65]

At another point Dr. Haddon stated: "The standards, therefore specify what is to be done, and not 'how' or by whom."[66]

A. *The Relationship Between the Philosophy and the Act*

Perhaps this NHSB approach to its standards development function is justifiable as to the overall program and, in general, as to the thirteen initial standards,[67] but it is doubtful that the NHSB can justify its argument that the standards had to be expressed in "broad terms" and at "realistic" levels. In part, the NHSB philosophy may be criti-

[64] *Hearings on S.* 1467, *supra* note 1, at 174-75.

[65] *Id.* at 178.

[66] *Id.* at 180.

[67] 23 C.F.R. § 204.4 (1970).

cized for erroneously assuming that the National Highway Safety Act required states to *meet* all NHSB standards before January 1, 1969. It is true that Sec. 402(b) of the Act forbids approval of any state highway safety program which does not contain the five mandated provisions;[68] however, there is no statutory requirement that the mandated provisions or other standards promulgated by NHSB must be *operational* by that date. Conversely, the statute provides that states which are implementing (*i.e.*, progressing toward compliance) *approved* programs on January 1, 1969, will not lose federal safety or highway-aid funds.[69] Therefore, it is fallacious to assume that NHSB cannot include high performance level components in its standards. *Implementation* of state safety program elements may occur over a period of time. This implementation concept is consistent with statements of the Undersecretary of Transportation and the Federal Highway Administrator.[70]

Further, there are at least three reasons why states would not be forced to lose federal funds if the NHSB were to adopt exacting and precise standards. First, the NHSB has discretion to approve late implementation of approved state programs, so long as some real progress is made. Congress accepts this without question.[71] Second, the Act gives the Secretary of Transportation power to protect the state share of highway funds (but not the safety funds), authorizing him "in the public interest" to suspend the safety program approval requirement of any state "for such period as he deems necessary."[72] Third, the Act

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[68] 23 U.S.C. § 402(b) (Supp. 1970).

[69] *Id.* § 402(c).

[70] The NHSB policies emphasize implementation of state safety programs over a period of time. The NHSB believes it has power to approve state program plans on December 31, 1968, but allow for full implementation later as the state progresses in fulfilling its obligations under the plan approved. For example, Under Secretary of Transportation Everett Hutchinson stated to the National Highway Safety Advisory Committee:

> The law provides that each Governor shall submit to the Secretary of Transportation, for his approval, a comprehensive highway safety program by December 31, 1968. Each program will be reviewed in the light of the progress the plan calls for over the existing level of safety program performance in the State. A plan does not have to provide for full implementation of the standards the Secretary will promulgate by any specific point in time.
>
> In the final analysis, I cannot image [sic] a State being penalized 10 per cent of its highway funds except in a very extreme situation. Of course, the public interest will be served by early implementation of the safety programs.

Hearings on S. 1467, *supra* note 1, at 176-77 (quoted as part of the statement of Lowell K. Bridwell, Federal Highway Administrator). See the statement of Dr. William Haddon, former Director of NHSB, in the *Hearings on S.* 1467, *supra* note 1, at 177-79, and the response of Mr. Bridwell to a question by Senator Cooper:

> As I understand, it is absolutely correct that what you have to do is gauge the progress that is being made and make a determination as to whether or not a State is making not only a good faith effort, but also a substantial effort to implement the regulations. Is that correct?
>
> MR. BRIDWELL. Yes, sir; I think that certainly agrees with my assessment.

Id. at 179. *See also Hearings on S.* 1467, *supra* note 1, at 206-07 (statement of Lowell K. Bridwell).

[71] *Hearings on S.* 1467, *supra* note 1, indicate this acceptance.

[72] 23 U.S.C. § 402(c) (Supp. 1970).

gives the Secretary of Transportation power (in the "public interest") to "amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis, by one or more States . . . ."[73] This congeries of express power is ample authority upon which the NHSB might justify individual state deviations from the exacting standards which it could promulgate. In short, the NHSB was not forced into the philosophy it chose to adopt.

B. *Factors Contributing to the Philosophy*

The philosophy adopted by the NHSB for determining the initial standards may have been influenced in part by the probable federal funding drain occurring as a result of demands imposed by the Viet Nam war. Without sufficient federal grant-in-aid funds, high quality state safety programs could not be implemented. However, this factor does not justify the setting of low federal standards. The NHSB could construe "implementing" to mean whatever progress is possible within the budgetary limitations imposed.

Another factor which could have contributed to the perspective of the standards chosen is the statutory requirement that the standards must be developed in cooperation with the states, their political subdivisions, and appropriate federal agencies.[74] The cooperative relationships described in the Act may have been taken too literally, and the desire for federal "leadership", which was expressed in the committee reports of both Houses of Congress, may have been lost. In effect, the philosophical rationale announced may have evolved during the NHSB deliberations with states, political subdivisions, and other federal agencies as to the standards which could "cooperatively" be agreed upon.

The determination to set "realistic goals"[75] also may have been influenced by a desire to reassure the states that most of them would be able to meet NHSB expectations without resort to the waiver process. Innocuous standards may be promulgated to demonstrate that the NHSB is fulfilling its responsibilities. Unfortunately, such standards may be erroneously assumed by the general public to make a significant contribution to improved driver performance. Political considerations may get in the way of crusading spirit; and thus watered down, the crusade enters a new phase in which the social problem, which led to the creation of the agency, may become relegated to a secondary position. The danger is that the mix of decision factors may become such that the agency concerns itself with deciding standards' questions primarily on the basis of what is expedient rather than what is needed.

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[73] *Id.* § 402(a).

[74] *Id.* § 402(e).

[75] *Hearings on S.* 1467, *supra* note 1, at 174-75 (statement of Lowell K. Bridwell, Federal Highway Administrator).

IV. NHSB Driver Licensing Standard

Inasmuch as the standards are based on the philosophy described above, they should be analyzed to determine the effect of the implementation in light of the stated philosophy. For purposes of this paper, the NHSB driver licensing standard will serve as an example of the effect of the philosophy on a single aspect of the federal program. It is submitted that the philosophy, in this instance, has subverted the Congressional desire for "uniform standards." However, it should be borne in mind that driver licensing is only one of thirteen standards promulgated by NHSB. For this reason, the general success or failure of the NHSB standards to achieve the goals set by Congress should not be expected to be forecast from the analysis which follows.

A. *General Provisions*

Under the Act, the NHSB could have promulgated the mandatory driver education and training standard[76] as the sole federal requirement

[76] 23 U.S.C. § 402(b)(1)(E) (Supp. 1970) wherein the Congress declared that no state highway safety program should be approved by the Secretary of Transportation, unless it provides for comprehensive driver education and training programs.

NHSB may be justified in expressing this standard in broad terms, for the reason that driver education and driver training are two of the most expensive elements in any highway safety program. The question of "where do we get the money?" looms large in the minds of both state and federal officials. The Viet Nam War has resulted in a drastic curtailment of federal safety funds available to NHSB. Furthermore, Congress did not make successful completion of either a driver education or driver training course a prerequisite to being licensed to drive. Hence, this standard relates to driver licensing in the larger sense, in that it is also designed to improve driver performance, but it is not imposed on individuals as a licensing control measure.

For these reasons, it is difficult to fault the NHSB driver education and training standard. The congressional mandate has been met, for the standard does require establishment of such programs, and it contains all of the elements which appear in the statute, with possibly one exception. The standard is vague on the point that the driver education program must be within the state school systems and administered by appropriate school officials. Perhaps it is present by implication, but this statutory requirement could well be stated more explicitly.

The standard indicates that the content of the high school driver education course will be expected to consist, at a minimum, of practice driving and instruction in the following:

1. Basic and advanced driving techniques, including handling emergencies;
2. Rules of the road and other state and local laws and ordinances;
3. Critical vehicle systems and subsystems which require preventative maintenance;
4. Vehicle, highway, and community features which aid the driver in avoiding crashes, protect him and his passengers in crashes, and maximize salvage of the injured;
5. Signs, signals, highway markings, and design features of highways which must be understood if one is to drive safely;
6. Differences between urban and rural driving, including use of expressways;
7. Pedestrian safety.

Highway Safety Program Standard No. 4, Driver Education, 23 C.F.R. § 204.4 (1970). Finally, students are to be encouraged to enroll in first aid training. *Id.*

Other than providing for the high school course, states are further expected to: (a) establish a research and development program leading to procurement of practice driving facilities, simulators, and other teaching aids; (b) establish a program for adult driver training and retraining; (c) establish a policy for control of commercial driving schools by licensing them and certifying their instructors; and (d) evaluate its entire program periodically, and provide NHSB with an evaluation summary. *Id.*

in the area of driver controls for state programs. However, it exercised its discretion to promulgate an additional standard pertaining to driver licensing.[77] This standard establishes "minimum" state licensing program content; hence, states must adopt *at least* these licensing control measures, but they are also obligated to structure their licensing programs to prevent *needlessly removing* the opportunity of the citizen to drive.[78] The eight components which comprise the standard will be discussed consecutively along with relevant portions of the NHSB *Highway Safety Program Manual,*[79] which provides more specific recommendations for implementing the standard.

B. *Component I: One-License Concept*

The state must adopt the one-license concept and identify the types of vehicles the licensee is authorized to drive.[80] With a multiplicity of licenses, the driver is in a position to continue driving until his supply is "exhausted" by suspension, revocation, or expiration of all his licenses. Multiple licensing makes it difficult to construct viable controls through point system pressures and formal license actions by administrators or courts. Thus, the one-license system makes it illegal to possess more than one license and requires surrender of *all* valid licenses when applying for a license.[81] If all states apply this concept, eventually all drivers will be limited to a single license.

This requirement appears to be a worthwhile standard which is within the power granted NHSB. It is useful, because it helps prevent drivers from escaping licensing controls. It is relevant to improved

[77] Highway Safety Program Standard No. 5, Driver Licensing, 23 C.F.R. § 204.4 (1970) [hereinafter cited as Standard No. 5].

[78] *Id.*

[79] DEPARTMENT OF TRANSPORTATION, HIGHWAY SAFETY PROGRAM MANUAL, VOL. 5, DRIVER LICENSING (1969) [hereinafter cited as MANUAL].
The NHSB *Manual* is a publication proposed for the states to give them more specific recommendations for implementing the Standards:

> To assist the States in developing the details of their highway safety programs under the new standards, the Bureau is now preparing a set of policies and procedures to be issued with regard to each individual standard . . . . These policies and procedures will provide specific recommendations for matters to be incorporated in State and local program regulations. When State safety projects are presented to the Department for approval, consideration will be given to the extent to which the State has followed the recommendations embodied in these policies and procedures.

Hearings on S. 1467, *supra* note 1, at 174 (statement of Lowell K. Bridwell, Federal Highway Administrator).

> To assist them [states] in the administration of their program, we have included several projects, one of which will develop guidelines in the form of texts and manuals, describing managerial policies, techniques, methods, and procedures for conducting the safety programs.

Hearings on S. 1467, *supra* note 1, at 201 (statement of Dr. William Haddon, former Director of the NHSB).

[80] Standard No. 5, *supra* note 77, § 204.4(I).

[81] NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE § 6-101(c) (Revised 1968).

driver performance, for it helps make effective license withdrawal decisions. The single-license concept may be evaluated as to its success or failure as a safety measure by a determination of whether it permits more effective control over individual drivers and makes it possible to subject them to measures designed to improve driver performance. However, evaluation must await the accumulation of sufficient experience data. It is not the sort of "broad generalized recommendation" the House Committee rejected as unacceptable.[82]

C. *Component II: Proof of Date and Place of Birth*

Drivers must submit acceptable proof of date and place of birth when applying for an original license.[83] This component complements the policy of establishing minimum age limits, which is based upon the assumption that there is, in fact, a predictive relationship between age and being involved in an accident. Furthermore, information with respect to age makes it possible to collect accident statistics and relate them to age. Hence, the proof requirement contributes to an evaluation of the success or failure of age requirements as driver control measures. It is acceptable as something more than a "broad generalized recommendation."[84]

D. *Component III: Examinations*

1. Initial Examination

All drivers must pass an initial examination in which the applicant demonstrates his (1) "[a]bility to operate" the types of vehicles for which he seeks a license; (2) "[a]bility to read and comprehend" traffic signs and symbols; (3) "[k]nowledge of laws relating to" traffic, safe driving practices, vehicle and highway safety features, emergency situations, and other driving responsibilities; and (4) "[v]isual acuity, which must meet or exceed State standards."[85]

There is little doubt that all four parts of this component are relevant to the goal of improved driver performance. Current knowledge is not complete and empirical, but it is sufficient to justify assuming a relationship exists.[86]

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[82] H.R. REP. No. 1700, 89 Cong., 2d Sess. 8 (1966) (Highway Safety Act of 1966).

[83] Standard No. 5, *supra* note 77, § 204.4(II).

[84] H.R. REP. No. 1700, 89 Cong., 2d Sess. 8 (1966) (Highway Safety Act of 1966).

[85] Standard No. 5, *supra* note 77, §§ 204.4(III)(A)(1-4).

[86] Dr. Haddon, former NHSB administrator stated:

> I think also that if we were to wait for adequate information with respect to all of the more clearly important aspects of highway safety we, in effect, would be doing nothing for a good many decades.
>
> The issues are just so complicated that obviously we can, and I believe should, move ahead for quite a few years on the best information that we have available without waiting for the momentum of perfect information.

Hearings on S. 1467, *supra* note 1, at 205.

But are these expressions acceptable as the sort of "performance criteria"[87] standards which Congress expected from the NHSB? Are they capable of being evaluated as to their success or failure "in actual application"?[88] Are they anything more than "broad generalized recommendations"?[89] If they are neither of these, then in what sense are they "uniform"?[90] Are they actually "nonuniform nonstandards" and outside the meaning of the Act?

Phrases such as "[a]bility to operate,"[91] "[a]bility to read and comprehend,"[92] "[k]nowledge of law,"[93] and "[v]isual acuity"[94] are sufficiently amorphous to require further definition if they are to be applied by the states. By making it necessary for the states to give their own content to these phrases, the so-called "standard" is revealed to be devoid of content. Furthermore, the "strict uniform"[95] licensing programs sought by the House Report on the Act are likely to be lost because states may individually ascribe whatever meaning they desire to the phrases. For example, State A may require an extensive, in-depth demonstration of ability to operate, while State B may require no more than a superficial demonstration. Yet, both states may contend, with justification, that they have met this part of the federal standard! State A may require visual acuity of 20/40 correctable in both eyes, while State B may require only 20/40 correctable in one eye. Yet, both states may contend that they are in compliance with the visual acuity requirement.

Where is the uniformity which Congress sought? Is not each state left to write its own standards as has been the practice? About the most that can be said for this component of the standard is that it informs the states that they are supposed to "do something" in the areas identified without telling them what is really expected.

In order to "do something" which would result in NHSB approval of the state program when reviewed after December 31, 1968, the state had few ways in which to discover what was *actually* expected of it. Aside from conferences with NHSB personnel, the only other source of information appears to be the NHSB *Highway Safety Program Manual, Vol.* 5, *Driver Licensing* (1969).[96] It provides little specific

[87] 23 U.S.C. § 402(a) (Supp. 1970).

[88] H.R. REP. No. 1700, 89 Cong., 2d Sess. 8 (1966) (Highway Safety Act of 1966).

[89] *Id.*

[90] 23 U.S.C. § 402(a) (Supp. 1970).

[91] Standard No. 5, *supra* note 77, § 204.4(III)(A)(1).

[92] *Id.* § 204.4(III)(A)(2).

[93] *Id.* § 204.4(III)(A)(3).

[94] *Id.* § 204.4(III)(A)(4).

[95] H.R. REP. No. 1700, 89 Cong., 2d Sess. 8 (1966) (Highway Safety Act of 1966).

[96] MANUAL, *supra* note 79, ch. IV, at 6-7.

guidance for state administrators as to the meaning of the vague language of this component of the driver licensing standard.

For example, the required demonstration of "ability to operate"[97] is explained to mean that a road performance test should be given and should include — but not limited to — the road test recommendations of the American Association of Motor Vehicle Administrators in *Testing Drivers*.[98] In addition, the examiner is expected to explain any unsatisfactory performance to the applicant, and the road performance test may be omitted if a licensee with a satisfactory driving record is applying for renewal or if the applicant possesses a license from another state having an acceptable licensing program.[99] The specific licensing policies[100] which the states are expected to adopt are not articulated in the *Manual*.

The required demonstration of ability to read and comprehend traffic signs and symbols is also not explained further in the *Manual*.[101] Similarly, the required demonstration of knowledge of laws relating to traffic, safe driving practices, vehicle, highway and other safety features is amplified only briefly.[102] The specific elements of the knowledge test are not indicated and must be created by each state.

The required test of visual acuity is amplified in the *Manual* to include an evaluation of field of vision.[103] This raises a related question: If the NHSB believes license applicants should be examined for field of vision, why is it not included in its standard? The *Manual* implies visual acuity is only one of several vision factors which relate to improved driver performance. Perhaps the explanation is found, in part, in the NHSB administrative philosophy to establish "watered-down" standards with which states could more easily comply.[104]

2. Licensee Re-examination

After an initial examination, each licensee must be re-examined every four years for "at least visual acuity and knowledge of rules of the road."[105] This component presses the states to recognize that continuing driver controls are necessary, since it is fallacious to assume

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[97] Standard No. 5, *supra* note 77, § 204.4(III)(A)(1).

[98] MANUAL, *supra* note 79, ch. IV, at 6.

[99] *Id.* ch. IV, at 6-7.

[100] *I.e.*, the actual criteria of decision applied as working policies in the state licensing program.

[101] MANUAL, *supra* note 79, ch. IV, at 5.

[102] *Id.* ch. IV, at 5, 6.

[103] *Id.* ch. IV, at 5. These visual characteristics, along with depth perception, muscle balance, and color perception, are believed, by the American Optometric Association and the American Association of Motor Vehicle Administrators, to be relevant to proper performance of the driving task. AMERICAN OPTOMETRIC ASSOCIATION, VISION SCREENING FOR DRIVER LICENSING 12-13 (1966).

[104] *See* notes 64 & 65 and accompanying text *supra*.

[105] Standard No. 5, *supra* note 77, § 204.4(III)(B).

that physical and mental characteristics of drivers do not change after initial licensing. Periodic re-examination facilitates discovery of licensees who no longer qualify. This requirement should also help eliminate the license renewal by mail practice — followed in some states — which destroys the utility of the license renewal process as a safety device, at least insofar as the renewal function is expected to involve a re-evaluation of the licensee. Thus, periodic re-examinations are relevant to improved driver performance. Furthermore, the re-examination requirement will be capable of being so evaluated as to its success or failure in actual application, after sufficient experience to permit accumulation of a base of data.

Unfortunately, however, this component uses the same type of vague phrases which appear in the previous component and is thus subject to the criticism that it, too, is devoid of content. The states are told they must re-examine licensees on at least two of the factors tested for initial licensing; but they are not told what is expected because the standard is so vague as to be meaningless. The NHSB driver licensing *Manual* indicates the re-examination should occur prior to license renewal at least every four years and should include as a minimum "the tests for visual ability and knowledge of rules and regulation."[106] The road test may be waived at renewal if the applicant's driving record is satisfactory.[107]

E. *Component IV: Driver Record System*

This component imposes on states recordkeeping responsibilities, which should lead to a future source of detailed information on individual drivers. It requires the state record system to provide rapid entry of data, controls to eliminate delay in obtaining data for the system, rapid response to requests for status of license validity, ready availability of data for statistical purposes, and ready identification of drivers.[108] The *Manual* suggests that close liaison should be maintained with state education, highway, health, welfare, and traffic records agencies in order to facilitate an interchange of information.[109]

Such a requirement is useful, because it facilitates collection of information for both highway safety research purposes and for the driver identification and license validity purposes. The building of a base of appropriate licensee information obviously has relevance to improved driver performance, if only because it makes possible more sophisticated research on driver behavior.

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[106] MANUAL, *supra* note 79, ch. IV, at 4, 8.

[107] *Id.* ch. IV, at 6, 7.

[108] Standard No. 5, *supra* note 77, §§ 204.4(IV)(A)-(E).

[109] MANUAL, *supra* note 79, ch. IV, at 11.

F. *Component V: Specific Term and Renewal of Licenses*

This portion of the federal licensing standard requires states to issue licenses for "a specific term,"[110] and they must be "renewed"[111] to remain valid. At the time of both issuance and renewal, the applicant's "record must be checked."[112]

Yet the NHSB's meaning of "specific term"[113] is not clear. Does it mean any period of time adopted by the state which has an identifiable beginning and end? If NHSB desires the term to be no longer than the four-year maximum term established for re-examination in Component III, why doesn't it so specify? Such vague language in the standard presents the states with the same problem described above with respect to the initial examination requirements.

However, if state officials examine the licensing *Manual*, they will discover that NHSB expects the maximum "specific term" of a license to be no longer than four years.[114] Why is this information not included in the language of the formal standard? Why is it tucked away in a publication designed to interpret standards purportedly expressed as "performance criteria"?[115] If NHSB knows this is what it will expect of the states, why does it not so state in a straightforward manner? Without the *Manual*, the states would be left to their own interpretations of the phrase.

The component imposes the further requirement that a "driver's record must be checked"[116] at the time of issuance or renewal of the license. For what is the record to be "checked"? The *Manual* merely repeats the language of the standard.[117] However, it does provide that before issuing an original license, each state should request the National Driver Register to "verify the applicant's eligibility for licensing."[118] These appear to be the only statements which refer to checking the applicant's "record." Furthermore, even if it were possible to ascertain what is expected as a "check," what is the state supposed to do about the matters which it checks? Under the present standard, a state may "check" for many things and still determine that it is appropriate to issue or renew a license. If the NHSB expects states to deny initial and

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[110] Standard No. 5, *supra* note 77, § 204.4(V).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] MANUAL, *supra* note 79, ch. IV, at 8.

[115] 23 U.S.C. § 402(a) (Supp. 1970).

[116] Standard No. 5, *supra* note 77, § 204.4(V).

[117] MANUAL, *supra* note 79, ch. IV, at 9.

[118] *Id.* ch. IV, at 7. The Register is fully described in THE NATIONAL HIGHWAY SAFETY BUREAU, THE NATIONAL DRIVER REGISTER (1967). The Register acts as a clearing house for driver identification and records information received from states.

renewal licenses on the basis of certain factors to be checked, why doesn't it so state?

In large measure, this entire component leaves the states to their own devices to determine what NHSB expects of them. Yet safety program approval by NHSB is required if states are to continue to qualify for federal safety and highway-aid funds.

G. *Component VI: Driver Improvement Program*

Each state is required to establish a driver improvement program "to identify problem drivers for record review and other appropriate actions designed to reduce the frequency of their involvement in traffic accidents or violations."[119] The vagueness of this standard raises a number of questions: What criteria are to be used to select those licensees who are to be termed "problem drivers"? What sorts of license actions are deemed "appropriate" and in what circumstances? What assumptions lie behind the notion that frequency of "involvement" in accidents should be reduced? Does this expression indicate that NHSB assumes "involvement" in an accident to be the equivalent of *causation* (*i.e.*, fault) based on human failure?[120] Like the language of other components, states may interpret the language of this standard very differently and still be within its terms. As a result, there is no assurance of uniformity among the states; it is another example of a "nonuniform nonstandard." Again the states must consult the *Manual* to determine what NHSB expects of them; and, fortunately, the *Manual* describes more precisely the content of the driver improvement program it expects states to establish.[121]

Basically, the state licensing agency is expected to establish a system of identification and rehabilitation of drivers who "repeatedly" become *involved* in accidents and traffic law convictions.[122] The selection of persons for treatment is to be made on the basis of a point system such as that described in the American Association of Motor Vehicle Administrators publication, *Guide to Driver Improvement*.[123] The essence of a point system is the assignment of a numerical value to traffic law convictions and accidents according to their "severity."[124] When the total number of points reaches a predetermined action level,

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[119] Standard No. 5, *supra* note 77, § 204.4(VI).

[120] For a full discussion of this question, see J. REESE, POWER, POLICY, PEOPLE: A STUDY OF DRIVER LICENSING ADMINISTRATION pt. II, ch. 1 (1970) [hereinafter cited as J. REESE].

[121] MANUAL, *supra* note 79, ch. IV, at 12-15.

[122] *Id.* ch. IV, at 12.

[123] *Id.*; NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE § 206(b), wherein there is included a point system for the identification of problem drivers.

[124] MANUAL, *supra* note 79, ch. IV, at 12. What is meant by "severity"?

the administrative machinery is activated, and some "reform"[125] action designed to improve driving performance is taken.

The action is initiated by specially trained driver analysts who are expected to review the record of each driver.[126] According to the *Manual*, the first action should consist of sending an advisory letter to drivers who have accumulated a certain number of points but who are not yet considered to have become serious problem drivers.[127] The second action should consist of a personal interview — to be conducted by a driver analyst — after an advisory letter has been sent followed by the accumulation of more points. The interview is expected to "[r]esult in recommendations by the driver analyst of remedial measures designed to improve the driving performance . . . ."[128]

The range of remedial choices available to the analyst for recommendation includes (but is not limited to) the following:

(a) Referral to a Medical Advisory Board — This recommendation is justified when the analyst has "reason to believe" that the licensee has a physical or mental limitation which impairs his driving performance.[129] However, the *Manual* does not provide the factors which the analyst should use to conclude that there is "reason to believe" medical evaluation is necessary. The *Manual* suggests that states should establish their own guidelines to assist the analyst to select the most suitable measures.[130] The results of any medical examination are to be reviewed by the Medical Advisory Board before further action is taken.[131] However, the medical criteria and standards to be applied by the Board are not stated. Perhaps the primary reason statements regarding mental and physical limitations on driving are not more precise is that not enough is known about the driving task to permit its elements to be identified and quantified.[132] Until this has been accomplished, there will be a great deal of calculated guessing by analysts and medical boards.

(b) Instruction — The analyst may decide driving performance can be sufficiently upgraded by discussing with the licensee "the specific problem areas"[133] believed to have caused poor performance. *How* the analyst determines the problem areas or when such a decision is appropriate remains unstated, and no examples are given.

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[125] *Id.* ch. IV, at 12.

[126] *Id.* ch. IV, at 12-13.

[127] *Id.* ch. IV, at 13. How is the "serious" problem driver to be identified? The point system *per se* does not make the selection. Someone must establish an action level, and the action level may vary widely from state to state. The uniformity Congress sought is sacrificed.

[128] MANUAL, *supra* note 79, ch. IV, at 13.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] J. REESE, *supra* note 120, pt. II, ch. 1.

[133] MANUAL, *supra* note 79, ch. IV, at 14.

(c) Driver improvement school — The analyst is expected to require attendance at such a school when he "has concluded that such treatment may improve the licensee's driving performance."[134] Yet upon what factors is the analyst to base such a conclusion? There are no illustrations. The *Manual* is as useless as the standard! To permit analysts to make this judgment on factors known only to themselves makes it impossible to evaluate and control analysts' choices within the range of recommendations. If this situation occurs, it is virtually impossible to determine whether the agency has provided the due process and equal protection of the law's guarantees which the general public is entitled to expect of its administrative agencies. The factors of choice should be made known.

(d) The final three remedial choices available to the analyst are license probation, license suspension, and license revocation.[135] Suspension is expected to be recommended when the analyst concludes that it "[w]ill produce an improvement in an individual's driving habits ...."[136] How the analyst is to decide and what factors he is to use in estimating the probability of improvement of habits are not stated. Such vagueness vests in the analyst a broad case of uncontrolled authority to make the critical initial withdrawal decision which, in all probability, will become that of the agency. Without knowledge of the specific criteria of decision, it will be difficult to evaluate and control the analysts' recommendations.

The *Manual* suggests probation in lieu of suspension when deemed appropriate.[137] Yet the factors which should be used to decide when probation is appropriate are not indicated in the *Manual.*

Revocation is said to be appropriate when the analyst concludes that the attained driving record "precludes the immediate upgrading of the individual's driving ability"[138] through any of the other choices. Again, the *Manual* is of no assistance, for it does not indicate the criteria on which the recommendation should be based.

A final driver improvement program suggestion found in the *Manual* is that all licensees *suspended* "may"[139] be re-examined in the same manner as are original license applicants before their licenses are restored. Further, the *Manual* provides that an examination *must* be given if a new license is sought after *revocation.*[140]

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[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* ch. IV, at 7.

[138] *Id.* ch. IV, at 14.

[139] *Id.* ch. IV, at 4. The use of the word "may" is an invitation to states to delay instituting a policy requiring re-examination of licensees following expiration of a period of suspension. "May" transfers power to the states to choose not to re-examine.

[140] MANUAL, *supra* note 79, ch. IV, at 4.

The existence of the *Manual* suggests several questions about the formal language of the licensing standard. First, if the NHSB expects its *Manual* recommendations to be part of the state programs, why does it not state them in the standards? If it can reduce them to writing in the *Manual*, it can include them in the language of the standard. It must not be forgotten that NHSB has power to approve state safety program plans which have not yet been fully implemented.[141] Therefore, a standard containing specific requirements would constitute a useful policy statement to which backward states could aspire.

Second, several instances have been described wherein the *Manual* is either silent on the particular topic or speaks in the same terms as the standard. The *Manual*, therefore, does not provide the specific recommendations which Mr. Bridwell and Dr. Haddon promised.[142]

Third, the net effect of parroting the language of the formal standard in the *Manual* is to leave the NHSB with almost total discretion to approve or disapprove the driver licensing provisions of state safety programs on whatever basis it desires. The NHSB has not committed itself except in general terms, for it has promulgated a "non-standard" which is inadequately explained in its *Manual*. This is particularly true of the initial licensing examination component, the renewal process component, and the driver improvement program component.

H. *Component VII: Medical Evaluations*

1. Establishment of a System

States must establish a system which provides for "medical evaluation" of licensees whom the agency "has reason to believe have mental or physical conditions which might impair their driving ability."[143] The NHSB licensing *Manual* contains two elements pertaining to medical evaluation of specific licensees: The first is the authority of the driver analyst to refer licensees to a medical advisory board, licensed physicians, or specialists for examination as part of the driver improvement program,[144] and the second is a requirement that the results of a physical examination should be reviewed by the medical advisory board before any license action is taken by the agency.[145]

A curious feature of both the standard and the *Manual* is that they appear to assume medically trained persons possess competence not only to evaluate physical conditions but also to determine to what extent those conditions relate to performance of the driving task. It is sub-

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[141] 23 U.S.C. 402(c) (Supp. 1970); *see* notes 69-71 *supra*.

[142] *See* note 79 *supra*.

[143] Standard No. 5, *supra* note 77, § 204.4(VII)(A).

[144] MANUAL, *supra* note 79, ch. IV, at 13.

[145] *Id.*

mitted that, at best, the conclusions of the physician relative to appropriate licensing action will be largely guesswork. This contention is based primarily on the fact that high quality research into the nature of the driving task has been unable to describe the task in terms which permit its quantification.[146] Until this has been done, the actual relationships of mental and physical abilities to the driving task remain in large measure speculative.

No doubt it is useful to acquire medical opinion before licensing action based on physical and mental qualities is taken. No doubt such decisions will be made despite the lack of knowledge on the critical issue of relevance to the driving task. However, medical opinion should be recognized as offering no panacea to driver licensing administrators. Although it is an informed judgment, the licensing recommendation of a physician is nothing more than an opinion. It should be recognized and treated as such. As more information on the nature of the driving task becomes available and relevant characteristics are identified, the licensing agencies, including NHSB, should make certain that medical examiners base evaluations on those physical and mental factors known to relate to the driving task. In short, the criteria of medical judgment must be readily adaptable to change with the base of knowledge acquired if medical judgment is to be rational. Furthermore, it would seem that some knowledge of the driving function currently exists although it is far from perfect.[147] Assuming this to be true, NHSB should identify the physical and mental factors believed to be relevant to driving and instruct the medical examiner to base his conclusions on those factors insofar as it is possible. Criteria of judgment should be indicated to the medical examiner no matter how imperfect. Surely some such identification of criteria can be made, and hopefully, the medical profession will insist upon it. Otherwise, the medical examiner's responsibility to both the licensee and the traveling public may not be met.

These comments also apply to the medical advisory board which reviews the medical examiner's recommendations.[148] Although it is composed of medically trained persons, there is no reason to assume the board is more competent to determine the relevance of physical and mental factors to the driving task. Similarly, medical advisory boards, whose members may be unfamiliar with driver behavior research, should be provided with guidance by those who make an occupational specialty of high caliber highway safety research. It is they, if anyone, who should

[146] According to Dr. Ross McFarland, and other researchers, our knowledge of the driving task is fragmentary. See their statements to this effect, in J. REESE, *supra* note 120, pt. II, ch. 1.

[147] Highway Research Board Pilot Workshop on Human Factors in the Design and Operation of the Highway Transportation System (1968, proceedings not published). *See generally* A. LITTLE, INC., THE STATE OF THE ART OF TRAFFIC SAFETY (1966).

[148] MANUAL, *supra* note 79, ch. IV, at 13.

be familiar with the current state of scientific knowledge of the characteristics of driver performance. If the medical advisory board is not given such guidance in its review task, its decision may actually be irrational, because it may be based on factors irrelevant to driving performance; at the very least, it may be heavily colored by irrelevant factors, erroneously thought to be relevant because of the "folklore" and dogma of traditional safety literature which is typically based on *unreliable* research conclusions.[149]

2. Identity of Applicants for Aid to the Blind

States are expected to establish a procedure which will inform the licensing agency of the identity of licensees who have applied for or are receiving any type of aid to the blind or the near blind.[150] This requirement establishes a form of licensee surveillance which, on its surface, should aid in enforcing vision requirements for drivers. So viewed, it is a commendable requirement. However, its effect in application may be to drive into "hiding" licensees with serious vision deficiencies who must choose between the receipt of state aid and the risk of losing their licenses. It has been asserted that statutes making denial of the license mandatory where epilepsy is involved have had that effect in some states.[151] With respect to this requirement, the NHSB *Manual* makes no specific recommendations; it merely restates the requirement in the language of the standard.

3. The Medical Advisory Board

The states are expected to create a medical advisory board, or its equivalent, "to advise the driver license agency on medical criteria and vision standards."[152] Such a requirement is comforting, for it suggests that some licensing decisions should be made on medical criteria known to be related to driver performance. It is also psychologically comforting to be told such criteria ought to be established by "qualified personnel,"[153] even though no statement of qualifications for appointment to the Board is made. Considered together, these suggestions offer further comfort, for they imply licensing decisions should not be made on factors irrelevant to driving performance, *e.g.*, morality, character, economic status, or race. Therefore, such statements have the salutary effect of reiterating the goal of driver licensing to be improved driver performance and not the general regulation of antisocial conduct.

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[149] That such unreliable research exists is apparent from the comments of Dr. Ross McFarland, in PROCEEDINGS OF THE NATIONAL CONFERENCE ON MEDICAL ASPECTS OF DRIVER SAFETY AND DRIVER LICENSING 44 (1964); W. HADDON, E. SUCHMAN, D. KLEIN, ACCIDENT RESEARCH: METHODS AND APPROACHES 30 (1964).

[150] Standard No. 5, *supra* note 77, § 204.4(VII)(B).

[151] Fabing & Barrow, *Restricted Drivers' Licenses to Controlled Epileptics: A Realistic Approach to a Problem of Highway Safety*, 2 U.C.L.A.L. REV. 500 (1955).

[152] Standard No. 5, *supra* note 77.

[153] *Id.* § 204.4(VII)(c).

However, the requirement is disquieting in other respects. What basis exists for NHSB to presume that people who are "qualified" (medically or otherwise) for appointment to such a Board are, in fact, sufficiently acquainted with the current state of empirical research knowledge to be competent to advise licensing agencies on "medical criteria" and "visual standards" for driver license actions? A doctor may be a good medical man and still know nothing about medical factors or vision requirements in the context of driver performance. Is this possibility recognized by NHSB? Are the Board members instructed to study research findings and recommended norms of professional groups in the licensing context (*e.g.*, AAMVA-AOA vision norms[154]) in order to make medical and vision licensing criteria recommendations? Why cannot significant research findings be compiled by NHSB, or by one of its research contractors, be used as the basis of medical and vision criteria and be written into NHSB standards? Perhaps this kind of work is being done;[155] but meanwhile, there is some danger that local medical boards may suggest the use of irrelevant medical factors as criteria for license actions.

Another difficulty with this federal standard in its current form is that it presents the possibility of losing the desired uniformity of licensing standards throughout the nation. As in other instances, the language of the federal standard is imprecise. The quoted phrases are so broad as to be meaningless. Similarly, the licensing *Manual* is not helpful; it offers no more specific recommendations or definitions than the formal language of the standard.[156] Hence, further definition will be provided by the boards themselves, and there is no assurance they will establish the same interpretations in all the states. Hence, what begins as a vague expression in a so-called "uniform standard" promulgated by NHSB may actually result in fifty different sets of "medical criteria" and "vision standards." If that occurs, the only assured uniformity is that there will be boards and they will have made recommendations. This sort of uniformity can hardly be termed that which is expected by Congress, for the concept of *uniform performance criteria* is effectively destroyed. Another "nonuniform nonstandard" has been promulgated by NHSB.

J. *Component VIII: Periodic Evaluation of a State Licensing Program*

The final component of the licensing standard is a requirement that the state program shall be "periodically" evaluated by the state

[154] AMERICAN ASS'N OF MOTOR VEHICLE ADMINISTRATORS & COMM. ON MOTORISTS' VISION AND HIGHWAY SAFETY OF THE AMERICAN OPTOMETRIC ASS'N, VISION SCREENING FOR DRIVER LICENSING (1966).

[155] The Institute for Educational Development, Newport Beach, California and Spindletop Research, Lexington, Kentucky have been awarded NHSB research contracts to evaluate driver licensing programs and inventory and evaluate licensing criteria.

[156] MANUAL, *supra* note 79, ch. IV, at 19.

and that a summary of the evaluation shall be given to the NHSB. The evaluation is expected to attempt to ascertain the extent to which driving without a license occurs; yet the standard does not make clear to what extent and by what methodology the NHSB expects the states to conduct such an evaluation, nor does it indicate what span of time is meant by "periodically." Similarly, the licensing *Manual* does not suggest a specific time span; and, while a sample checklist of questions to be asked in establishing a base for evaluation of the licensing program is provided,[157] it does not provide any suggestion of a research model which the states should use to attempt to determine the extent to which driving without a license occurs. Until such suggestions are made, the states may make all sorts of interpretations of the evaluation language of the standard.

On the other hand, some insight into the expected content of the periodic review is gained from NHSB indications of the type of report which will be expected from the states. The *Manual* states that a reporting system should encompass program operations, program management information, and program evaluation.[158] The NHSB intends to ask the states for summary reports containing information similar to the checklist in chapter IV of the *Manual*.[159] The checklist questions are oriented toward determining the extent of state compliance with the driver licensing standard.[160]

K. *Recommendations*

As the above analysis makes evident, the NHSB driver licensing standard is essentially illusory. It may be described as a "nonuniform nonstandard." Because of its lack of precision, state programs may vary greatly and yet meet the standard; and because the standard is so vague, the states must confer individually with NHSB to determine what licensing criteria will be deemed to meet the standard.

The driver licensing *Manual* is also generally unsatisfactory. As has been shown, it contains little explication of most of the components of the licensing standard. In large part, the more specific recommendations which were promised are not contained in the *Manual,* and the states are left largely to develop their own interpretations.

The NHSB could strengthen its driver licensing program by promulgating an amended standard more precisely stating the national expectations, or it could amend its *Manual* to provide more specific recommendations to the states. As a third alternative, the NHSB could promulgate both a new standard and a new *Manual.* What is important

[157] *Id.* ch. V, at 6-11.

[158] *Id.* ch. VI, at 1.

[159] *Id.* ch. VI, at 4.

[160] *Id.* ch. V, at 6-11.

is that NHSB proceed to develop an improved driver licensing standard, and it should do so with a commitment to monitor and modify both the standard and *Manual* as new knowledge becomes available in ensuing years. This is essential, for sound research may be expected to identify new relevancies with respect to the "human factors" aspects of highway collisions, and it may serve to expose the fallacy of current "folklore" licensing policies as contributing nothing to the solution of the problem of driver failure which results in highway accidents.

The commitment to monitor and modify is essential because of our history of protecting persons from unwarranted governmental controls on their activities. The American tradition has been to foster liberty of the individual by limiting governmental interference whenever possible. Hence, through its standard-setting authority, the NHSB may be viewed as having the responsibility of balancing the interests of individuals against those of society in light of emerging highway safety knowledge. Fortunately, the NHSB seems aware of this responsibility; the introductory language of its driver licensing standard provides: "Each State shall have a driver licensing program: (a) to insure that only persons physically and mentally qualified will be licensed to operate a vehicle on the highways of the State; and (b) to prevent needlessly removing the opportunity of the citizen to drive."[161] While the vagueness of the components of the present driver licensing standard allows sufficient flexibility to adjust control measures to avoid unduly restricting the need to drive, that same vagueness may permit states to adopt licensing program policies which "needlessly" remove the opportunity to drive. This problem might be eliminated if the United States Supreme Court, which on several occasions has recognized individual mobility to be a Constitutionally protected interest, would also recognize that driving an automobile is the primary means by which this mobility is expressed.[162] The significance of such a Supreme Court decision would be to require state and federal governments to adopt driver control statutes, administrative standards, and administrative procedures which meet federal requirements of due process of law and equal protection

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[161] Standard No. 5, *supra* note 77, § 204.4.

[162] The right to travel has been accorded constitutional protection; *e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Guest, 383 U.S. 745, 757-59 (1966); Optheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Kent v. Dulles, 357 U.S. 116, 125 (1958); Edwards v. California, 314 U.S. 160, 162-63 (1941); *see* Zemel v. Rusk, 381 U.S. 1 (1965); *cf.* Hague v. CIO, 307 U.S. 496 (1939); United States v. Wheeler, 254 U.S. 281 (1920); Williams v. Fears, 179 U.S. 270 (1900); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It is not to be expected that the Court would hold motor vehicle operation to be a constitutional "liberty" or "right" of the individual. The constitutional protection lies in mobility and not its method. However, since the purpose of the motor vehicle is mobility, a Court decision that driving a car is the primary means by which mobility is expressed would have the same effect. The data collected in the APPENDIX *infra* leave no doubt that the motor vehicle is, in fact, the overwhelming choice of the American public.

of the laws. Such a holding would press the NHSB to *effectively* consider *all* interests — individual and governmental — and thus truly implement the introductory language of the driver licensing standard noted above.

V. SUMMARY

In 1966, social facts were translated into formal legal policy through congressional recognition that highway safety is a nationwide problem. The thrust of the 1966 legislation was to inject the federal government into the field to provide, if possible, national leadership out of the chaos which claims more lives than the Viet Nam War.

The federal leadership is to be provided by the National Highway Safety Bureau through its power to set national standards designed to press states to create more effective programs to attack the problem; through its power to approve or disapprove state programs which are not in compliance with the national standards; and through its authority to impose financial sanctions on states which do not adopt safety programs which it is willing to approve.[163]

In developing a philosophy by which to implement its powers, the NHSB decided to promulgate broadly stated goals to which states could aspire rather than specific standards with which the states would be eventually expected to comply.[164] Yet it is arguable that Congress expected more precision, uniformity, and strictness than the NHSB provided; for various committee reports and other sources of legislative history suggest that the statutory language may have been intended to have the legal effect of pre-empting the states in certain areas.[165] The agency's decision appears to be based on the premise that the statute required compliance with all NHSB standards by January 1, 1969; a more accurate reading of the statute would permit compliance at a later date, so long as the state is making good faith progress toward meeting the standards.

The result of the agency's decision to develop broadly stated goals instead of specific standards is evidenced in the NHSB driver licensing standard.[166] In promulgating a standard, the NHSB has the duty to provide responsible leadership while encouraging states to upgrade and unify their driver licensing programs. This responsible leadership would take the form of an NHSB obligation to make a dual evaluation of its licensing standard and state licensing program policies, based upon both

[163] *See* § I(C) *supra.*

[164] *See* § III *supra.*

[165] *See* § II(B) *supra.*

[166] *See* § IV *supra.*

the need for greater safety on the highways and the need of individuals to drive motor vehicles in an auto-oriented society. Such responsibility would seem to imply the need for more precise standards in order to achieve uniformity which, in turn, would prevent states from interfering unduly with the need to drive.

Yet the major criticism which may be levelled at the licensing standard is that its components are, in general, not sufficiently precise to achieve more than a modicum of uniformity in state driver licensing programs. Because of the vagueness of the component expressions, state licensing programs may be widely different and yet comply with the literal language of the standard. The broad terminology and vagueness apparently result from the philosophy behind the NHSB standards, which precluded use of its authority to set standards at high levels and grant waivers for non-compliance to states which could not implement the standards immediately.[167]

In short, NHSB did not actually commit itself to a program of leadership by its driver licensing standard. Hence, NHSB actually retains broad discretion to approve or disapprove individual state driver licensing programs on whatever criteria it chooses to apply. The lack of precision in the standard has the effect of leaving the NHSB in a position of great flexibility with respect to evaluation of individual state licensing program content. Lack of commitment does not serve to promote the strict uniformity of which Congress spoke with respect to standard setting in the field of driver licensing. It is unfortunate that NHSB did not provide stronger leadership in the area of driver licensing through its standard setting function.

Despite our dissatisfaction with NHSB action in the field of driver licensing, it would be inappropriate to fail to recognize that driver licensing is only one facet of the total problem of highway safety which the NHSB must confront. The driver licensing standard is only one of thirteen standards promulgated by the NHSB in its initial attempt to accomplish its task. It should not be assumed from these comments that similar criticisms are inferred with respect to other aspects of the safety agency's program. Perhaps it should be assumed that the NHSB has met its responsibilities in other areas until analysis shows otherwise. The crucial problem of lack of adequate funds for staffing and research may serve in large measure to explain the relative ineffectiveness of NHSB standard setting in the driver licensing field. For these reasons, the question of the general success or failure of the NHSB program remains unanswered; the jury is still out.

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[167] *See* §§ III(A)&(B) *supra.*

APPENDIX

A SOCIAL PROFILE OF THE MOTOR VEHICLE

I. URBANIZATION OF THE POPULATION

The 1960 census figures indicated that almost two of every three Americans live in metropolitan areas.[168] The population concentration in metropolitan areas is evident in the following percentages of the total population living in Standard Metropolitan Statistical Areas: 1900 — 32 percent; 1920 — 44 percent; 1940 — 51 percent; 1960 — 63 percent.[169] Projections of the metropolitan percentage by 1980 are in the range of 70 percent to 80 percent.[170] The Stanford Research Institute believes the Interstate Highway System will reinforce and accelerate the trend toward metropolitan concentration for the reason that it focuses on the present metropolitan areas and maximizes their accessibility.[171]

II. URBANIZATION OF MOTOR VEHICLES

Since motor vehicles could be expected to be found and used where the population is located and in view of the fact there are relatively few highly populated metropolitan areas, it is interesting to note that 54 percent of the motor vehicles registered in the United States are located in ten states.[172] Furthermore, these ten states include thirteen of the twenty largest metropolitan areas[173] and account for 54 percent of the nation's licensed drivers.[174] In addition, the same states report 53 percent of the annual vehicle miles traveled in the nation and 61

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[168] THE COMMITTEE FOR ECONOMIC DEVELOPMENT, DEVELOPING METROPOLITAN TRANSPORTATION POLICIES 18 (1965) [hereinafter cited as THE COMMITTEE].

[169] *Id.* Standard Metropolitan Statistical Areas are defined generally as:

> A county or group of contiguous counties containing at least one city of 50,000 or "twin cities" with combined populations of at least 50,000 persons. Contiguous counties are included in an SMSA if they are essentially metropolitan in character and are socially and economically integrated with the central city. Prior to some revision in definition in 1959, these areas were designated Standard Metropolitan Areas.

Id. at 18.

[170] The 70 percent projection is by the CED staff, COMMITTEE, *supra* note 168, at 18. A 75 percent projection is made by SMITH & ASSOCIATES, FUTURE HIGHWAYS AND URBAN GROWTH iii (1961) [hereinatfer cited as SMITH & ASSOCIATES]. An 80 percent prediction is made by Rouse, *Transportation and the Future of Our Cities*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 2-5 (1962). *See also* Mylroie, *Predicting the Public's Changing Appetite for Better Transportation Facilities and Services*, PLANNING TOMORROWS STREET AND HIGHWAY SYSTEM 91 (1960).

[171] ALLEN & MCELYEA, IMPACT OF IMPROVED HIGHWAYS ON THE ECONOMY OF THE UNITED STATES 86 (1958).

[172] UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 553 (1968) [hereinafter cited as BUREAU OF CENSUS]; *accord*, AUTOMOBILE MANUFACTURERS' ASS'N, INC., AUTOMOBILE FACTS AND FIGURES 18 (1969) [hereinafter cited as AUTOMOBILE ASS'N]. The states are California, New York, Texas, Pennsylvania, Ohio, Illinois, Michigan, New Jersey, Florida, and Indiana.

[173] THE COMMITTEE, *supra* note 168, at 26.

[174] AUTOMOBILE ASS'N, *supra* note 172, at 47; BUREAU OF THE CENSUS, *supra* note 172, at 553.

percent of the total urban and municipal vehicle miles.[175] However, only 48 percent of the traffic deaths of 1967 occurred there.[176]

Empirical data is essential to an assessment of the extent to which there is harmony between social fact and social policy. Fortunately, some empirical studies have been made with respect to motor vehicles which should serve to help describe those who use motor vehicles, where the vehicles are located, and how they are used.

In general, it may be said that 79 percent of all American households (48 million) own passenger cars, and 25 percent of them own two or more.[177] Sixty-two percent of the households owning passenger cars are in metropolitan areas and 38 percent in nonmetropolitan areas. Of the 62 percent in metropolitan areas, 12 percent are in central cities of more than 500,000 population, 16 percent in central cities of less than 500,000 population, and 34 percent in suburbs of metropolitan areas.[178]

By income groups 63 percent of the nation's households earning an income of less than $4,000 per year own passenger cars. Ownership in the higher income groups ranges from 76 percent to 95 percent.

Privately owned passenger cars accounted for 80 percent of the total vehicle miles traveled in 1967. Trucks accumulated 19 percent, while all other vehicles combined accounted for 1 percent.[179] Urban traffic alone accounted for 50 percent of the total vehicle miles, and passenger car operation accounted for 43 percent of that 50 percent. The significance of these figures is that 50 percent of the travel occurred on urban streets which comprise only 14 percent of the total road mileage, and 37 percent occurred on main rural roads which consist of 15 percent of the road mileage. With 87 percent of all travel occurring on 29 percent of the road mileage, it is apparent that the traffic capacity problem is concentrated in a relatively small part of the total road mileage.[180]

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[175] AUTOMOBILE ASS'N, *supra* note 172, at 49; Dickerson & Corvi, *Motor Vehicle Traffic Estimates,* 33 PUBLIC ROADS 148-50 (1965) [hereinafter cited as Dickerson & Corvi].

[176] NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 64 (1968 ed.). But note that BUREAU OF THE CENSUS, *supra* note 172, at 573, indicates that 50 percent of the traffic deaths of 1966 occurred in these states.

[177] AUTOMOBILE ASS'N, *supra* note 172, at 44.

[178] AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., AUTOMOBILE FACTS AND FIGURES 41-42 (1965). These figures are based on ALFRED POLITZ RESEARCH, INC., NATIONAL AUTOMOBILE AND TIRE SURVEY (1964) (a sample survey sponsored by LOOK magazine).

[179] AUTOMOBILE ASS'N, *supra* note 172, at 50, based on Bureau of Public Roads, Table VM-1, 1967; Dickerson and Corvi, *supra* note 175, at 150.

[180] AUTOMOBILE ASS'N, *supra* note 172, at 50, 52. The definition of *urban* used in this study included areas within the political boundaries of municipalities, such as cities, boroughs, and villages. A similar Bureau of Public Roads study of 1964, in which state highway officials were asked to estimate the traffic in their states for 1962, defined *urban* as "an area including and adjacent to a municipality or other urban place having a population of 5,000 or more. . . ." Under this narrower definition, urban traffic was reported as 46 percent of the total vehicle mileage. *See also* RECK, A CAR TRAVELING PEOPLE 31 (1960); SMITH & ASSOCIATES, *supra* note 170, at v.

At the request of the Bureau of Public Roads, 24 states conducted empirical research on the uses of passenger cars by their inhabitants between 1951 and 1958. In addition, the Bureau of the Census conducted relevant studies as a part of its *1963 Census of Transportation.* The findings tell a great deal about the purposes for which Americans use their motor vehicles.

Combined data for the state studies show that passenger cars are used as follows: 46 percent of the trips and 44 percent of the vehicle miles are for earning a living, including travel to and from work, and related business; 29 percent of the trips and 19 percent of the vehicle miles are for family business, including medical and dental trips, shopping, and miscellaneous purposes; 8 percent of the trips and 4 percent of the vehicle miles relate to educational, civic and religious activities; while 17 percent of the trips and 34 percent of the mileage are social and recreational, consisting of vacations, pleasure rides, and other purposes.

Therefore, 75 percent of the trips of the passenger car and 63 percent of its mileage are directly related to earning a living and family business. Educational, civic and religious activities, along with social and recreational use account for only 25 per cent of the trips, but 37 percent of the mileage.[181] It should be noted that rush hour congestion is largely explained by the fact that almost half the trips and vehicle miles are directly related to work, travel, and business. Two-thirds of these trips occur in two or three hours of the day during the working week as travel to and from work.[182]

In incorporated areas of high population density (population of 100,000 or more), the combined data indicate the following: 51 percent of the trips and 48 percent of the mileage are for earning a living; 26 percent of the trips and 15 percent of the mileage are for family business; 6 percent of the trips and 3 percent of the mileage are for educational, civic and religious purposes; 17 percent of the trips and 34 percent of the mileage are social and recreational. Thus, in highly populated metropolitan areas, 77 percent of the trips of the passenger car and 63 percent of its mileage are directly related to earning a living and family business.[183]

As for length of trip, the state studies indicated the average distance to the first stop was 8 miles. The breakdown for the above purpose was: earning a living — 8 miles; family business — 7 miles; educational, civic and religious — 4 miles; social and recreational (ex-

[181] AUTOMOBILE ASS'N, *supra* note 172, at 40; Bostick, *The Automobile in American Daily Life,* 32 PUBLIC ROADS 243 (1963) [hereinafter cited as Bostick]. In these studies, a "trip" is defined as a one-way movement from starting place to the first stop for one of the purposes shown.

[182] AUTOMOBILE ASS'N, *supra* note 172, at 61; Bostick, *supra* note 181, at 241.

[183] Bostick, *supra* note 181, at 249.

cluding vacations) — 13 miles. Vacation trip length averaged 296 miles one way.[184]

As has been noted, use of the passenger car for work travel is an important part of its function. The state studies disclosed that two out of three of the nation's workers travel to work as drivers or passengers in cars. Fifteen percent use public transportation and 12 percent walk to work.[185] The 1963 Bureau of the Census survey indicated that of all commuting workers, 82 percent travel by passenger car, while 14 percent use public transportation, and 4 percent use other means or walk. In the core cities of Standard Metropolitan Statistical Areas 67 percent of the commuters use cars and 29 percent use transit. Even there, the passenger car is favored by two to one. Outside the core city, commuters favor the passenger car by ten to one. Such widespread selection of the passenger car is said to be due largely to the fact that about 43 percent of the work commuters do not have ready access to mass transit.[186]

A 1967 Bureau of the Census survey covered national travel, which was defined as travel by one or more members of a household to and from (a) an out-of-town place for overnight or longer or (b) a place at least 100 miles away. It excluded travel of persons while serving as crews, commuting trips, and travel by military personnel under orders. The findings were that 79 percent of all such trips are by automobile, and they account for 86 percent of the travelers.[187]

III. SUMMARY

Such studies as these portray automobile ownership and use as follows: Privately owned automobiles account for 80 percent of all motor vehicle mileage. About half of this travel is on urban streets, and the private automobile accounts for almost all of it. Three-fourths of the nation's households own automobiles of which two-thirds are owned by metropolitan area households. About one-third of the automobiles will be found in the suburbs of the great metropolitan centers, one-third divided between metropolitan central cities of more than or less than 500,000 persons, and one-third in rural areas.

Cars are used primarily for earning a living or for family business, on trips between seven and eight miles in length one way. Only one out of four car trips is for social, educational, or recreational purposes. The

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[184] AUTOMOBILE ASS'N, *supra* note 172, at 40. A 1961 survey by the United States Bureau of the Census showed the average trip length to be 9 miles. Its breakdown was: earning a living — 12 miles; family business — 7 miles; educational, civic, religious — 5 miles; social and recreational — 14 miles.

[185] Bostick, *supra* note 181, at 243.

[186] UNITED STATES BUREAU OF CENSUS, PASSENGER TRANSPORTATION SURVEY: HOME TO WORK TRAVEL, 1963 CENSUS OF TRANSPORTATION 76, 77 (1965); AUTOMOBILE ASS'N, *supra* note 172, at 41.

[187] AUTOMOBILE ASS'N, *supra* note 172, at 37.

car may be used on a vacation trip which will be about 300 miles one way.

Two-thirds of the nation's workers commute to and from their jobs. Four out of five of these commuters drive or ride in passenger cars. Even in central cities of metropolitan areas, two out of three commuters use cars rather than transit. Of commuters living in suburbs of metropolitan areas, the car is used in a ten to one ratio over transit.

FINDERS AND FINDERS' FEES

BY ROBERT E. BENSON*

Finders have long played an integral role in the world of commerce but only recently has a body of common law been developed to deal with their activities. This is due in part to the peculiar nature of a finder's business and in part to the reluctance of courts to depart from traditional legal concepts that "almost" fit the legal problems raised in finders' cases.

In his article, Mr. Benson describes the normal operations of a finder, compares finders to brokers and agents, and analyzes the finder's operations in hopes of determining appropriate legal principles. The case of Consolidated Oil & Gas, Inc. v. Roberts, *162 Colo. 149, 425 P.2d 282 (1967) is used to illustrate a typical factual situation in finders' cases and to provide a basis for the legal analysis presented in the paper. The author concludes by presenting the key elements in any case involving a claim by a finder for his fee.*

INTRODUCTION

WHILE finders are as old as commerce, it is only in recent years that finders have assumed an acknowledged position in the entrepreneurial world, and with it, a developing status in the common law. Early cases involving finders often used the terms finder, broker, and agent interchangeably,[1] and the confusion is understandable since their functions, modes of operation, and rights to compensation are very similar.[2] More recently, however, courts have recognized that the traditional rules of law relating to brokers and agents are not always adequate to define the rights, duties, and responsibilities of a finder.[3] Consequently, today's decisions reflect a tailoring of the traditional legal principles to fit the unique role of the finder in modern business life.

This article will first examine the nature of a finder and then review the case of *Consolidated Oil & Gas, Inc. v. Roberts,*[4] a finders' fee case that provides an excellent illustration of the developing factual and legal framework within which the finder works. Thereafter, the

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[1] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 157, 425 P.2d 282, 286 (1967).

[2] COLO. REV. STAT. ANN. § 117-1-2 (1963) defines broker as "any person, firm, partnership, association, or corporation who, in consideration of compensation by fee, commission, salary, or any thing of value, or with the intention of receiving or collecting such compensation, engages in or offers or attempts to engage in either directly or indirectly by a continuing course of conduct or by any single act or transaction, any of the following acts . . . ."

[3] As is always the case, when a new subject category of common law develops, the rules of analogous areas are borrowed. Thus, in many ways a finder is a "broker" within the customary legal structure, and these broker principles are borrowed to start the legal structuring of the "finder."

[4] 162 Colo. 149, 425 P.2d 282 (1967).

specific problems of the finder's legal position will be considered; namely, the elements of a finder's cause of action and the measure of recovery to which a finder is entitled.

I. Definition of a Finder

Probably everyone from time to time is a finder, whether the "find" be a bargain at the local department store or a hot tip for investments. The finder with which this article is concerned, however, is the professional finder, the man who finds and reveals information of business opportunities for a fee — *e.g.*, he who finds businesses available for purchase or sale; prospective buyers or sellers of goods; and available financing, investments, and employment.[5] Finders are also active in connection with corporate mergers and securities underwriting, many men devoting their full time to finding employment opportunities for underwriters and underwriters for companies seeking to issue stock.[6] In addition, finders are often engaged in seeking funds which are available for purchasing securities issues.

The role and efforts of a finder may vary dramatically according to the needs and wishes of the parties with whom he is dealing and the type of opportunities with which he is familiar. As a result, the description of a finder's functions and the legal principles applicable thereto have varied considerably. In *Seckendorff v. Halsey, Stuart & Co.*,[7] the court apparently felt that finders play a very limited role with minimal duties:

> Plaintiff was in nowise a broker. . . . He was merely a finder of this piece of business. He was to receive his compensation for finding the business and bringing the same to the attention of Rogers, Caldwell & Co. and its associates. He claimed his compensation solely on the ground that he was the originator of the business and had disclosed to Rogers, Caldwell & Co. and its associates the opportunity to engage in its financing.[8]

And in *Baldwin v. Grymes*,[9] the court also saw a limited role for the finder but recognized that his services might consist of something more than merely revealing an opportunity: "A 'finder,' it has been said, is one who finds, interests, introduces and brings together parties for

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[5] *See, e.g.*, Lindeman v. Textron, Inc., 229 F.2d 273 (2d Cir. 1956) (presenting the advantageous purchase of one textile company to another); Weinreb v. Strauss, 80 A.2d 47 (Mun. Ct. App. D.C. 1951) (finding a retail liquor store for sale); Garrett v. Wall, 29 Ga. App. 642, 116 S.E. 331 (1923) (finding and introducing prospective purchaser of saw mill timber); Miller & Demton v. Batten, 247 Ky. 339, 57 S.W.2d 33 (1933) (introducing a prospective purchaser of an oil and gas lease).

[6] An illuminating description of the role of finders in the securities field is set forth in C. Israels & G. Duff, When Corporations Go Public 36-40 (1962).

[7] 234 App. Div. 61, 254 N.Y.S. 250 (1931), *rev'd on other grounds*, 250 N.Y. 353, 182 N.E. 14 (1932).

[8] *Id.*, 254 N.Y.S. at 260.

[9] 232 Md. 470, 194 A.2d 285 (1963).

a deal, even though he has no part in negotiating the terms of the transaction."[10]

On the basis of the language in *Consolidated Oil & Gas, Inc. v. Roberts*,[11] the finder's duties, at least in the oil and gas industry, may be more substantial:

> The usual type of broker's commission case in the regulated real estate business in Colorado, as is urged by the defendant, is not necessarily in point here. For example, oil and gas brokers do not evaluate the properties, nor do they necessarily enter into the negotiations or consummate the transactions, *i.e.*, handle the closing. Such brokers' or finders' principal activities and services are to locate a property or lease, bring it to the attention of a prospective buyer and thereafter to obtain the requested data if possible. He is then only paid a commission if the property is actually acquired by his prospect.[12]

From the above cases it is apparent that the appropriate definition of a finder is often a factual question and that the only description that would include all those properly considered to be finders might simply be one who "finds, introduces, and brings together parties to a business opportunity . . . ."[13] Any more extensive definition of a finder's role, the conditions as to his compensation, or the opportunities with which he deals would inevitably be honored only in its exceptions.

Having briefly examined the nature of a finder's activities, a comparison of finders to brokers and agents is necessary to further clarify a finder's role and the legal principles applicable thereto. Depending upon the services a finder undertakes to perform and his relationship to his "buyer", he may act as an agent or as a broker. When he is engaged by another to locate a specific type of opportunity, he functions much like an agent and the law of agency may be determinative of his duties, rights, and obligations.[14] For example, the finder would have the customary responsibilities of loyalty and good faith to his principal,[15] and he could neither deal in the agency matter for his own benefit without the knowing consent of his principal,[16] nor could he act adversely to the interests of his principal by serving or acquiring any private interest of his own in antagonism or opposition thereto.[17] Further, he would be required to account to his principal for any secret

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[10] *Id.* at 472, 194 A.2d at 287.

[11] 162 Colo. 149, 425 P.2d 282 (1967).

[12] *Id.* at 157, 425 P.2d at 286.

[13] Annot., 24 A.L.R.3d 1160, 1164 (1969).

[14] Because a finder seldom acts as an agent and because his duties are not totally consistent with most agents' duties, he would probably be considered a slightly peculiar type of agent, but the general laws of agency would still apply.

[15] *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 387-98 (1957). The determination of the existence of an agency capacity of a finder generally would be no different than any other agent.

[16] *Id.* § 389.

[17] *Id.* § 387.

profit he may have realized in the course of his agency, even though the principal has suffered no loss.[18]

It is also true that as an agent, a finder cannot act for both parties to the opportunity, unless both parties consent at least as to matters involving the exercise of discretion.[19] Indeed, if the agent does so act, principal has a right to all compensation received by the agent from the other party;[20] has no obligation to compensate the agent;[21] and may even have the right to avoid the transaction. However, if the double agency is known to both principals, there is no violation of duty.[22]

When a finder learns of an opportunity independently and then seeks out persons who might be interested in such an opportunity, he acts not as an agent but as a broker. In such capacity he may introduce parties, assemble information, and assist in negotiations but cannot attempt to serve the particular interest of either side. His efforts are directed toward consummation of the transaction,[23] and to this end he assists either party. In these circumstances, the finder has no obligation of loyalty or duty to either party.[24] Similarly, he may receive a fee from both parties to the proposed transaction.

While the above discussion might suggest that a finder is a broker when acting independently, a finder can be distinguished from a broker by the limited subject matter of a broker's activities, the minimal duties of a finder, and the informality of the agreement between a finder and and the parties to the underlying transaction or opportunity. The *Consolidated Oil* case makes this distinction clearer and also suggests some of the problems which arise in finders' cases.

II. *Consolidated Oil & Gas, Inc. v. Roberts*

Consolidated Oil & Gas, Inc. v. Roberts [25] involved a somewhat typical finder situation, wherein the plaintiff sought compensation for disclosing a business opportunity to the defendant. While the court was somewhat ambiguous in its determination of the legal status of

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[18] *Id.* §§ 388, 403.

[19] *Id.* §§ 391, 392, 394.

[20] *Id.* § 388.

[21] *Cf.* Whittenberg v. Carnegie, 328 Mich. 125, 42 N.W.2d 900 (1950); McMichael v. Burnett, 136 Kan. 654, 17 P.2d 932 (1933).

[22] *Cf.* Fitzsimons v. Southern Exp. Co., 40 Ga. 330 (1869); Brockman v. Delta Mfg. Co., 184 Okla. 357, 87 P.2d 968 (1939); Rice v. Davis, 136 Pa. 439, 20 A. 513 (1890).

[23] The fact that the finder performs services may be relevant to our earlier considerations. First, it may indicate an implied assent that he is required to perform other services in order to be entitled to compensation. Second, particularly if the services aid the party from whom no compensation is sought, services may indicate an implied acknowledgment that consummation of the transaction is a condition to the finder's right to compensation.

[24] Except perhaps to not reveal the opportunity to others while the parties are negotiating.

[25] 162 Colo. 149, 425 P.2d 282 (1967).

the finder and his right to compensation, its opinion nevertheless touches upon or suggests the broad spectrum of problems of the legal status, rights, and obligations of a finder.

The facts, in brief, were as follows: Plaintiff Roberts was a broker in the oil and gas business and in this capacity learned that defendant Consolidated Oil & Gas, Inc. was interested in acquiring companies in the oil and gas business. In August of 1959, Roberts advised the officers of Consolidated of an oil company with whom Consolidated might merge, although he did not reveal the name of the company at that time. At Consolidated's request, Roberts submitted pertinent engineering data on the company and then informed Consolidated that the name of the prospect was Midland Oil Co. Consolidated did not ask Roberts to perform any further acts in connection with the transaction.

In the fall of 1960, approximately one year after Roberts disclosed the name of the company to Consolidated, the two companies merged on basically the same terms that had been proposed when Roberts first advised Consolidated of the opportunity. Roberts requested from Consolidated a reasonable "finder's fee" for his services in connection with the merger and commenced an action when his request was refused.

The court held that Roberts was entitled to recover on an implied contract basis,[26] since there was no express agreement between the parties and since the amount of compensation had not otherwise been agreed upon. The court was not overly specific as to the particular type of implied contract[27] which it determined had existed between Roberts and Consolidated, but it set out the following elements as essential to establishing the claim:

> The circumstances from which such a contract may be implied seem to be two; first, that the broker or agent has rendered services, and is permitted to do so in such a manner as to indicate that he expected to be paid for these services; and second, that the services are beneficial to the party sought to be made liable.[28]

Recognizing the duty to render services in order to be compensated, the court was faced with the issue of how much or what quantum of services to require. To this it was said:

> The measure of performance of an oil and gas broker or finder would seem to require only that he present a property available for acquisition and then procure any requested information needed to evaluate the

[26] *Id.* at 156, 425 P.2d at 286.

[27] *See* RESTATEMENT OF CONTRACTS § 5 (1933); Comment "a" refers to an express contract as being one the terms and existence of which are expressed verbally or in writing, an implied contract as one the terms and existence of which are expressed by the actions of the parties, and quasi contract as not being based upon apparent intention of the parties but created by law for reasons of justice. The latter two types of contracts are both *implied* but are based on different considerations!

[28] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 156-57, 425 P.2d 282, 286 (1967).

> property. His compensation is dependent upon the subsequent purchase, but not upon his efforts toward accomplishing the purchase.[29]

The last sentence makes it clear that the right to compensation is not dependent upon the quantum of services rendered, once the minimum requirement of making the opportunity available and providing requested information is met. It is also significant that this was only a finding of fact based upon evidence of the custom of the oil and gas industry[30] and presumably did not establish as a matter of law the amount of services required to be performed by finders in all instances, or even within the oil and gas industry itself.[31]

Even though the court only set out a minimum service requirement, it did add that for Roberts to be entitled to compensation there had to be a continuing connection between his services and the merger. To this point, citing cases involving claims for real estate broker's commissions, Consolidated asserted that Roberts did not prove that he was the "efficient agent" or "procuring cause" of the transaction.[32] The court rejected the argument that those requirements that are generally applicable to recovery of a real estate broker's fee applied to finder's cases. It said:

> [Those] [c]ases . . . relied on by the defendant, are not applicable here, for this is not the type of transaction where a broker, at the initial contact, produces a ready, willing and able buyer who purchases the property, upon the terms and at a price then designated by the principal. Those cases though do stand for the proposition, which is applicable here, that the broker must be the efficient agent or procuring cause of the sale. . . .
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> We discussed the rights of a so-called "finder" in George v. Dower, 125 Colo. 45, 55, 62, 240 P.2d 897 (1952) to the effect that he who is entitled to the commission is the one who sets the chain of events in motion which result in the sale.[33]

The term "procuring cause" suggests a primary or principal cause, but the court's explanation of this phrase — that a finder must set the "chain of events in motion which result in the sale" — suggests a lesser contribution by the finder. Again, the court was not clear but apparently felt that since Roberts had performed all the customary services required in the oil and gas industry, the services had suffi-

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[29] *Id.* at 158, 425 P.2d at 287.

[30] Custom of the industry is normally implied into every contract, and a fortiori, into every *quantum meruit* relation. *See* A. CORBIN, CONTRACTS §§ 631, 632, 653, 654 (1960); S. WILLISTON, CONTRACTS §§ 887(A), 887(AA) (3d ed. 1962).

[31] At some point custom may be judicially noticed, perhaps once a higher court has recognized the custom of an industry. Ultimately, requirements based upon custom may become statements of law.

[32] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 151, 425 P.2d 282, 286 (1967). Heady v. Tomlinson, 134 Colo. 33, 299 P.2d 120 (1956) and Babcock v. Merritt, 1 Colo. App. 84, 27 P. 882 (1891) were the cases relied on by Consolidated.

[33] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 157-58, 425 P.2d 282, 286 (1967).

ciently set the "chain of events" in motion.[34] According to this analysis, if the finder performs all services customarily required of finders in the same industry, and if the transaction is consummated, the "procuring cause" or "chain of events" requirement is a fortiori satisfied.[35]

Consolidated did not raise as error the trial court's determination that the requirement of benefit and the requirement that the services be rendered with a reasonable expectation of compensation were met.[36] Consequently, the Supreme Court's opinion does not specifically discuss these two elements, except to say generally that they were satisfied.[37]

The court closed with the following statement which appears to summarize the sole evidence needed to allow Roberts to recover his finder's fee:

> Clearly, no dispute existed as to the following facts: that Roberts brought Consolidated the deal; furnished all requested financial and engineering data; that a deal was made for a value in excess of that found by the trial court as the minimum; that that Goodstein, after being put in touch with defendant by Roberts, later dealt with the defendant through Straus.[38]

Roberts was awarded judgment in the amount of $30,000, based upon evidence that the usual (customary) commissions on a sale (or merger) up to $1,000,000 was 5%, although it might range from 3% to 15% with a scaled reduction on sales over $1,000,000.[39]

III. ELEMENTS OF A FINDER'S CAUSE OF ACTION

Although the factual setting of a finder's activities vary considerably, two factors must be considered in determining whether a finder is entitled to compensation: First, has the finder performed the services that are required of him; and second, have the events occurred (over which the finder may or may not have any control) which are conditions to his right to compensation?[40] The services the finder must perform and the other terms and conditions upon which a finder's compensation may be dependent may be set forth in an agreement between the finder and recipient of his services. If there is no agreement, the services to be performed by the finder and the other conditions

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[34] *Id.* at 158, 425 P.2d at 287.

[35] The court did not discuss, but from its use of the "procuring cause" or "chain of events" requirement presumably left open the possibility of intervening causes resulting in the consummation of the transaction. Thus, while the finder might perform all that is required of him by the custom of the industry, there might be a break in the chain of events such as to deprive him of his compensation.

[36] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 152, 425 P.2d 282, 284 (1967).

[37] *Id.* at 157, 425 P.2d at 286.

[38] *Id.* at 160-61, 425 P.2d at 288.

[39] *Id.* at 156, 425 P.2d at 284.

[40] One such condition evidenced by *Consolidated* is benefit. As will be discussed *infra*, benefit may also require the consummation of the transaction as well as a connecting link between the services rendered and the benefit bestowed.

precedent to his compensation, if any, are implied in law or fact under the legal theories of *quantum meruit* or implied contract. In either case the issues remain the same.

A. Agreement

Obviously, the finder and the persons to whom he renders services can agree upon the amount of, and conditions to, his compensation. This agreement can be oral, written, or implied in fact.[41] The parties may specifically define the services to be rendered by the finder, the dollar or percentage amount of the finder's fee, and/or the conditions, if any, to be attached to the payment of the fee. If such an agreement is made, it will be controlling, and the court will not imply any conditions or terms inconsistent with those expressed in the agreement.[42]

Similarly, if the conditions in the agreement are not satisfied, no recovery will be allowed, even though the finder has performed all services required of him by the agreement. This situation is illustrated by the case of *Scott v. Huntzinger*[43] which involved a claim by a real estate broker for a commission. The written agreement provided: "If the deal with White results in our sale of the property as provided in the agreement with him, then we will pay you a commission . . . ."[44] The "agreement" referred to gave White an option to buy certain property. White did not exercise the option but purchased the property from the defendant after the option expired. The Colorado Supreme Court held that the plaintiff was not entitled to a commission, stating, "the right of a broker to recover a commission depends upon the particular terms of the broker's employment."[45] The agreement between plaintiff and defendant provided that plaintiff's brokerage fee was contingent on White purchasing the land *under the option* to buy. Since the option was not utilized in buying the property, the broker was not entitled to compensation, even though he had performed all services required of him by the contract.

Similarly, as early as 1894 the New York court in *Knauss v. Gottfried Krueger Brewing Co.*[46] said:

> The record shows that there was evidence of the employment of the plaintiff for the mere purpose of bringing the possible buyer and

[41] Generally, finders' contracts do not need to be in writing. However, where the subject matter of the finder is within a statute of frauds and under the terms of a few statutes relating to employment contracts, a finder's contract must be in writing. *See* Annot., 24 A.L.R.3d 1160, 1168-70 (1969). Otherwise, recovery is available on an implied contract theory.
See generally Annot., 24 A.L.R.3d 1160, 1176 (1969). *See also* cases collected and discussed in Annot., *Validity, Construction and Enforcement of Business Opportunities or "Finder's Fee Contract,"* 24 A.L.R.3d 1160, 1168-70 (1969).

[42] *See* A. CORBIN, *supra* note 30, §§ 95-102, 556.

[43] 148 Colo. 225, 365 P.2d 692 (1961).

[44] *Id.* at 228, 365 P.2d at 693.

[45] *Id.* at 229, 365 P.2d at 695.

[46] 142 N.Y. Reports 70, 36 N.E. 867 (1894).

> seller together, and with the understanding that, if a sale were to result, the plaintiff was to have some compensation from the defendant for his services. The plaintiff testified that he was to have nothing to do with fixing the price or the terms of the sale; the principals were to do that part of the business; all he had to do was to bring them together, and if, through their subsequent negotiations, a sale should result, the plaintiff was to be entitled to some compensation.[47]

By agreement, if (1) the finder introduced the parties and (2) a sale resulted, the finder was entitled to the agreed compensation.

However, if the agreement is silent as to any conditions (other than the finder's services) to a finder's right of compensation, such conditions may nevertheless exist. The custom of the industry may impose conditions, and custom is normally a part of every contract, unless expressly excluded or unless inconsistent with the express terms of the contract.[48] The custom of finders in any particular sector of business may include conditions to his right to compensation. To the degree conditions are asserted when the written contract is silent, the law of *quantum meruit* and implied contract is applicable.

B. Quantum Meruit and Implied Contract

When there is no agreement as to the services to be performed or the conditions precedent to compensation, recovery may be dependent upon proof of a *quantum meruit* cause of action. The definitions of the courts suggest that the finder has no duty or responsibility other than revealing the opportunity, but the holdings often belie the definitions, and his right to compensation may well depend upon subsequent events.

The requirements for recovery by a finder in *quantum meruit* were set out in *Consolidated Oil & Gas, Inc. v. Roberts.*[49]

> [F]irst, that the broker or agent has rendered services, and is permitted to do so in such a manner as to indicate that he expected to be paid for these services; and second, that the services are beneficial to the party sought to be made liable.[50]

1. Services by the Finder

In most instances, the services that a finder must perform are questions of fact. *Consolidated* held that in the absence of agreement, the services that must be performed by a finder in order to be entitled to compensation are defined by custom in the industry.[51] In *Consolidated,* for example, the sole effort required of a finder in the oil and gas industry was "to present a property available for acquisition and

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[47] *Id.*

[48] *See* A. CORBIN, *supra* note 30, §§ 95-102, 556.

[49] 162 Colo. 149, 425 P.2d 282 (1967).

[50] *Id.* at 157, 425 P.2d at 286.

[51] *Id.*

then procure any requested information needed to evaluate the property."[52] It is implicit from the statement of facts that any duties created by requests for information may be defined by the person to whom the opportunity is revealed. And if a finder refuses to perform such further tasks, he may not be entitled to a fee or may receive a reduced fee.

While most finders are active in areas where there is considerable finder activity and, concomitantly, a finder custom, there seems no reason why a finder could not receive *quantum meruit* compensation for merely introducing parties or revealing an opportunity — subject to such conditions subsequent as may be imposed — if the finder were involved in an area in which no custom existed. Indeed, in the absence of a custom of the industry and in the absence of additional services being requested, the judicial definitions of a finder suggest such a conclusion, if the other conditions not related to the scope of the finder's services are fulfilled.[53] Further, while the issue of the services required of the finder in *Consolidated* was resolved as a finding of fact, other courts appear to have held as a matter of law that a finder's services may consist simply of revealing an opportunity.[54]

Yet according to *Consolidated,* the finder must also expect to be compensated for his services. With respect to this condition, it is usually sufficient that the person sought to be charged knew, or reasonably should have known, that the services were being rendered with the expectation of payment,[55] even though the person sought to be charged did not know that the party performing the services expected compensation and did not actually intend to pay for the services.

This requirement presents a special problem in finder's fee cases; for the typical *quantum meruit* case, the mere fact of performance of services and benefit to the recipient carries with it an implication or presumption that the services are rendered with the expectation of compensation, *i.e.*, people do not normally render services without

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[52] *Id.* at 158, 425 P.2d at 286.

[53] With respect to real estate brokers, the *quantum meruit* terms for recovery of compensation are well established, although these principles of law probably have their roots in the custom of the real estate business.

[54] *E.g.,* Lindeman v. Textron, Inc., 229 F.2d 273 (2d Cir. 1956); Crofoot v. Spivak, 113 Cal. App.2d 146, 248 P.2d 45 (1952); Seckendorff v. Halsey, Stuart & Co., 234 App. Div. 61, 254 N.Y.S. 250 (1931), *rev'd on other grounds,* 250 N.Y. 353, 182 N.E. 14 (1932). *But see* Towers v. Doroshaw, 5 Misc. 2d 241, 159 N.Y.S.2d 367 (Sup. Ct. 1957). A more complete discussion of the measure of recovery follows in a later section, but it should be noted here that the quantum of services has not to date been a significant factor in this decision.

[55] *E.g.,* Nagele v. Miller, 73 Ida. 441, 253 P.2d 233 (1953); Johnson v. Nasi, 50 Wash. 2d 87, 309 P.2d 380 (1957); *see* City Ice & Fuel Co. v. Bright, 73 F.2d 461 (6th Cir. 1934); Spencer v. Spencer, 181 Mass. 471, 63 N.E. 947 (1902); Poppa v. Poppa, 364 S.W.2d 52 (Mo. App. 1962); Kellogg v. Gleeson, 27 Wash. 2d 501, 178 P.2d 969 (1947); *cf.* Mills v. Sharpe, 129 Colo. 589, 272 P.2d 641 (1954); Millard v. Loser, 52 Colo. 205, 121 P. 156 (1912). *But cf.* Towers v. Doroshaw, 5 Misc. 2d 241, 159 N.Y.S.2d 367, 375-76 (Sup. Ct. 1957).

expecting compensation therefor.[56] However, the relationship of the parties may change this presumption.

For example, it is often held that where a family relationship exists between the performer and recipient, there is a presumption that compensation was not intended, the services being presumed to have been rendered gratuituously.[57] Perhaps such a presumption should be applicable to a finder's fee claim based upon *quantum meruit,* when the finder is claiming the fee from a business associate with whom he regularly or frequently deals on other types of business, or when the opportunity is volunteered without mention of, or agreement for, compensation. This presumption would be based upon a conclusion that many opportunities are revealed in the business world by business associates without any expectation of compensation for revealing such opportunity. In fact, the difficulties inherent in the claim for compensation by one who freely broadcasts or volunteers his knowledge of an opportunity and the multiple sources from which a person might learn of opportunities suggest the desirability of requiring that such agreements be in writing.

In any event, the relationship between the finder and the beneficiary may be determinative of the service requirement to a finder's *quantum meruit* case.[58]

2. Benefit to the Recipient

Often, however, the principal issue in a finder's claim for compensation is what constitutes benefit so as to entitle the finder to compensation. Knowledge of an opportunity, as knowledge of anything, may be benefit *per se.* If so, revealing an opportunity would satisfy the benefit requirement without more. Thus, the finder's services may consist only of revealing the opportunity, the definition of a finder's services and the benefit that must be received by the recipient being the same.

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[56] *E.g.,* Dieterle v. Gatton, 366 F.2d 386 (6th Cir. 1966), *appealed after remand,* 397 F.2d 155 (6th Cir. 1968); Ferber Co. v. Ondrick, 310 F.2d 462 (1st Cir. 1962), *cert. denied,* 373 U.S. 911 (1963); Meredith v. Marks, 27 Cal. Rptr. 737, 212 Cal. App.2d 265 (1963); Leoni v. Delaney, 83 Cal. App. 2d 303, 188 P.2d 765 (1948); Dixie Builders, Inc. v. Partin, 54 So. 2d 811 (Fla. 1951); Maui Aggregates, Inc. v. Reeder, 446 P.2d 174 (Hawaii 1968); Shurrum v. Watts, 80 Ida. 44, 324 P.2d 380 (1958); *In re* Winan's Estate, 77 Ill. App. 2d 462, 222 N.E.2d 546 (1966).

[57] *In re* Moyer, 190 F. Supp. 867 (W.D. Va. 1960); Russell v. Baumann, 239 Ark. 830, 394 S.W.2d 619 (1965); Wilson v. Equitable Sec. Trust Co., 52 Del. 353, 158 A.2d 281 (1960); Tanner v. Tanner, 106 Ga. App. 270, 126 S.E.2d 838 (1962); Morris v. Bruce, 98 Ga. App. 821, 107 S.E.2d 262 (1952); Shurrum v. Watts, 80 Ida. 44, 324 P.2d 380 (1958); Ferris v. Barrett, 250 Iowa 646, 95 N.W.2d 527 (1959); McDaniel v. McDaniel, 305 S.W.2d 461 (Mo. 1957); Doby v. Williams, 53 N.J. Super. 548, 148 A.2d 42 (1959); Porter v. Ferguson, 53 Wash. 2d 693, 336 P.2d 133 (1959).

[58] Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 156-57, 425 P.2d 282, 286 (1967). *Consolidated* said that the finder must not only provide services but his relationship with the principal must be such as to justify a reasonable expectation of compensation on the part of the finder.

Yet the services and the benefit are not the same; for while knowledge is desirable, it is beneficial in a legal sense only when *used* by the recipient. Utilization of the information seems to be a condition precedent to a finder's compensation or a necessary part of the "benefit" requirement, even though his services may be completed when he reveals the opportunity. Hence, in any discussion of benefit, two other factors must be considered: the need for a connecting link between the services and the benefit, and the necessity for a consummated transaction.

a. Chain of Events or Procuring Cause

Obviously, there must be some connection between the finder's services and the benefit to the recipient of the services for recovery of a finder's fee on the theory of *quantum meruit. Consolidated* described this connection as a "chain of events" or the services as being the "procuring cause"[59] of the benefit and held that if the finder performed all that was required of him by custom or request and if the benefit was realized, the connection requirement was fulfilled.

Often, however, there can be such interruptions and intervening causes such as to deny the finder his fee. The issue and the approach to the resolution of the question of link or connection between the finder's services and the benefit obtained cannot be more precisely phrased than it was in *Consolidated.* When such circumstances arise, the issue can normally be resolved by the same principles as are applied by the courts in analogous situations involving brokers.[60]

b. Consummated Transaction

Perhaps the most critical facet of the benefit requirement — and perhaps a separate requirement in itself — is the need for a consummated transaction. Indeed, the author's research has disclosed no case in which a finder has recovered compensation if the opportunity revealed by the finder was not exploited. While the parties may contractually provide for a finder's fee regardless of the use made of

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[59] *Id.* at 157-58, 425 P.2d at 286: The law of brokers requires the broker to be the procuring cause of the sale. This procuring cause has been defined as the "effective cause" or the "predominating effective cause"; *see, e.g.,* Hayutin v. DeAndrea, 139 Colo. 40, 45, 337 P.2d 383, 385 (1959). *See also* Pass v. Industrial Asphalt of Calif., Inc., 239 Cal. App. 2d 776, 49 Cal. Rptr. 190 (1966): " 'Procuring cause' has been defined as the cause originating a series of events that, without break in their continuity, result in the accomplishment of the prime object of the employment." *Id.* 49 Cal. Rptr. at 195.

[60] In the real estate industry, if more than one broker is employed, the broker who is the first to present a ready, willing, and able party is entitled to the commission. *See* Pueblo v. Leach Realty Co., 149 Colo. 92, 368 P.2d 195 (1962). Of course, such rule should be subject to a finding of an uninterrupted chain of events. It is generally held that the broker is entitled to his commission if his client is the cause of the failure of the sale to be consummated. *See, e.g.,* Circle T. Corp. v. Crocker, 155 Colo. 263, 393 P.2d 744 (1964); Pueblo v. Leach Realty Co., 149 Colo. 92, 368 P.2d 195 (1962).

the information disclosed by the finder,[61] in the absence of such a contractual provision the exploitation of the opportunity by the recipient of the finder's information should be held to be a condition subsequent, implied by law or implied in fact to the right of a finder to compensation,[62] whether the action is *ex contractu* or *quantum meruit*.[63]

The importance of whether the consummation of the transaction is a condition to a finder's right to compensation lies in the mode of operation of a finder. Whereas a broker usually is specifically employed by a party for the purpose of a particular transaction, a finder often is employed by no one. The finder often simply approaches persons whom he feels may be interested in the opportunities of which the finder has knowledge. Often the finder is not revealing a specific proposal; he is revealing a very general concept of an opportunity. The transformation of this opportunity into a transaction may occur long thereafter, and the finder may have nothing to do with the transformation. Hence, a problem then arises, because the finder will often fail to state the terms of compensation prior to revealing the opportunity, and the "ready, willing and able" concept applicable to a broker's right to compensation can rarely be applied to a finder. In most instances, the finder's compensation must be tied to actual exploitation of the opportunity, without an exception for the failure of the exploitation due to the refusal or neglect of the party to whom the finder disclosed the opportunity.

The conclusion that utilization of the finder's information is normally a condition to a finder's right to compensation was reached by the New York court in *Towers v. Doroshaw*,[64] wherein plaintiff sought a finder's fee for merely telling the defendant of a merger opportunity which was never consummated.

> [T]he Court does not consider the question . . . whether, upon satisfactory proof of the promise so made, a party might be held liable to pay for the mere mention to him of a corporation or firm with which he might subsequently do business . . . . In no case cited by

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[61] With respect to real estate agents, COLO. REV. STAT. ANN. § 117-2-1 (1963) provides that no such agent shall be entitled to a commission for finding a purchaser "until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed on." No doubt this provision merely reflects prior case law. Query, could the parties make a contract contrary to the terms of COLO. REV. STAT. ANN. § 117-2-1 (1963)?

[62] An argument for finding the condition to be implied may be based on two theories: First, that there is an established custom in particular industries which would give the principal notice of the finder's expectation *upon consummation*; second, that common sense compels the conclusion that the consummated transaction is the benefit for which the principal must compensate the finder, the absence of which estoppes the finder from claiming compensation. *See* Towers v. Doroshaw, *supra* note 54.

[63] COLO. REV. STAT. ANN. § 117-2-1 (1963) provides:

> No real estate agent or broker shall be entitled to a commission for finding a purchaser who is ready, willing and able to complete the purchase of the real estate as proposed by the owner, until the same is consummated or is defeated by the refusal or neglect of the owner to consummate the same as agreed upon.

[64] 5 Misc. 2d 241, 159 N.Y.S. 2d 367 (App. Div. 1957).

> the plaintiff has there been enforced an obligation to pay compensation to a "finder" for the disclosure of the name alone, without an introduction or negotiations leading to an eventual transaction between the defendant and the buyer. Certainly, when such an agreement is not reduced to writing, the plaintiff must sustain his burden of establishing the contract by evidence of a quality and quantity sufficient to satisfy the court of a clear and unequivocal intention by the defendant to pay for the mere disclosure.[65]

In holding that the plaintiff could not recover in *quantum meruit* if the transaction proposed was not consummated, the court said: "A broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success."[66] While generally the custom of the industry in which the finder operated would be the basis of the holding and the consummation of the transaction would be a condition subsequent implied in fact, [67] the result in *Towers* appears to be a conclusion of law, *i.e.*, a separate condition implied by law into the contract or into the *quantum meruit* relationship.[68]

Even in the absence of custom, the consummated transaction condition should be implied in law, unless there is evidence of circumstances showing an intention (or justification) of the parties that the finder would be paid for merely revealing the opportunity regardless of what transpired thereafter. Such constructive conditions, as defined by Corbin, are founded on grounds of justice, independent of expressed intention or consideration. [69] With respect to finders, it seems difficult to concede that the parties would have intended the finder to be compensated regardless of the outcome of the transaction if they had considered it,[70] since the sole purpose of the relationship between the finder and exploiter is to consummate the proposed transaction.

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[65] *Id.* at 249, 159 N.Y.S. 2d at 376.

[66] *Id.* at 252, 159 N.Y.S. 2d at 379, *quoting* Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 383 (1881).

[67] "In truth, usage is one of the agencies by which the law has been gradually formed and still is not only added to, but otherwise amended." That usage may harden by repeated decisions into such new rules of law as do not contradict any previously existing rule is, however, clearly stated. S. WILLISTON, CONTRACTS § 655 (3d ed. 1961). Perhaps the custom of consummation of the transaction as a condition to compensation has already become a part of the common law of finders' fees.

[68] Perhaps this conclusion is merely the result of sound logic and common sense. It seems highly unlikely that compensation to the finder would be agreed upon regardless of whether the information resulted in actual benefit to the obligor. However, the benefit should be defined in terms of exploitation of the opportunity rather than the amount of profits realized therefrom, although the latter fact may be highly important to the question of amount of compensation.

[69] *See generally* A. CORBIN, CONTRACTS §§ 631-32, 653-55 (1960).

[70] One might approach the issue by way of the commercial frustration doctrine. *See* RESTATEMENT OF CONTRACTS § 288 (1932). Ordinarily, both parties would assume the opportunity would be exploited, and if the promisor is unable to exploit the opportunity through no fault of his own, the objective has been frustrated. However, most often the failure of the exploitation is because of an inability to agree upon terms.

In rationalizing such an approach, some courts have implied the condition that the transaction be consummated by applying the principle that one must accomplish what he undertook to do in order to recover compensation for his services.[71] Applying this rule, a finder does not merely undertake to reveal an opportunity; he undertakes to obtain an advantageous transaction for another. Unless the opportunity revealed by the finder is exploited, the party to whom the opportunity is revealed has not obtained an advantageous transaction. While this approach results in the proper conclusion and while no doubt both parties to a finder's arrangement anticipate that it will culminate in an advantageous transaction, it is not precise to say the finder undertook to accomplish the advantageous transaction. At most, the finder undertook to present an advantageous transaction and, perhaps, to do what he could to assist the parties in consummating the transaction. The consummating of the transaction is ordinarily left to the parties involved.

Another way in which the consummated transaction is made into an implied condition is based on the "procuring cause" requirement, *i.e.*, the finder must have procured a consummated transaction or he is not entitled to compensation. The same conclusion can be reached in a *quantum meruit* case by a holding that no benefit has been received unless the recipient of the finder's disclosure utilizes the information to his benefit.

While the requirement of a consummated transaction can be based on several theories, perhaps it can best be explained by the doctrine of commercial frustration. Under this doctrine, it is held that

> [w]here the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.[72]

Thus, in the circumstances of a finder, exploitation of the opportunity or information is normally a desired object or effect which forms the basis of an agreement or *quantum meruit* relation upon which a finder's fee is asserted. This assumption is obviously logical, and unless the finder can prove a "clear and unequivocal intention by the defen-

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[71] Here, the difference between a broker and a finder may be most apparent. At the time a real estate broker, for example, comes on the scene, the deal that his principal wants is normally defined in specific terms. In the business of the finder, *e.g.*, corporate mergers, there is often only a vague concept of the terms upon which the "deal" could be consummated because of the sundry alternatives that can be followed to consummate a merger.

[72] RESTATEMENT OF CONTRACTS § 288 (1933). *See also* A. CORBIN, CONTRACTS §§ 1351-61 (1962).

dant to pay for the mere discloser,"[73] the finder's right to a fee should be held to be conditioned upon exploitation of the disclosure.

IV. Determination of the Fee

A. Agreement

If the parties have agreed upon the amount of the finder's fee, this is ordinarily conclusive.[74]

B. Quantum Meruit

Under the theory of *quantum meruit*, "reasonable compensation" is recoverable. Obviously, many factors are relevant to the determination of reasonable compensation. Therefore, no attempt will be made here to define the scope of evidence admissible on the issue of reasonable compensation,[75] except to point out that generally the type of evidence necessary to establish the amount of any *quantum meruit* claim should also be relevant to a finder's fee *quantum meruit* claim. Thus, the time spent by the finder, the skill of the finder, and the value of the subject

Although the usual evidence of reasonable compensation in a *quantum meruit* cause of action is relevant, it rarely provides much guidance to the determination of a reasonable finder's fee. The time spent and scope of services provided by the finder may provide some guidance, but it is difficult for such factors to be persuasive, since a finder is usually paid on a commission basis. Indeed, a finder's compensation, not unlike a lawyer's contingent fee, must compensate him somewhat for the failures for which he received no compensation as matter are all relevant to the determination of the value of the services. well as for his successes. Of course, if the fee is claimed, even though the opportunity was never exploited, consideration of factors such as time involved would be appropriate.

In either case, proof of customary finders' fees will normally be the mode of proving a reasonable fee. Evidence of fees customarily received for similar services is admissible to show the reasonable value of services rendered by the finder.[76] The admissibility of evidence of customary fees is based on the presumption that a fee would not attain

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[73] Thus, in the circumstances of a finder, exploitation of the opportunity of information is normally the desired object or effect which forms the basis of an agreement or *quantum meruit* relation upon which a finder's fee is asserted. This assumption is obviously logical, and unless the finder can prove a "clear and unequivocal intention by the defendant to pay for the mere disclosure," the finder's right to a fee should be held to be conditioned upon exploitation of the disclosure.

[74] When finder's fees are negotiated, relevant factors include the dollar size of the opportunity, the anticipated profit, and the scope of the services to be performed by the finder. However, often the agreed upon fee is merely a recognition of the finder's fee that is customary in the particular industry.

[75] *See, e.g.*, C. McCormick, Law of Damages § 46 (1935); A. Corbin, Contracts §§ 1004, 1112 (1964).

[76] Geiger v. Kiser, 47 Colo. 297, 305, 107 P. 267, 270 (1910).

the stature of custom if it were not reasonable. Evidence of customary fees is also admissible on the ground that custom is incorporated by law into every contractual or *quantum meruit* relationship. In *Fleming v. Wells*,[77] a case wherein the plaintiff sought to recover reasonable compensation for real estate broker services, the court said:

> The right of one rendering service for another to have their value estimated under a *quantum meruit* upon a basis of commissions can only arise out of a general custom, so that where such custom exists in reference to certain kinds of business, anyone actually or presumptively having knowledge of it, and employing the persons engaged in such business to perform services in their line without special contract, will be presumed to have done so with reference to such custom . . . .[78]

However, sometimes both of the parties will not be a part of the industry whose customary fees are sought to be used as evidence, and this is particularly true with respect to finders. The rule in this circumstance is that customary charges are evidence of reasonableness but are in no way conclusive.[79]

CONCLUSION

By reason of the informal manner in which most "finder" business is conducted, the scope of services to be performed by the finder and the terms upon which he is to be paid will usually not be expressed. Evidence of custom of the industry may be used to fill some of these gaps. However, often because of the difficulty of obtaining testimony of an industry's custom, or due to the absence of a custom in the industry, the gaps in a finder's arrangement cannot be filled in this manner. In such a situation, the courts should not hesitate to fill the gaps by applying logic and making their own determinations as to what the parties would have reasonably contemplated had they in fact considered these issues. Ultimately, as in the case of real estate brokers, many of the arrangements will be defined by law as a matter of law.

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[77] 45 Colo. 255, 101 P. 66 (1909).

[78] *Id.* at 259, 101 P. at 67; *cf.* Consolidated Oil & Gas, Inc. v. Roberts, 162 Colo. 149, 425 P.2d 282 (1967).

[79] Fleming v. Wells, 45 Colo. 255, 101 P. 66 (1909): "In an action for reasonable compensation by one employed to sell real estate and who effects the sale, but who is not regularly engaged in that business, evidence of the customary charges of real estate agents for such services is relevant, but such customary charges are not conclusive at fixing the compensation of the persons making such sale and such circumstances." *Id.* at 259, 101 P. at 67. *See also* 12 AM. JUR. 2d *Brokers* § 161 (1964); Morehouse v. Shepard, 183 Mich. 472, 150 N.W. 112 (1914).

VOIR DIRE: CRITICISM AND COMMENT

A DISCUSSION BY

WALTER E. CRAIG*

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In this interesting and somewhat unique article, four members of the bench and bar exchange their thoughts on the subject of voir dire. *In general, the participants consider abuses which have crept into the present* voir dire *procedure and discuss ways in which these abuses can be curbed, focusing in particular upon the role of education as a method for corrective change as against developing new state and federal procedural rules.*

INTRODUCTION

In a prize-winning article entitled "The Case of the Rebellious Juror," Mr. Robert F. Maxwell brings to light some of the current problems which exist with respect to the practice of *voir dire.* Using the context of a hypothetical case brought before the United States Supreme Court in 1979, Mr. Maxwell's article — which constitutes the opinion of the Court — examines these problems and suggests ways in which they can be resolved.

When this article came to the attention of the *Denver Law Journal,* the *Journal* Association thought that the issues raised by Mr. Maxwell and the solutions which he suggested would lend themselves to an interesting discussion. Therefore, the *Journal* contacted four very respected members of the bench and bar and conducted a conversation via telephone conference call on the subject of *voir dire,* using Mr. Maxwell's article as a basis for discussion.

In order to give the reader some necessary background for the edited conversation which follows, the *Journal* has condensed Mr. Maxwell's essay. The following material is the core of that article

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and includes the specific portions to which the discussion participants addressed themselves:

The Case of the Rebellious Juror[1]

LESTER WAITHCOMBE, Petitioner,

v.

STATE OF CALIFORNIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 515 Argued October 15, 1979 — Decided December 10, 1979.

THE CHIEF JUSTICE delivered the opinion of the Court.

Petitioner, a professor of political science at a community college, was called as a juror in a state court prosecution for inciting to riot. The defendants were students at a university in a distant section of the state, a change of venue having been granted. On *voir dire* the petitioner was asked a series of questions concerning his and his wife's political activities. He refused to answer these questions on the grounds that they violated his rights under the First, Fourth, and Fourteenth Amendments. The judge excused him from serving on the jury, but held him in contempt and sentenced him to thirty days imprisonment.

After exhausting his state remedies, he petitioned the United States District Court for a writ of *habeas corpus*. That court denied his petition on the ground that no constitutional rights had been violated. In its opinion, the court stated that the trial judge had not abused his discretion in allowing an extended *voir dire* on points which could possibly justify a challenge for cause and would certainly elicit information which might make a peremptory challenge advisable. In support of his appeal to the court of appeals, petitioner contended that his case came within the protective doctrines of *Sweezy v. New Hampshire*[2] and *N.A.A.C.P. v. Alabama*.[3] The court of appeals agreed with petitioner as to the holdings of these two cases yet decided the case adversely to him. The court quoted the language of Mr. Justice Frankfurter in *Sweezy*: "For a citizen to be made to forgo even a part of so basic a liberty as his political autonomy" (*i.e.*, the revelation of

[1] This article, originally published in full in the September 1970 issue of the AMERICAN BAR ASSOCIATION JOURNAL, won the 1970 Ross Essay contest that is conducted annually by the American Bar Association. Appreciation is extended to the American Bar Association for permission to reprint portions of this article. It should be noted that the citations, which appeared in the text of the article as originally printed, have been made into footnotes and run consecutively with the footnotes added to the comments of the discussion participants.

[2] 354 U.S. 234 (1957).

[3] 357 U.S. 449 (1958).

his political beliefs and associations), "the subordinating interest of the State must be compelling."[4] The court of appeals held that the interest of the state in securing an impartial jury was "compelling" and that the disputed *voir dire* was essential in obtaining such a jury.

We granted certiorari not only because of the fine line between the right to an impartial jury and the right of privacy vouchsafed to the petitioner by the Constitution, but also because of the serious problems concerning the propriety and value of *voir dire*, which have become ever more pressing in our complex and fast moving society.

Originally, *voir dire* was principally the concern of federal and state judges at the *nisi prius* level. It was our problem solely in the exercise of our general supervisory responsibilities over the operations of the federal court system.

Events, however, forced us to consider the adequacy of *voir dire* in numerous state cases where substantial prejudicial publicity occurred. Our general conclusion was that *voir dire* is a completely inefficacious protection when such publicity exists.[5]

In three cases decided within a 2-week span in the spring of 1968, however, we crossed the great divide between state and federal responsibility in regard to jury trials. In *Duncan v. Louisiana*,[6] the Court held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee."[7] It is true, of course, that this decision applies only to criminal trials. It proved, however, to be extremely difficult, in fact, impossible, to uphold the argument of the Court in *Duncan*, applying the criminal jury trial requirements of the Sixth Amendment to the states, and to deny that argument efficacy in incorporating the civil jury requirements of the Seventh. Thus, the extension of federal constitutional guarantees to jury trial, together with the concomitant responsibilities and powers of this Court, has been applied by this Court not only to criminal but to civil matters.

The caveat by Mr. Justice Fortas in *Bloom v. Illinois*,[8] is particularly pertinent to our responsibility and power over *voir dire*. He states that "[n]either logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. . . . [The Due Process Clause] does not command us rigidly and arbitrarily to

[4] 354 U.S. 234, 265 (1957).

[5] Irvin v. Dowd, 366 U.S. 717 (1961); *see* Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966).

[6] 391 U.S. 145 (1968).

[7] *Id.* at 149.

[8] 391 U.S. 194 (1968).

impose the exact pattern of federal proceedings upon the 50 States."[9] The court of appeals quotes this very language in stating that federal interference with the details of state procedure in jury trials was unwarranted except in matters of the most vital and serious import.

We cannot, however, abjure the responsibility we assumed in *Witherspoon v. Illinois*,[10] to regulate the methods of *voir dire* insofar as they impinge upon the constitutional guarantees. To disregard the methods by which the jury was selected and the type of personnel who are entitled to sit thereon would render meaningless our guarantee of a jury trial.

The import of our decision in *Witherspoon* is of the widest possible application. It commands precisely the opposite conclusion to that reached by the court of appeals that we should interfere solely in matters of the most substantial nature. It means that in order to discharge our responsibility, we must closely examine all methods of jury selection, including that of *voir dire*, to be certain that they meet the requirements established by the Constitution.

The true basis of the denial of relief by the court of appeals is its holding that the right to impanel an impartial jury overrode whatever right to privacy the petitioner may have possessed except, of course, his right to avoid self-incrimination under the Fifth Amendment. Implicit in the decision of the court of appeals are the assumptions that a fair trial is impossible without (1) the use of the *voir dire* in general, and (2) the employment of an extended *voir dire* in the situation here presented.

It is interesting to note that the extensive use of the *voir dire* as allowed throughout most of the United States has been throughout history and is now practically unique among all common law jurisdictions. In England and Canada, for instance, no *voir dire* at all has ever been allowed except where a particularized challenge for cause has been levelled against a specific juror.[11] The English practice was general throughout this country at the time our Constitution and its Bill of Rights were approved.[12] The right to jury trial as constitutionally guaranteed did not, therefore, include the right to *voir dire* except as strictly limited under the English practice.[13] We must, however, inquire as to whether the widespread adoption of extended *voir dire* since its inception in the early 19th century has in effect enshrined it as one of the essential guarantees of our governmental system.

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[9] *Id.* at 213, 214 (concurring opinion).

[10] 391 U.S. 510 (1968).

[11] MILLAR, CIVIL PROCEDURES OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 289-92 (1952).

[12] *Id.* at 292.

[13] MILLAR, *supra* note 11.

Even a cursory inspection of the countless cases interpreting the scope of *voir dire* and the questions which may or may not be asked reveals an utterly unmanageable diversity.[14] Neither a constitutional guarantee nor a right essential to free men can be erected from a meaningless assemblage of discordant cases. Obviously, *voir dire* is merely one of the various procedural methods used or which might be used to attain the ineluctable requirement of an impartial jury. It is subject to modification and even to elimination as the dictates of efficiency and justice require. It is our responsibility under our holdings in *Duncan*, *Bloom*, and *Witherspoon* to determine what, if anything, should be done in this regard, not only so far as the federal judicial system is concerned, but also as to all the state courts throughout the nation.

Undoubtedly, interference on our part with *voir dire* will generate the accusation that a power-hungry urge has induced us to replace the empirical flexibility of *nisi prius* judges with an iron rule imposed from an ivory tower. We are considering this action, however, solely to ensure that the universal right to jury trial granted by *Duncan* not be impaired.

It has long been the policy of Congress and this Court that "all litigants . . . shall have the right to grand and petit juries selected at random from a fair cross-section of the community . . . that all citizens shall have the opportunity to be considered for service on grand and petit juries. . . ."[15]

Voir dire must operate within the framework of this basic purpose. It must not be used to render nugatory all of the other selection procedures which have been meticulously devised to ensure that the panel be, so far as possible, a microcosm of the community. As de Tocqueville stated long ago, the American jury is not solely a judicial institution, "for, however great its influence may be upon . . . the courts, it is still greater on the destinies of society. . . . The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated. . . . The institution of the jury . . . invests the people . . . with the direction of society. . . . It imbues all classes with a respect for the thing judged and with the notion of right. . . . It makes them all feel the duties which they are bound to discharge towards society, and the part which they take in its government."[16]

De Tocqueville's tribute to the jury establishes the rationale for *Duncan*, *Bloom*, and *Witherspoon*. Moreover, his argument justifies the limitation which we now impose that *voir dire* must not distort the

[14] 1 BOSCH, LAW AND TACTICS IN JURY TRIALS 503 *et seq.* (1959); 1 GOLDSTEIN & LANE, TRIAL TECHNIQUE (2d ed. 1969); 4 A.L.R. 2d 761 (1949); 54 A.L.R. 2d 1204 (1957); 72 A.L.R. 2d 905 (1960); 67 A.L.R. 2d 560 (1959).

[15] 28 U.S.C. § 1861, as amended March 27, 1968, Pub. L. 90-274, 82 Stat. 54.

[16] DE TOCQUEVILLE, DEMOCRACY IN AMERICA 127-28 (New American Library ed. 1956).

achievements in panel selection accomplished through the projects of the American Bar Association[17] and required by the Jury Selection and Service Act of 1968.[18]

We appreciate, as noted by Mr. Justice White in *Swain v. Alabama*,[19] that "[t]he persistence of peremptories and their extensive use [in the United States] demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[20] We, therefore, do not at this time see any necessity for the elimination of peremptory challenges, as such, except where proof can be educed of a state's systematic use of this procedure to eliminate jurors of a certain race or class. We cannot, however, ignore the fact that "*voir dire* in American trials tends to be extensive and probing . . . and the process of selecting a jury protracted" because the questioning is used as "a predicate for the exercise of peremptories."[21]

Many devastating attacks have been mounted against *voir dire*. The average trial manual bows in passing to the use of *voir dire* in obtaining a jury that is fair to both sides. Then it emphasizes that its greatest use is, in the words of the notorious Irish comic, Mr. Dooley, to get a jury that is "more fair to one side than the other."[22] Much of what purports to be serious literature on *voir dire* would be hilarious, except that it indicates the depths to which the pursuit of victory can descend.

The purpose of *voir dire* is to eliminate bias, not to create rapport nor to discover its impossibility. The denial of the right to question in order to establish grounds for a peremptory will go far, not only to expedite *voir dire* and to eliminate most of the abuses described above, but, what is much more vital, to focus it once again on what it was created to accomplish. We shall not prohibit peremptory challenges themselves since the litigants should have an arbitrary right to remove a limited number of jurors whose appearance, demeanor or background they dislike. We do, however, forbid inquiry to establish a basis for this type of challenge.

The jury trial is weakest at its inception. The potential jurors, having waited aimlessly, perhaps for days, are confronted by a cross-examination which frequently probes into their private concerns. With little explanation, they are either found wanting or are precipitated into a proceeding in which the connection of one episode with another is often difficult to perceive. Their precise relationship to what is trans-

[17] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY (Approved Draft, 1968).

[18] 28 U.S.C. § 1961 *et seq.*

[19] 380 U.S. 202 (1965).

[20] *Id.* at 219.

[21] *Id.* at 218, 219.

[22] Dunne, *Mr. Dooley on Criminal Trials*, in PROSSER, THE JUDICIAL HUMORIST (1952).

piring is never explained until at the end the judge instructs them as to their function. By then, a major portion of what they are to do is already behind them: to listen intelligently to the evidence from the standpoint of the duty they are to perform. No judge worthy to sit upon the bench would deign to listen to a case unless, at the outset, he knew the questions involved, the contentions of the parties, and what his powers and responsibilities were in relation to the issues before him, true he would not be expected to know every detail, but his general knowledge should be of sufficient scope to ensure his comprehension as the trial unfolded.

The juror is a partner in the judging process. As we have previously explained, such partnership is essential in these parlous times. Is it fair to the juror or the litigant, is it sensible to expect the juror to participate in adjudication without possessing at the outset the same general knowledge that a judge should have? Obviously, the juror can have neither the educational background nor the professional experience of the jurist. But should we impose upon him the frustrating task of sailing a ship when he knows not the peculiarities of the vessel nor the methods by which he is to navigate? The answer to the questions propounded must obviously be "no."

Initially, the members of the jury panel should be instructed as intensively as possible as to the jury's function in relation to the specific case to be heard. The burdens of proof which must be sustained, the relationship of the law to the facts to be elicited, the prejudices which may be created in the story to be unfolded or in the identities of the parties and witnesses should be emphasized at once. To summarize, the judge should instruct the jurors at the start, just as the participants in any other human project are briefed before they enter upon their tasks. Vagaries may occur en route requiring alteration of the instructions, but this would pose little problem. With the wide use of pretrial discovery now in vogue, the likelihood of substantial changes would be small.

Voir dire should be so coordinated with the instructions that it flows naturally therefrom and complements their meaning. Potential jurors, as part of their education in the problems they will meet throughout the trial, will be answering questions related logically to the instructions in an ambience of mutual trust and with a consciousness that they are cooperating members of the judicial team. They will be much more likely to probe intelligently the inner depths of thought and feeling and determine sincerely whether they are qualified to judge impartially. The first impressions, rated so important by the trial manuals, will be imparted by an even-handed judge rather than by caviling attorneys seeking personal advantage.

There is no doubt that this will impose additional duties on already burdened judges. We believe that this additional burden is required if jury trials are to survive and possess the significance they must have for all our citizens, dissident or not. The judges' burden may be lightened by the preparation of general outline instructions and accompanying specimen *voir dires*, adaptable to the various types of litigation coming before the courts. We shall see to the appointment of outstanding committees of federal and state trial judges and members of the Bar for this purpose.

The extent of the preliminary instructions and the accompanying *voir dire* must be established in each case by pretrial procedures similar to those now used for discovery. We do not at this time determine precisely how these procedures will operate since it will require the promulgation of additional rules after proper detailed study. Once proper general forms are prepared, it may be a relatively simple procedure.

Perhaps a pretrial conference should be held, at which the lawyers and the judge, using the forms as a guide, would determine the scope of the instructions and *voir dire,* the same to be incorporated in a pretrial order.

Perhaps the rules should provide that the scope established by the forms will govern at the trial unless prior thereto one of the lawyers serves upon his opponents specific and detailed proposals for alterations or additions. Whether these proposals are opposed or not, the petitioning attorney must establish their necessity and propriety to the satisfaction of the trial court, which shall enter a pretrial order explaining the reasons for any deviations. Either method, or others which may be devised, will eliminate the present haphazard groping before the panel, which results in loss of public respect and unconscionable delay.

Above all, the procedures should be developed so that this preliminary function becomes one of the most essential duties of the judge. The opening of the trial must become a vital educational experience for the panel.

The questions, their scope determined before the trial, must be propounded solely by the judge, be limited to establishing grounds to challenge for cause, and this cause limited strictly to contemporaneous and direct prejudice concerning the case itself, the parties, witnesses or counsel. Questions calculated to discover general opinions, beliefs, associations and experience of the juror must be disallowed. Inquiry to determine whether the juror has some knowledge of the issue or some thought in relation thereto must be forbidden unless directed specifically to events, persons or organizations involved in the trial or incidents leading thereto. As Chief Justice Marshall said in the trial

of Aaron Burr: "To say that any man who had formed an opinion on any fact conducive to the final decision . . . would . . . be disqualified . . . would exclude intelligent and observing men."[23] To permit such questions is to transform the jury from a representative cross-section into an instrument favoring the philosophy of the examining advocate or the judge himself.

We have already discussed the inadequacy of *voir dire* in cases of prejudicial publicity. There, after a brief explanation, the court should inquire as to whether any juror has read, witnessed or has significant knowledge of the objectionable publicity. If so, he should be excused. If this publicity has been widely disseminated throughout the community, other methods than *voir dire* must be employed, as, for instance, change of venue, empaneling jurors from another area or postponement.

Obviously, the *voir dire* of the petitioner was too broad. Although our ruling is not to be effective retroactively to other cases, we have no choice but to reverse and remand with instructions to the district court to order the conviction and sentence set aside.

It is so ordered.

THE DISCUSSION

Journal: At the outset of this discussion, the *Journal* would first like to extend its appreciation to each of you for taking the time to engage in this project and, second, would like to set forth in general terms the tenor of the conversation which is to follow. The *Journal* hopes that each of you will try to direct your comments to the history, scope, and purpose of *voir dire;* the abuses that exist within that practice; some of the steps that have been taken to correct those abuses by the Federal Rules and the ABA STANDARDS; and the suggestions that Mr. Maxwell developed in his essay. Perhaps Mr. Erickson would like to begin the discussion.

ERICKSON: Initially, I would like to address myself to abuses of *voir dire* and the effect of Rule 24(a).[24] Specifically, the federal court system with Rule 24(a) certainly has shortened the *voir dire* process in most instances. The only place that I find the Federal Rule lacking is when the federal judge permits no additional questions or any *voir dire* of any kind by opposing counsel. Even when the trial judge restricts traditional *voir dire,* if he allows meaningful questions for the purpose of exercising the *voir dire* in accordance with the new standards relating to trial by jury (to determine whether grounds exist

[23] 1 ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 414 *et seq.* (Hopkins & Earle, Philadelphia, 1808).

[24] FED. R. CIV. P. 24(a).

for a challenge for cause or for meaningful exercise of a peremptory challenge) I think that the Federal Rule is quite desirable and that the standards spell out a means. I do, however, think that Mr. Maxwell's suggestion that a pretrial conference be held to spell out the zone of inquiry is a worthwhile suggestion.

CRAIG: I was very much impressed with Mr. Maxwell's article. I might say that for some time our [federal] courts have been following the practice under 24(a) and limit the *voir dire* to examination by the judge. We have inadvertently incorporated to some degree Mr. Maxwell's thought about pretrial on the subject of *voir dire*, but we don't call it that. What we do is notify counsel that if they have any areas that they would like to have covered in *voir dire,* the court will go over them and cover them in the court's words if the court believes they are pertinent to the *voir dire* inquiry and if counsel will submit them before the case is called.

I think that Mr. Maxwell points out very well in his article that the purpose of *voir dire* is simply to secure a fair and impartial panel. It's not for the purpose of opening a rapport between counsel and some prospective juror, although I know that in many instances it has been used for that purpose; and I think that Mr. Maxwell's quote from our friend Dooley[25] was a very pertinent one, illustrating the situation in which counsel tries to become friendly with the jury and be the fair-haired boy. I think this practice should be restricted — as far as rapport is concerned — to counsel's opening statement. I know that Bill Erickson and I have sat on panels and have heard both sides of that issue — whether, for example, defense counsel should make an opening statement subsequent to the choosing of the jury. That's another subject. But I think that is counsel's opportunity to at least sell himself to the jury in representing his client. There are some that disagree with that view, but I think it can be used appropriately in the trial process. But on *voir dire,* I think abuses have crept in.

FRIESEN: I think, like my friends, that the essay is quite scholarly and proposes a solution which should be adopted almost universally. But to say that it should be adopted is a long way from getting the people who are interested in these kinds of problems to adopt them. The article really avoids the issue by assuming that the purpose of the *voir dire* is to get an impartial jury. There is a substantial amount of opinion and a substantial number of lawyers and judges who still subscribe to the view that the adversary process requires each lawyer to have an opportunity to assess the psyche, if you like, of the jurors and to develop rapport with them. We can all assume — I think the

[25] Dunne, *supra* note 22.

four of us do — that that is not the purpose of *voir dire.* But I had hoped that we might talk about this more crucial and fundamental issue as a part of this discussion.

ERICKSON: I know that I heard one old lawyer say, "As soon as I finish with the *voir dire,* it's time for the jury to retire and reach their verdict."

CRAIG: [Laughter] I would hesitate to implement the philosophy or return to the original philosophy of *voir dire* examinations by creating too many rules. I think the Federal Rule is adequate the way it is. I think that what we really need is a little more education of the profession — maybe even through the law schools — as to the function of *voir dire* and how it should be conducted. Then the bar can take care of itself without having too many rules. What I am concerned with is that if you develop a body of rules directed to *voir dire,* then pretty soon some court is going to come along and say, "well, in this case somebody failed to dot the 'i' on this particular segment of the rule; therefore, it is reversible error, and we'll send it back for a new trial." You get bogged down in the rule process instead of going back to the purpose of it, *i.e.,* was the jury drawn as a result of that *voir dire* examination, so far as we can determine, a fair and impartial one? I think Ernie Friesen's emphasis in that area is absolutely right.

ERICKSON: Of course, the well-publicized trial is one that the federal courts have a difficult time coping with because of the manner used to determine jury eligibility. The question whether or not a challenge is going to be exercised, either peremptorily or for cause, once you have a widely publicized case doesn't come to the forefront as quickly as it does in state court practice where a wide-open *voir dire* is permitted. It is often very difficult when a juror has been bombarded with publicity for a period of six months to ask one question that will go into the depth of his knowledge or the depth of his feelings about a particular case. When you read the case of *Sheppard v. Maxwell,*[26] you can see that the panel was actually brainwashed; and then you look at the *Rideau*[27] case and you see that it was impossible to effectively select a jury after the televised confession of these rather atrocious murders in Louisiana.

CRAIG: Of course I think a significant portion of the problem in the *Sheppard* case, and in some of the others, results from the willingness of the trial judge to allow counsel to explore every avenue willynilly, whether it is meritorious or not, on the primary function of fair and impartial juror selection. What is really required in those

[26] 384 U.S. 333 (1966).

[27] Rideau v. Louisiana, 373 U.S. 723 (1963).

circumstances is a little tighter rein from the bench; possibly a formal pretrial conference in that type of situation would be advisable. While I would not recommend such practice in every case, I think that in a case like *Sheppard* it might be helpful. I am firmly of the belief that it is ridiculous to take two or three weeks or longer to get a jury, and I don't care what kind of a case it is. In six years on the bench, I've experienced some pretty well-publicized cases and some pretty hoary ones, and I have yet to spend over an hour and a half selecting a jury.

FRIESEN: I think Judge Craig has hit on the note that I would emphasize and that is that we should not limit the discretion of the judge by further imposing rules to try to control the problem of *voir dire.* The image of the judge as a "patsy referee" is dying, I hope, and the position of the judge as an active manager of the trial is the emerging view. We should hopefully inculcate in lawyers and thereby in judges what the purpose of *voir dire* is and emphasize that in the exercise of sound discretion the judge should be able to rule out all sorts of questions that go into areas that Mr. Maxwell would exclude. But I think I agree with Judge Craig; this change in *voir dire* should be left to judicial development and training and not to rules.

CRAIG: Another practice affecting *voir dire* that exists in federal courts and in many state courts involves the selection of the panel from the master wheel. Once the proposed candidates are drawn from the wheel they receive a questionnaire. The questionnaire is a pretty thorough one with respect to age, health, place of birth, residence, occupation, family, children, etc. Our counsel have become educated to the fact that they can come into court the day before trial — sometimes sooner — and examine that list of questionnaires. In addition, when a panel reports for duty in any given courtroom, the clerk has available those same questionnaires; and counsel, while the court is drawing the panel, can be going through the answers to see just who the people are. If counsel has been on the ball, he knows just where the people came from, how long they've been there, how many children they have, what their occupation is, and all the rest of it. Thus, he can know pretty well who he has before the *voir dire* interrogation begins.

ERICKSON: I think every trial lawyer wants primarily to have a basis on which he can intelligently exercise a peremptory challenge. However, if the *voir dire* is conducted by the court and covers only very restricted matters, the peremptory challenges can only be exercised indiscriminately; this often happens when an overzealous trial judge is involved.

CRAIG: In my opinion, the trial judge should make a pretty complete *voir dire* examination; but when I say complete, I don't mean he

should go into what the fellow had for breakfast and what his ideological fancies may or may not have been. I have 23 general questions in my standard criminal case *voir dire* which are supplemented by questions relating to the specific crime charged. For example, if it is a Dyer Act case,[28] I ask anyone on the panel if they ever had a car stolen; if it was returned and, if so, in what kind of condition; and whether the fact that they had a car stolen would affect their judgment in this case. So one can make succinct inquiries in each case without delving into a person's religious background or philosophy or what their mother taught them when they were six years old.

ERICKSON: I have no objection to that, but I had occasion to be called upon in federal court to exercise peremptory challenge after some 15 to 20 questions were asked. That hardly gives one an indication of anything. As a matter of fact, I was once called upon to exercise peremptory challenges in the federal court after some 10 or 12 questions were asked; I was told to exercise challenges for cause and then peremptory challenges. I stood and I said, "If the court please, will the court ask Question No. 38?" (I'd turned in a series of questions.) The presiding judge said, "I've covered it." I replied, "Did you ask Question No. 12?" He said, "Covered it." So finally I said, "Your Honor, would you ask Juror No. 6 if she has any difficulty hearing?" Whereupon he said, "I'll ask that," and said, "Mrs. Smith, do you have any difficulty hearing?" She looked at him and she said, "Not as a rule, Your Honor, but in your case I haven't heard a word you said, you mumble so much." After that statement the judge said, "I'll honor a challenge for cause."

CRAIG: [Laughter] Well, I guess those kinds of situations Erickson describes can be repeated many times. I think Ernie Friesen put his finger on it pretty well: You have to educate the judges as well as the lawyers. I don't think that's an impossible task. I think they are generally receptive to recommendations and good viable criticism.

MAXWELL: Wouldn't this be an area in which something along the line of a pretrial conference going into what the general questions are to be in the *voir dire* might help? If such a device were employed, the extent of the *voir dire* could be wrangled out before trial and, at trial, the problem of whether or not enough questions were asked would not exist. In other words, if there were some list of questions which were going to be asked by the judge in the particular case, the attorneys would have had the opportunity prior to the trial to suggest other questions. This would have been determined before the trial rather than at the trial itself. Wouldn't Mr. Erickson's story indicate

[28] 18 U.S.C. § 2312 (1964).

that sometimes something more should be done prior to the trial rather than at the trial?

CRAIG: As I said earlier, I think that is true in certain cases. I guess it doesn't make much difference in violations of the law except when the punishment is capital punishment. You can get a lot of inflammatory facts arising out of the circumstances that brought about the charge. But what one is confronted with in cases like *Sheppard, Sirhan,* and others is not the facts and circumstances nor the qualifications of the average juror that comes in off the street; the real problem is the effect of the publicity. As has been pointed out by the Supreme Court and others, in some circumstances there is no way to get a fair trial at a particular moment and in a particular locality because the public in the locality has been so inflamed by the media that their minds are made up. In those cases I think, as that Court has suggested, that two things can be used: delay to dull the public's memory or change of venue where the publicity is limited to a relatively reasonable area.

MAXWELL: In the well-publicized type of case, the actual fact is that *voir dire* really becomes useless. You can't do much with it if that type of publicity has been widespread in a particular community.

CRAIG: That is true, but after you remove or delay, the *voir dire* assumes its place again. All I contend is that it is not necessary to have a pretrial on *voir dire* in every criminal action.

MAXWELL: I do not necessarily disagree. I think, however, that the idea suggested by Mr. Friesen of educating the bar and state and federal judges, as to the adversary process is a very long process; it certainly cannot be coordinated very well throughout the country. The thrust of my article, more or less, is not to advocate any particular course of action but to attempt to call the attention of the bar and the readers of the article to the fact that the situation is pretty critical at this time in certain trials; that in certain states and areas where extended *voir dire* does occur, it somewhat damages the image of the processes of justice; and that the situation is such that unless pretty prompt action is taken generally to overcome this situation, there is a risk that there will be doctrinaire and strict rules promulgated by the Supreme Court or some central fountainhead.

This kind of approach may or may not be desirable, but I think the educational process is perhaps too long. Something has to be done as to the adversary process generally — and this is only one facet of it — to bring trials and the court procedures within some general control so that the processes of justice are expedited and still remain fair. This process relates not only to *voir dire* but to many other elements of

the trial. We are coming to the position in many courts where the calendars are so delayed that something has to be done generally to the trial processes. As Chief Justice Burger indicated, much of this delay is caused by a horse-and-buggy-age approach to problems when we have rocket ships on the moon. The whole trial system has to be closely investigated, and there have to be some new rules and processes developed almost immediately to handle these trials before the situation gets more out of hand than it already is in many courts.

CRAIG: I agree with the major part of what you have just said except that I think the suggestion for an educational process is a sound one.

MAXWELL: I agree, but I am of the opinion that something more direct and more positive has to be done now in cooperation with the educational process.

CRAIG: I think we have already started to develop some new approaches, such as the new Federal Rules.

MAXWELL: I agree, but it is only a start.

FRIESEN: I don't really think you can handle the whole problem of *voir dire* with new rules. The Federal Rules of Civil Procedure were new in 1938 and actually became effective in 1939. Yet if one reads cases that were published in 1949 (and some as late as 1955), he finds that the spirit of the rules was not in effect. It took an educational process of judges and lawyers and an interaction of the two to get anything done.

Rules alone don't accomplish this educative task because, as I said earlier, I think rules tend to gloss over the fundamental problem. Look at Mr. Maxwell's article for example; he says we should not prohibit peremptory challenges themselves, since the litigants should have an arbitrary right to remove a limited number of jurors whose appearance, demeanor or background they dislike. We do, however, forbid inquiry to establish a basis for this type of challenge. Are you saying, Mr. Maxwell, that we should allow counsel to exercise peremptories because they don't like the way jurors smile or wear their hair and that we should also permit them to exercise peremptories without any regard to what these jurors think?

MAXWELL: Well, basically, in a state like Pennsylvania, we have a questionnaire that is similar to the one that was mentioned before. The *voir dire* is extremely limited in Pennsylvania, and in most cases — except in a capital case where there would be an extended *voir dire* at some times — the peremptory challenge is pretty well based on the items that Mr. Friesen mentioned. In Pennsylvania the peremptory

challenge really depends on the feeling of the lawyer for the party. I think that if the questioning develops things of the nature we are talking about and if there is some serious situation, then a challenge for cause would lie; but a peremptory challenge, in my opinion, depends largely on the idiosyncrasy, the whim, or the hunch of the lawyer. I think this is true no matter how long questions are asked.

ERICKSON: Don't you think it is true, Mr. Maxwell, that the challenges for cause, even under the new STANDARDS OF CRIMINAL JUSTICE relating to TRIAL BY JURY,[29] are very restrictive? And isn't it nearly impossible to bring a challenge within the cause requirements of most statutes? If so, your only basis in selecting a jury is to intelligently exercise your peremptory challenges; and if you limit the areas of questioning that trial counsel is going to use, the defendant is going to be deprived of the effective use of counsel.

I think that it is for the experienced advocate to determine what use is going to be made of certain material; the trial judge is not in many instances prepared to know just exactly what concerns trial counsel, particularly in cases which receive wide publicity, such as some heinous sex offense. In cases involving public officials, questions that look wholly innocuous on their face may have really deep significance.

MAXWELL: I think the difficulty you present goes to the question of the extensiveness of *voir dire* and to the place of an extensive *voir dire* in reference to the breakdown in many of the jurisdictions — the populous jurisdictions — of the processes of justice and of the expedition of justice. This is very serious in places like Philadelphia, New York and Boston. Something must be done to expedite and still be fair. When you argue against the limitation on the areas of questioning you have opened the door wide to the type of abuses that *voir dire* is capable of allowing. Once you doubt that the trial judge understands the significance of certain questions that counsel wants to ask and that counsel cannot convince the court that a challenge for cause is warranted, I think at that point you have destroyed the entire desire to change or simplify *voir dire.* I don't think you can do that.

In regard to the statement by Mr. Friesen about the Federal Rules, it is unquestionable that — except in very progressive courts such as

[29] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATING TO TRIAL BY JURY § 2.5 *Challenges for Cause* (Approved Draft, 1968):

> If the judge after examination of any juror is of the opinion that grounds for challenge for cause are present, the judge should excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause. A challenge to an individual juror should be made before he is sworn to try the case, but the judge may permit it to be made after he is sworn but before jeopardy has attached.

the Eastern District of Pennsylvania — after the promulgation of the original Federal Rules, it took a long time before such a procedure as discovery really came into the prominence that it enjoys today. It is true that it took a long educational process; but my point is this: The educational process is fine, but would the educational process have developed if the new Rules had *not* actually been put in? Without the new Federal Rules the educational process would not have taken the line it did and would have accomplished nothing along the lines that have been established. The two (educational process and rules) must work together; and without the certain promulgation of new rules, not only as to *voir dire* but as to other procedures, the educational process cannot succeed. I think they must walk together as they did in the promulgation of new Federal Rules 20 or 30 years ago.

ERICKSON: Don't the Federal Rules make *voir dire* discretionary with the trial judge?

MAXWELL: What I am getting at is that a great deal of this discretion as to length and so on must be dispensed with in many procedures today because our courts are so bogged down. There are too many differences between the judges, one judge doing one thing and in the next courtroom another judge is doing another; it varies from district to district, especially in the populous states. I think for example, that courts in Delaware County in Philadelphia may vary significantly on all types of procedures. This cannot go on. There has to be discretion to a certain extent, of course; but I think that because of the mounting crisis in courts in these populous places, something has to be done to make things uniform and progressive. I am not talking about a Hitlerian dictatorship and I am not saying remove all discretion, but I think there have to be strong guidelines.

ERICKSON: Wally [Craig], have you ever known a federal judge to abuse his *voir dire* by extending it beyond reason?

CRAIG: No, I can't say that I have; but I think what you and Mr. Maxwell are referring to is the reverse of that. If a federal judge cuts it too short, that is not good either. Again, it takes educational programs like seminars of judges to go into these problems. In the 9th Circuit there is now a Federal District Judges' Association which is undertaking to put on seminars for the judges on procedures and methods of operations that will move the calendar more rapidly. Ernie [Friesen] was formerly Dean of the National College of State Trial Judges, and they are conducting programs which can accomplish the same thing with state judges. These are all very good. What I am afraid of is that

if we start promulgating rules without giving the educational process an opportunity we will hurt the system rather than help it. What has happened with our great "new" Rules under the federal system which Arizona adopted in 1939 as part of the state system (and we were warned about this back in the days when they were discussing adoption of the new Rules and in the discovery process particularly) is that abuses have crept in and delayed rather than expedited litigation. This happens and has been happening in our jurisdiction; boiler-plate interrogatories are a good example of this problem.

MAXWELL: I agree. These boiler-plate interrogatories are not strategically valuable in most cases. I think they are ridiculous, and this type of practice is an abuse of the Rules. Obviously, no matter what type of rules you put in, you are going to have abuses.

I certainly do not advocate prompt and immediate enactment of a group of rules. I think the article indicates the promulgation of new rules could only be done after thorough study; a lot of these studies are going on at the present time. The article merely attempts to light up in one small area of our trial procedure the crisis that exists and attempts to show that there must be an educational process. There must be continuing thought given to revision of rules and to more ways in which the trial process can be modernized. Much of what is said in the article and much of what we have been talking about really relates to the abuses of the adversary system that work into *voir dire* and make the process seem ridiculous. The Judge [Craig] said that much of the solution to these problems depends upon the rein a judge keeps on the lawyers — of course there are tyrannical judges who keep too much of a rein; but I don't think that this means that you should not seriously consider the enactment and promulgation of new rules and also the investment of the judge with the power to really control the trial.

FRIESEN: If the whole argument for rules to limit *voir dire* is based upon the congestion and delay in the courts, it is a specious argument. By reducing *voir dire* to one-tenth of what it now is, we would not increase the judge power of the United States by one percent. There is misapprehension of the amount of time that judges spend in that process.

We might also want to look at other solutions. For example, a practice which has existed in New York and in parts of Pennsylvania for a number of years allows the jury to be selected outside of the hearing of the judge. Despite all the cries of anguish which have come from outsiders who have never experienced it, it works rather well and does not consume a lot of the lawyers' time. Los Angeles is now running

an experiment on this procedure, and its documentation indicates, or seems to indicate, that it is going to be effective.

I would, however, like to leave that comment on a more positive note. I think Mr. Maxwell's suggestion that we work diligently at educating juries about their role and explaining to them what the case is about — connecting it with the instructions which they are going to get with the case — is a very good one and something that we should follow and work at as some judges have. Judge Grimes in New Hampshire has for years given a half day indoctrination to a new jury panel; he carefully explains these things just as Mr. Maxwell suggests. These practices should certainly be emulated.

CRAIG: I don't take a half day; but after the full panel is qualified, I take from half an hour to 45 minutes. With every new panel we give sort of an eighth grade civics lesson on how the court works and what the functions are of the various parties to the trial; we read the indictment and the statute upon which the indictment is based, explain the burden of proof and why the government opens and closes as distinguished from having rebuttal from both sides. It's a little difficult because you don't want to assume total ignorance; they've heard it someplace in their educational process. They know generally what it is about; but I get down to the nitty-gritty specifics as to what their function is and as to what the functions of the various counsel are. I can do it within 30 to 45 minutes on a full panel. Then, with each case — whether they have heard it before or not — I spend about 10 minutes with them reviewing what their function is and what we are doing there. So I think we are attempting, in my court at least, to carry out some of the meritorious recommendations that were contained in Mr. Maxwell's article.

I have had no objections from counsel or anybody else on that approach to the problem, nor really have I had any objection to the limitation on *voir dire.* As I said before, however, on the more difficult cases — the ones that have had local publicity to some extent — I go a little further on *voir dire* than I ordinarily would and am a little more lenient with counsel on the questions they want to ask. But I still hold it down; I don't let them go like they do in Los Angeles. I have sat in Los Angeles, and I don't think *Sirhan* would have taken as much time in a federal court even in Los Angeles.

ERICKSON: Mr. Maxwell, do you have any quarrel with the new STANDARDS OF CRIMINAL JUSTICE relating to TRIAL BY JURY,[30] particularly the *voir dire* examination concepts as they are set forth in

[30] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY (Approved Draft, 1968).

Sections 2.4[31] and 2.5[32] on challenges for cause and the method under which the *voir dire* is carried out? It is really just an overgrowth of Rule 24a of the Federal Rules of Criminal Procedure.

MAXWELL: I think basically that the Federal Rules are satisfactory. Along the lines of the article, however, I would suggest certain refinements and explanations. In particular, the principle points of the case should be explained to the jury so that they will have a much better picture of what they are going to be listening to. With certain modifications, as outlined in the article, I would not seriously argue with the Federal Rules.

Your question, Mr. Erickson, seems to also have reference to what Mr. Friesen said a moment ago about the procedure in the State of New York where the *voir dire* is held outside of the hearing of the judge. I understand that this form of *voir dire* becomes extremely extended, even in automobile accident cases, because counsel ask practically everything under the sun that has any remote relation to their case. Consequently, I don't think this method will solve this problem in federal courts. In metropolitan areas like New York City, there is a serious problem not only with *voir dire* but with other dilatory procedures. These procedures make a show out of a trial, and I think that's the gravamen of the article.

ERICKSON: Judge Craig, how do you read *Williams v. Florida*?[33] What size jury should we use? To save time, should we cut the jury down from 12 to six; should we say, for example, that in Dyer Act cases we will have six jurors and that in misdemeanor cases we will have a jury of three; but in cases involving capital punishment we will have a jury of 12? Just where do we draw the line?

CRAIG: I don't think you have to lessen the size of the jury. We have been been working under the 12-man system for a few centuries

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[31] *Id.* § 2.4 *Voir Dire Examination*:

> A *voir dire examination* should be conducted for the purpose of discovering basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge should initiate the *voir dire examination* by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge should then put to the prospective jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The judge should also submit to the prospective jurors such additional questions by the defendant or his attorney and the prosecuting attorney as he deems proper.

[32] *Id.* § 2.5 *Challenges for Cause*:

> If the judge after examination of any juror is of the opinion that grounds for challenge for cause are present, the judge should excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause. A challenge to an individual juror should be made before he is sworn to try the case, but the judge may permit it to be made after he is sworn but before jeopardy has attached.

[33] 399 U.S. 78 (1970).

now, and I think it has worked out pretty well. When I was engaged in private practice, I must confess that I had some question in my mind about the value of the jury system. The old adage was that if you were guilty you would want to be tried by a jury, but if you were innocent you would want to be tried by a judge. My faith, having sat on the bench of 6 years now, has been thoroughly renewed in the jury system. In those 6 years, in only two instances did the jury, in my opinion, make a mistake; and on both occasions I took the decision away from them and corrected it. Maybe I was wrong, I don't know; but we'll never know because I found for the defendant in both instances. I think the system under the Constitution and the practice that we have had is a very good one. I see nothing wrong with a 12-man jury, and I would not differentiate between one charge and another. Any felony charged is a felony, and a fellow's liberty, and sometimes his life, is at stake.

ERICKSON: I concur with you, Judge. A 12-man jury system is a thing of historical signficance; but in addition, it has proven its worth with the passage of time. I don't think the *Williams* case is going to dictate that every legislature change the number of jurors to be used in any particular case. I know the people that are striving to speed up justice and think that reducing the number of jurors would reduce the cost and the time spent in administering justice; but I think it is a false premise. Basically, I think the Federal Rules that stand today, when implemented by the STANDARDS OF CRIMINAL JUSTICE, leave our judicial system in a satisfactory state and one that can be developed by new techniques that are employed by the judges under the discretionary powers that they now have.

CRAIG: I thoroughly agree with that. I would, however, add a footnote: Today the profession and the public generally are very much concerned with the selection process of judges. There has been a lot of comment about removal — that's all right — but I think the emphasis should be on the selection. Then when you get — I say this with some temerity — a well-qualified judge, I would hesitate to limit his discretionary prerogative. He's trying to do the job that was assigned to him, and with the aid of the jury, he's trying to seek the truth within the limits of the law. If you cut his discretionary authority to any great extent, his hands are going to be pretty well tied so that when he sees a situation developing, he can't control it. This would be, in my opinion, an error in the administration of justice.

I have great faith in our system. Abuses have crept in, particularly in metropolitan areas, and to some extent they are the result of the lack of effort used in the selection of the man on the trial bench. These are not difficult problems to correct. Ernie [Friesen] had experience

with it, and I think he'll corroborate this approach. If you find a reasonably alert, intelligent judge on the bench, he can expedite a trial through the facilities that are presently available to him: the preliminary pretrial conference; the pretrial conference; and the conference with counsel on *voir dire* before the trial, and I would hesitate to make a *voir dire*, as I said earlier, the subject of a *formal* pretrial conference except in extraordinary cases. In the extraordinary case there certainly is a place for it, but I would hate to put in a blanket rule that says in all criminal cases involving a penalty of "x," there must be a pretrial conference on *voir dire* examination. If this were done the judge might say, "Well, I don't know about that," and then you get an opportunity to have error creep in as a result of the pretrial conference. We're trying to get to a point where we have *less* error, not *more* error. When you get good, viable rules you can proceed on that process. When you get a body of rules that is difficult for anyone to interpret, then you're going to have error.

JOURNAL: Mr. Maxwell, would you make one final statement?

MAXWELL: I generally agree with what has just been said; the only difference is really a matter of degree or emphasis. The suggestions in the article are not to tie the judge's hands to any great extent, but to give him the instruments by which he can proceed and properly handle the trial using a pretrial procedure, instructing the jury in advance, and so on. There are certain things that should be promulgated but none of them should to any great extent limit the discretion of the trial judge. The only disagreement any of us seem to have is on the question of the degree to which such rules should be promulgated and how they should be handled. All I'm saying is that trial judges should be given tools — more powerful tools at this time — to meet the rising problems that are occurring, particularly in metropolitan areas.

JOURNAL: It is rather clear that there are problems with the practice of *voir dire* even with the promulgation of the Federal Rules and the ABA STANDARDS. There are differences of opinion as to the best way to solve these problems, but, as Mr. Maxwell pointed out, the differences are more a matter of degree or emphasis than of substance. The choice between relying totally on rules or totally on the education process would certainly be a difficult one to make, and either one would not suffer from lack of criticism. The combination of guidelines and gradual education would seem to be a likely compromise. It must be remembered that Mr. Maxwell's article was based on a hypothetical Supreme Court decision nearly 10 years in the future. It is conceivable that if nothing in the way of progress is made in this

area over the next 10 years, a central "fountainhead" such as the Supreme Court *will* decide a case similar to Mr. Maxwell's hypothetical — a result that seems unanimously undesirable.

Mr. Freisen made a very interesting point when he discounted the notion that clearing up of the "*voir dire* problem" would result in an unclogging of our courts. While Mr. Maxwell was not basing his entire argument on this notion, it appears that there is some disagreement over the "clogging factor" of *voir dire*. If so, it would be well to find out just how important a factor *voir dire* really is before it is labeled as one of the chief culprits in our court congestion problem.

As a final thought, it might be worth mentioning the fact that the participants as a group did at least recognize that there is a problem with *voir dire*. Mr. Freisen did point out that this is *not* a feeling shared by all lawyers and judges since some do feel that *voir dire* should not be limited to securing an impartial jury but should also serve the adversary function of allowing an attorney to establish a rapport with the jurors. That view was not represented in this discussion, but it certainly cannot be discounted in speaking about the *voir dire* problem.

This discussion, although not reaching any definitive conclusions, has raised a number of issues and has presented a number of perspectives and approaches. It is the *Journal's* hope that this kind of conversation presented in this fashion will be of some benefit to lawmen, who must contend with *voir dire*, and to laymen, who must face the practice when called as jurors, and that the approaches outlined by the principals will be the focus for further comment as the legal profession seeks to improve the *voir dire* process.

NOTES

AN INTRODUCTION TO AN EXPERIMENT IN LEARNING

ONE of the maxims which is indelibly impressed upon the mind of the American lawyer early during his professional career is that "lawsuits are won on the facts, not on the law." As a consequence, one of the first lessons which the fledgling lawyer must learn is to *get the facts*. To the extent that this maxim is true or pervasive within the legal profession today, it raises a curious dilemma and a seeming contradiction for the enterprise of legal education.

Contrary to the maxim, the structure of legal education in law schools tends to stress "getting the law" with seemingly little attention being given to "getting the facts." Traditional legal methods courses, which, insofar as course titles are concerned, constitute the attention given in law schools to the methodology of law, more often focus upon the mazes for finding the law within the four walls of a law library. The idea of "the common law" with its emphasis upon the historical development of law norms has influenced the design of the mechanics by which this development can be traced. Thus, the law student in his initial exposure to the task of lawyering must master the intricacies of citators, digests, reporter systems, indices and the like — devices by which the growth of the law can be charted step-by-step.

Yet, once the law library is no longer an obstacle to be overcome and the budding lawyer moves comfortably into and through its several resources, his systematic exposure and indoctrination into the methodology of the law ceases. To be sure, he must master the techniques of briefing a case; but this skill is learned or dismissed by the law student within the first year of the law school experience, that period of time within which legal methods courses are usually taught. Accordingly, the law student is too often left to his own devices to learn the methods of getting the facts and of understanding and evaluating those facts in relation to the law.

These introductory observations set the context for the following three student notes. They are experiments in learning to "get the facts" relative to a particular legal problem in order to gain understanding of that problem and the processes related to it. Substantively the studies deal with: (1) the functioning of the Colorado Judicial Qualifications Commission pursuant to the constitutional amendment and rules of

procedure which became effective in 1967; (2) the viability of the legal system as a means for change by Negroes in Denver; and (3) an analysis and comparison of the Colorado Commission on Civil Rights and the Federal Equal Employment Opportunities Commission. No comment need be made concerning the relevance of these matters for the contemporary legal scene, these being matters to which considerable attention is now being given from several quarters. But several facts which have bearing upon these studies as experiments in learning warrant particular mention so that the studies can be read in proper perspective.

First, these studies were completed by students in their *first* year of law study. In fact, at the time that these studies were undertaken, their authors had completed an introductory course dealing with the decision processes of the legal system and a course in the skills required to use the law library. They had completed the first part of two-part courses in contracts and torts and were beginning a course in basic property law. According to the usual standards of legal education, these students could be classified as neophytes with little grasp or equipment needed to tackle the more difficult intricacies of the law — a premise which may be questionable in view of their performances.

Second, these students were working under a very limited and tight time schedule. During the first week of January, they received assignments to conduct "an empirical study" of their own choosing as one of the requirements for a course on the legal profession in which they were enrolled. The completed reports of their research were due in final manuscript form six weeks later! This factor affected to varying extents the selection of social problems to be translated into legal problems for study, the definition of the problem once selected, the nonlibrary resources (including the expertise of the students themselves) which could be utilized, and the organization of the research task once all preliminary questions had been resolved. The students were required to match their resources with the bounds of time imposed by the divisions of the legal academic year and to define the scope of their studies accordingly. It may be, therefore, that some of the authors would have preferred a more comprehensive treatment of their subjects had they more freedom so to do.

Third, it should be noted that these studies were group efforts. In addition to the strictures upon time (or perhaps as a *result* of those time demands), these students were involved in the process of melding an *ad hoc* assemblage of individuals, who up until that time were relatively unknown to each other, into a working team. The metamorphosis of a crowd to a group in itself presents interesting problems. Yet, this change is essential to the educational process called "professional socialization." One dimension of a "profession" is the

sense of the group which the individual derives by being a member of and identifying with his professional peers in a common occupational calling. Further, although the image of the lawyer as the sole practitioner who is the jack-of-all-legal-trades is still very pervasive within the legal profession, the firm mode of law practice is becoming more and more common as lawyers form "groups" for their professional endeavors. However, the opportunities for group action in law schools are limited, the editorial staff of the law journal being the prime, and in many cases the sole, example for such group interaction. These studies became one such opportunity to experiment in a group endeavor. The finished products of these efforts do not reveal on their surfaces the tensions which oftentimes must be resolved to move people to decisions and to produce a single work product. By these studies, these students accomplished that goal.

There are other implications and ideas which can be derived from the fact of these studies. Suffice it to suggest that thereby some of our time honored assumptions about legal education stand in need of review and that the enterprise of legal education can learn from its students.

James E. Wallace
Professor of Law

A STUDY OF THE COLORADO COMMISSION ON JUDICIAL QUALIFICATIONS

INTRODUCTION

IN recent years, as the demand for more efficient administration of justice has reached unprecedented proportions,[1] the traditional methods of judicial selection and awards of tenure have fallen into sharp disrepute. Initial reaction to this situation was expressed in the adoption by several states of improved methods of selection designed to overcome the defects of the traditional elective systems.[2] However, it soon became apparent that while new methods proved effective in elevating well-qualified individuals to the bench, they were no guarantee that those selected would remain competent throughout their tenure. Thus, attention was turned toward the development of methods by which judicial officers who were found incompetent or guilty of misconduct could be disciplined and/or removed from office without resort to the cumbersome procedures of a bygone era.[3]

In 1959, a national conference on court administration was held in Chicago for the purpose of discussing various proposals for the reform of the judiciary. Out of that conference came the following recommendations:

> Disability should be determined by a standing commission on which the judiciary is represented. . . . There is a need for a less cumbersome method to bring about the discipline or removal of a judge . . . whose conduct has subjected or is likely to subject the court to public censure or reproach or is prejudicial to the administration of justice.
>
> The ultimate responsibility for disciplinary action or removal should rest in the highest court of the state [and] [p]rovisions should be made for the initiation and investigation of complaints before

[1] Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 68 WASH. U.L.Q. 378 (1968); Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166 (1963); *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149 (1966).

[2] *See generally* Garwood, *Judicial Selection and Tenure — the Model Article Provisions*, 47 J. AM. JUD. SOC'Y 21 (1963).

[3] Colorado serves as a good example for illustrating some of the outmoded methods of disciplining judges. The first of these methods — and one which is still available — is recall of a judge as provided for in COLO. CONST. art. XXI, § 1. This process involves large amounts of time, extensive publicity, and numerous people; it can also overshadow any real issue of competency. The second of these procedures (replaced by the commission plan) was the old COLO. CONST. art. VI, § 31 provision which dealt with retirement of judges. When questions of age and physical or mental infirmity or disability arose, an investigation could be initiated only by a motion from the Colorado attorney general to the Colorado Supreme Court. Thereafter, the court would appoint a referee to conduct the investigation and submit his report thereon to the court. The court then decided if mandatory retirement of the judge was fitting. It seems clear that both of these procedures were difficult to work with effectively. Therefore, the need for more competent and streamlined procedures was definitely felt in Colorado.

> presentment of formal charges, and precautions should be taken for the protection of all persons involved.[4]

In 1960, California adopted the essential features of this recommendation by constitutional amendment and became the first state to make use of the "commission plan" for the retirement, removal, and discipline of judges.[5]

The administrative and procedural advantages of the commission plan over traditional methods of judicial discipline and removal and the success of the California experiment prompted other states to follow suit.[6] In Colorado, the plan was adopted by constitutional amendment in the fall of 1966 and became effective in April 1967.[7] The purpose of this article is to present the results of an in-depth study of the performance of the Colorado commission from its inception to the present. More specifically, this article will set forth the statistical information gathered from the study, describe the working procedures of the commission, and evaluate its operational effectiveness.

I. METHODOLOGY

Anyone undertaking a study of the Colorado Judicial Qualifications Commission will immediately find himself faced with what appears to be an almost insurmountable obstacle: the constitutional requirement that "[a]ll papers filed with and proceedings before the commission on judicial qualifications . . . shall be confidential, and the filing of papers with and the giving of testimony before the commission . . . shall be privileged . . . ."[8] In effect, this means that a researcher is constitutionally denied access to a rich source of information — the files of the commission. As a result, the primary sources of information were interviews with the commission membership, the executive secretary of the commission, and the president of the Colorado Bar Association.[9]

The interviews began with very general questions designed primarily to put the respondent at ease and to give him some assurance that the researchers' intent was purely academic. For example, the respondent was usually asked to present his views concerning the rationale of the commission plan and the factors accounting for its

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[4] 45 J. AM. JUD. SOC'Y 12 (1959).

[5] CALIF. CONST. art. 6, § 6.

[6] For a state-by-state comparison of modern discipline and removal plans adopted in recent years, see the report prepared for the National Conference of Judicial Retirement and Disability Commission held at the University of Denver College of Law in August, 1969.

[7] COLO. CONST. art. VI, § 23. For a complete text of the rules of procedure of the Commission on Judicial Qualifications, adopted by the Colorado Supreme Court on May 18, 1967, see the APPENDIX *infra*.

[8] COLO. CONST. art. VI, § 23(3)(d). *See also* Rules of Procedure of the Commission on Judicial Qualifications, Rule 4.

[9] Inasmuch as the Bar Association was the primary instrumentality in securing the adoption of the amendment creating the commission, it was considered to be a valuable source for background material.

success. Thereafter, he was asked to evaluate the work of the Colorado commission, always being assured that the study was not interested in, nor concerned with, specific names. While this approach may seem a bit too cautious, it was found that following this short exchange, the respondent was usually more willing to entertain probing questions concerning the commission's work.[10]

Once the necessary rapport had been established, it was easier to probe for the substance of the commission's work; and inasmuch as the bulk of the commission's work is accomplished without resort to formal procedures,[11] the primary concern was with the informal structures and processes, which constitute the functional nucleus of the Colorado commission plan. To facilitate the research in this area, questions were directed to the various steps taken by the commission in its consideration of an individual complaint. Hence, it was first necessary to consider the procedure by which complaints are brought to the attention of the commission; and the questions employed were designed to elicit information on the number, source, and nature of the complaints as well as the processes by which they are received and screened.

Once a complaint is received, the next step is to institute a preliminary investigation to determine whether or not the complaint has merit.[12] Thus, the next line of questioning dealt with the mechanics of this investigation as well as its effect on the subsequent disposition of complaints.

If it is determined that a complaint has merit, the judge is notified and an informal hearing is scheduled.[13] It is at this stage that the commission has demonstrated its worth; and, for this reason, a major part of the interview was devoted to this subject. Of particular interest was the process by which a judge is informally disciplined and either agrees to correct his conduct or is forced to retire. It was also thought important to ascertain the extent of input into the informal hearing by the respective groups that make up the commission: judges, lawyers, and laymen; therefore, the researchers attempted to get an idea of the interaction among the members, including any manifest disagreement or dissension.

All but one of the complaints brought before the commission have been disposed of by informal hearings or in some manner other than a formal hearing. Consequently, this stage of the commission's procedures was of somewhat less interest. However, inasmuch as the formal

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[10] In one instance, however, the respondent, a county judge, was so reluctant to talk about the commission that only general answers were elicited from him in response to the questions asked.

[11] Rules of Procedure of the Commission on Judicial Qualifications, Rules 6-20.

[12] *Id.* Rule 5.

[13] *Id.* Rule 5(b).

hearing does represent the ultimate weapon of the commission, some attention was given to the procedures involved in its employment.

In addition to the structured approach outlined above, impromptu questioning was also employed. This was often necessitated by the introduction of unanticipated information into the interview by the respondent. Needless to say, this type of questioning yielded extremely useful data.

By employing the methods herein described, the constitutional obstacle, which in the beginning appeared so threatening to the viability of the study, was effectively bypassed. As a result, sufficient data was obtained to permit a description in fairly precise terms of the functional elements of the Colorado commission.

II. STRUCTURE AND PURPOSE OF THE COMMISSION: STATISTICAL INFORMATION

The official title of the Colorado commission — the Commission on Judicial Qualifications — is a misnomer, since the commission deals not with qualifying judges to sit on the bench but with disciplining and removing them. Five of the commission's nine members are judges chosen by the supreme court: three from the district courts and two from the county courts.[14] Of the four remaining members, two are attorneys chosen by majority action of a committee consisting of the Governor, the attorney general, and the chief justice of the Colorado Supreme Court;[15] and two are laymen chosen by the Governor.[16] All members of the commission serve four-year terms.[17] Once constituted, the commission itself selects an executive secretary who handles the administrative work of the commission.[18] In addition, investigators are hired to do the commission's "leg work."

On a purely conceptual level, the primary purpose of the commission is to recommend to the supreme court the removal or formal censure of any judge found by the commission to be guilty of willful misconduct in office, of willful or persistent failure to perform his duties, or of intemperance.[19] Likewise, the commission is to recommend the retirement of any judge having any disability which seriously interferes with the performance of his duties.[20] To effect this purpose, the commission

[14] COLO. CONST. art. VI, § 23(3)(a)(i).

[15] *Id.* § 23(3)(a)(ii).

[16] *Id.* § 23(3)(a)(iii).

[17] *Id.* §§ 23(3)(a)(i)-(iii).

[18] Because of a low working budget, the commission has appointed as its acting executive secretary the Colorado court administrator. Yet, the dual role played by the executive secretary has had a significant impact on the development of commission procedures. *See* § IV *infra.*

[19] COLO. CONST. art. VI, § 23(3)(b).

[20] *Id.*

is empowered to investigate complaints,[21] subpoena witnesses,[22] and take evidence;[23] and the commission's jurisdiction extends to all courts in the state with the single exception of the county court of the City and County of Denver.[24]

It should be emphasized that the formal powers outlined above are almost never used. Instead, the real success of the commission has been its ability to induce problem judges to resign or retire prior to formal proceedings. It is for this reason that the primary concern in this study is directed toward informal procedures which account for this result. However, before turning to a consideration of those procedures, it will be useful to review statistically the work of the commission during its first 3 years of operation.[25]

As of January 1970, the commission had received 39 complaints against the state's judges.[26] Of these, 12 were disposed of as frivolous on their face or as not within the jurisdiction of the commission. In each of the 27 remaining cases, files were prepared and at least cursory investigations made.

The vast majority of the complaints were from unhappy litigants and represented what one respondent referred to as "cheap appeals." However, at least two complaints have come from the bar association,[27] the highway patrol, the United States Attorney, and the executive secretary; one has come from a juror; and a few have been initiated on the commission's own motion.

The majority of complaints were concerned with the treatment of litigants and lawyers and can be placed in the "cheap appeal" category. Other complaints include three for excessive use of alcohol, two for physical or mental disability, one for conflict of interest with a party to a proceeding before the judge, and several for the mishandling of probate cases. Two additional complaints which involved felonious activities

[21] Rules of Procedure of the Commission on Judicial Qualifications, Rule 5.

[22] *Id.* Rule 11.

[23] *Id.* Rule 10.

[24] COLO. CONST. art. VI, § 26. Discipline of Denver County Court judges is under the jurisdiction of the Denver County Judicial Commission.

[25] All of the statistical information herein referred to was acquired from the executive secretary of the commission.

[26] This figure represents the number of judges against whom complaints were received and is somewhat lower than the actual number of complaints, since several complaints against a particular judge are treated by the commission as one complaint. There are well over 100 judges in Colorado subject to the jurisdiction of the commission. This figure includes seven supreme court justices; seven appeals court justices; 22 district court presiding judges; 54 district court judges; one superior court judge; one probate judge and two juvenile court judges for the second judicial district; and all county court judges, except Denver County.

[27] In talking with the president of the Colorado Bar Association, it was learned that complainants often contact the Association for information on how to proceed with their complaints. Of particular interest here is the fact that the president often advises the complainant as to whether or not he has a valid complaint. Thus, to some extent the Bar Association is an informal screening mechanism for the complaints against judges.

and which were thus outside of the commission's jurisdiction[28] were filed pending the outcome of the criminal procedures against the judges involved.

The vast majority of complaints were found to be unwarranted or frivolous in the course of the preliminary investigation. However, in several cases the charges were found to be substantial enough to warrant the notification of the judge and the initiation of a formal investigation. Of these, two cases were disposed of after the receipt of a satisfactory explanation by the judge involved. In several of the more serious cases, however, the judges were asked to appear before the commission for an informal hearing;[29] and in all but one instance this appearance proved to be the final step in the proceedings. The single exception went on to the formal hearing stage but was disposed of before recommendations to the supreme court became necessary.

The final disposition of the rather serious complaints received by the commission demonstrates the commission's value: Under commission pressure three judges have retired and two have resigned.[30] Of these five, two were found physically incapable of carrying on with their duties, and three were found guilty of some form of misconduct. In two additional cases in which the behavior in question did not warrant removal, the judges were subjected to an informal censure by the commission.[31]

These figures represent the work of the commission as far as it can be reflected in statistical data. Of course, the more important question for the purposes of this study concerns the procedures which produce the data.

III. PROCEDURAL ELEMENTS

In order to determine the extent to which the commission makes use of the formal procedures and powers made available to it and the extent to which it resorts to informal procedures of its own development, it is necessary to pinpoint the precise procedural elements which the commission uses in considering and disposing of a particular complaint. Concurrently, it is important to consider the roles played in this process by the various members of the commission and its staff.

A. *Setting the Machinery into Motion*

In order for a complaint to receive commission consideration it must be in writing, and sufficient details must be included to permit a prima

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[28] COLO. CONST. art. VI § 23(2).

[29] The informal hearing is a procedural step invented by the commission and is not specifically provided for either by the amendment or the rules of procedure.

[30] In addition, two judges — who no doubt would have retired — died before they had a chance to do so.

[31] The informal censure is another procedural invention not provided for in the amendment. It will be more fully discussed at a later point in the paper.

facie evaluation of the allegations. Complaints that are received by telephone never receive commission consideration, and in such cases the complainant is advised to put the complaint in writing.[32] Further, when an anonymous complaint is received, the commission may or may not act upon it, depending upon the seriousness of the charge and upon whether or not the complaint appears valid on its face; at least one anonymous complaint has been acted upon by the commission.

A related problem involves those instances in which the complainant wishes to remain anonymous. Attorneys, for instance, are often reluctant to complain for fear of retribution from the judge against whom the charge is made. Hence, the commission has honored requests for anonymity by initiating the action on its own motion, recognizing that to do otherwise might stifle valid complaints. Of course, this protection can only extend up to the time of the formal hearing; for at that point, the complainant must be identified in order to provide the accused with the opportunity for rebuttal and cross-examination. However, since a formal hearing is almost never held, this problem is minimal.

In any event, not all complaints are of sufficient substance to warrant commission consideration, and there appears to be a two-step screening process designed to eliminate obviously frivolous or un-

[32] REQUEST FOR INVESTIGATION OF

_____

A member of the judiciary of the State of Colorado

TO THE COMMISSION ON JUDICIAL QUALIFICATIONS:

I, _____, complain about the above-named (justice) (judge) of the _____ court in _____, Colorado, and that, as set forth in the statement below: he has committed acts of willful misconduct in office; or he has wilfully and persistently failed to perform his duties; or he is, or has been, habitually intemperate; or his conduct is prejudicial to the administration of justice, so as to bring the judicial office into disrepute; or he has a disability that seriously interferes with the performance of his duties and such disability is or is likely to become permanent.

STATEMENT

I therefore request that such misconduct be investigated and that appropriate action be taken by the Commission on Judicial Qualifications and the Supreme Court of the State of Colorado.

Signature: _____

Date: _____, 19____ Address: _____

_____ Phone: _____

_____, being duly sworn on oath deposes and says that he has read the foregoing request for investigation, knows the contents thereof, and that the same is true to the best of his knowledge and belief.

_____

founded complaints. First, the chairman of the commission, in consultation with the executive secretary, reviews the complaint and decides whether or not it should be docketed. The second step is the presentation of all complaints — including those deemed to be frivolous — to the entire commission for their determination as to disposition.[33] This second step, however, is a mere formality, since the opinion of the chairman is almost never challenged.

An interesting sidelight in this initiating process is the role of the executive secretary who, in addition to being the executive secretary of the commission, is also the Colorado court administrator. As such he is kept apprised of the conditions in the state's courts and is in a position to evaluate the competency of the judges. The indication that he takes advantage of his dual role is evidenced by the fact that the two judges who were forced to retire for ill health were brought to the attenion of the commission by the executive secretary. Even more important than his observation of the state courts is the contribution he makes to the screening process of the commission; for there can be little doubt that the chairman, in making his initial evaluation of complaints, relies heavily on the executive secretary for information. It should be noted that this contribution does not end with the evaluation of complaints but is relevant throughout the proceedings.

B. *The Investigation*

Once a complaint is determined to be of sufficient substance on its face to warrant some form of commission action, the investigative procedures are set into motion. The first step is a preliminary investigation which is usually conducted by a member of the commission and which often involves no more than a phone call.[34] The judge himself is not notified, and, in order to protect his reputation, the persons contacted are cautioned that the investigation is confidential. A significant number of complaints are disposed of at this stage, particularly those lodged by unhappy litigants.

If the results of the preliminary investigation do not negate the assertions made in the complaint, a formal investigation is launched.[35] The first step in this process is notification of the offending judge.[36] Notification may take the form of a mild, informal letter which recites

[33] Rules of Procedure of the Commission on Judicial Qualifications, Rule 5(a). It should be noted that this was not always the case. During the early months of the commission's existence, obviously frivolous complaints were disposed of by the chairman and the executive secretary without the consideration of the commission as a whole.

[34] This stage of the investigation should not be confused with the "preliminary investigation" referred to in Rule 5 of the Rules of Procedure of the Commission on Judicial Qualifications. In practice the latter is better termed the formal investigation.

[35] Rules of Procedure of the Commission on Judicial Qualifications, Rules 6(a)-(b).

[36] *Id.* Rule 6(c).

the charges against the judge and invites an explanation.[37] However, in some cases a formal, registered letter is used,[38] the force of which is calculated either to bring about the required change in the judge's behavior or prompt him to begin thinking about resignation or retirement.

After notifying the judges, the commission appoints an investigator to ferret out the pertinent facts. In most states the executive secretary heads up the investigation, but in Colorado special efforts are made to keep the secretary out of the formal investigative procedures in order to enable him to maintain the integrity of each of his two positions.[39] In less serious cases, a member of the commission may be called upon to conduct the investigation, especially if the member is from the same area of the state as the judge against whom the complaint is filed. In more serious cases, an investigator may be hired by the commission.

Often the formal investigation reveals the invalidity of the allegations made in the complaint, and the matter is closed. However, when the results of the investigation tend to confirm the charges, the commission may choose one of two alternate courses of action depending on the nature of the offense. First, if the offense is not particularly serious — for example, a case involving mistreatment of counsel — a personal contact may be in order. In such a situation the judge is asked by a member of the commission, often one with whom he is acquainted, to

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[37] *Id.* Rule 5(b). Also presented here is a sample of such a letter:

STATE OF COLORADO
BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS NO.

INQUIRY CONCERNING — NOTICE OF PRELIMINARY INVESTIGATION

NOTICE is hereby given to you, , that the Commission on Judicial Qualifications of the State of Colorado has decided to conduct a preliminary investigation of your conduct as County Judge pursuant to Rule 5 of the Commission's Rules of Procedure.

This investigation is on the Commission's own motion and is based upon unverified information submitted to the Commission indicating willful misconduct in that:

The Commission has appointed to investigate the aforementioned matters and report back to the Commission.

You are further notified that under the rules of the Commission you may present such matters as you may choose to the Commission for its consideration. The next meeting of the Commission will be on in Denver, at which time you are welcome to appear and to be represented by counsel should you choose to be so represented. If you elect to appear, please contact the undersigned Chairman for the time and place.

Your attention is called to the fact that this is not a formal proceedings for discipline or removal, but only a preliminary investigation to enable the Commission to determine whether formal proceedings are warranted.

Dated this 1971.

Chairman
Commission on Judicial Qualifications
of the State of Colorado
323 State Capitol Building

[38] *Id.* Rule 5(b).

[39] Interestingly, however, the investigator who has done the bulk of the work for the commission is a former court administrator.

mend his ways. He is then kept under observation for a time in order to assure compliance. If he fails to bring his behavior into line with commission wishes, further action may be taken. The members of the commission all seem satisfied that this is an effective means of bringing about conformity in cases involving minor complaints. The second alternative is utilized in the case of a more serious offense and involves asking the judge to appear at an informal hearing which may be scheduled for the same day as the commission's regular quarterly meeting or, in the case of a more urgent matter, on any day of the commission's choosing.

C. *The Informal Hearing*

Technically, the informal hearing is part of the investigative procedures, but because of the importance it has assumed, it warrants separate treatment. While no specific provision is made for an informal hearing in the commission's rules of procedure, the commission's power to employ it can certainly be implied from the provision of the rules that the judge "shall be afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose. . . ."[40]

At the informal hearing the judge is confronted with the evidence against him and is asked to present any facts tending to negate the charges.[41] The judge accused of physical or mental incompetence may also be asked to submit the results of a medical examination. While the commission does not have the power to compel a judge to submit to such an examination, it can consider a refusal to do so as a factor tending to prove the truth of the allegations.[42]

While the ostensible purpose of the hearing is to weigh the evidence and make a preliminary evaluation as to the guilt or innocence of the judge, it appears that the real purpose is to overwhelm the judge with the incriminating evidence collected during the course of the investigation and thereby induce him to resign or retire. By the very nature of the screening and investigative procedures, if a hearing is held there is little doubt that the commission believes the allegations against the judge to be true. Furthermore, all of the respondents indicated that they would do all they could to see the matter disposed of short of formal proceedings. This attitude is clearly attributable to a desire to protect the judge and the judiciary as a whole from the prying eye of the public.

In matters which are not serious enough to warrant a judge stepping down from the bench, the commission may, on its own motion,

[40] Rules of Procedure of the Commission on Judicial Qualifications, Rule 5(b).
[41] *Id.*
[42] *Id.* Rule 9(b).

censure the offender. While the power to informally censure a judge is not provided for in either the amendment or the rules of procedure, it is a power assumed by the commission to fill a specific need. Just as the commission, by applying informal pressure, has relieved the supreme court of the burden of removing offending judges, so too has it developed a means of disciplining problem judges in a way comparable to formal censure.

The informal censure has been used twice by the commission — once with success and once without. The case in which the procedure has proved to be unsuccessful has been a particularly troublesome one for the commission. It is a case which involves a judge whose obnoxious behavior in the courtroom has prompted a great many complaints and has resulted in several informal hearings. The difficulty appears to be that despite commission pressure, the judge in question is unable to alter his personality. This situation raises a question which has troubled the commission since its inception: To what extent is the commission to discipline judges who are guilty only of possessing a cranky disposition and a tendency to badger counsel and litigants? This problem of "judicial temperament," as one commission member called it, appears to be the only issue of discipline upon which the commission members persistently disagree, and because of inconsistencies in some of the interviewee's remarks, it was not possible to determine whether or not the judges on the commission were more apt to excuse such behavior than the other members. However, it appears that the disagreement does not necessarily parallel the laymen, lawyer, judge division of commission membership.[43]

Despite the disagreement over the problem of judicial temperament, the commission membership is usually able to present a united front at the informal hearing, and the results have been more than satisfactory. However, whether or not the informal hearing results in a retirement or censure depends entirely upon the judge's willingness to force his right to a formal hearing. As has been noted, only one formal hearing has been held, but this fact does not mean that other judges will not pursue this course in the future. Nevertheless, it seems safe to say that for the present the key element in the commission's procedural arsenal is the informal hearing.

IV. Retrospect and Prospect

If the performance of the Colorado commission during its first 3 years of operation is any indication of what can be expected in the future, it seems safe to conclude that the commission plan is a viable

[43] One of the laymen disagrees with this conclusion, charging that the judges often attempt to whitewash the offensive behavior. Not surprisingly, this particular member considers the role of layman on the commission to be that of a "watchdog" charged with keeping the commission from becoming a vehicle for the unwarranted protection of the judiciary.

solution to the problem of judicial discipline in Colorado. This is not to say, however, that there is no room for improvement.

As has been noted, one of the major problems facing the commission is that of determining the standards by which judicial behavior can be evaluated. In the past, the other commission members have looked to the judges for guidance in this regard. However, opinions differ even among judges as to what constitutes judicial misconduct. Furthermore, there appears to be a growing reluctance on the part of some members to defer to the judges on the commission. For example, in a recent meeting of the commission one of the laymen defied the consensus and demanded that the commission look into a matter involving somewhat questionable behavior. It is clear that such dissension over standards can only hamper the effectiveness of the commission's work; therefore the commission, as a matter of top priority, should establish for itself clear-cut guidelines as to what constitutes actionable misconduct.

Another area in which improvement is needed involves the commission's policy on publicity. Unlike its counterparts in other states, the Colorado commission has not published yearly reports summarizing its performance. As a result, very few people are aware of the commission's existence, and those who are aware of its existence are not sure of its function. It is obvious that the commission's effectiveness will be adversely affected if persons with valid complaints either fail to complain or complain to the wrong officials who, out of ignorance of the commission's existence, do not pass the complaint along. What is needed then is an extensive publicity campaign designed to make the commission's existence and effectiveness known to the lay public, the practicing bar, and the public officials likely to receive complaints. Not only would such a campaign tend to increase the number of valid complaints, it would also enhance the commission's role as a forum for the airing of frivolous complaints and thereby further protect the judge from unwarranted publicity. Finally, public awareness of an effective disciplinary mechanism would probably serve to increase public confidence in the judiciary as a whole.

Another practice which could prove to be troublesome in the future concerns the two hats worn by the present executive secretary. While the fact that the secretary is also the court administrator has been a help to the commission, commission members have come to depend on him for information and have put considerable stock in his evaluation of the validity of complaints. This could prove to be dangerously misplaced reliance; for as the business of the courts increases, the two positions will have to be severed, and the commission will be deprived of what has come to be a significant functional input. It will then be forced to fill the void with hastily contrived ad hoc measures which will impede

its effectiveness. Furthermore, there is always the present danger that the secretary will come to be looked upon as a bird dog for the commission, a contingency which could seriously undermine his effectiveness as court administrator. In order to avoid these possibilities, it is suggested that the two positions be severed and that a full-time executive secretary be hired by the commission. If this severance is not feasible for lack of funds, then someone whose full-time position is not in any way related to the administration of the courts should fill the position.

A final criticism (and one which was suggested by a respondent and seems to have some validity) is that the commission is not aggressive enough in prosecuting complaints. From what has been delineated, it is safe to conclude that the commission will seldom proceed with a complaint unless the allegations contained therein are supported *overwhelmingly* by the evidence. Consequently, those judges whose guilt is subject only to a minimal degree of doubt are exonerated without any attempt to actually weigh the evidence and come up with a true decision on the merits. Of course, this hesitancy on the part of the commission can be explained by reference to the facts that new ground is being broken and that the members are reluctant to establish precedents which may prove undesirable. For this reason, one cannot be too critical of the commission for its past caution. However, failure of the commission to assume a more forceful stance in the future could be an important factor in undermining its effectiveness.

Despite these few criticisms, it is beyond dispute that the Colorado experience tends to support the widespread consensus regarding the effectiveness of the commission plan.[44] In its 3 short years, the Colorado commission has established itself as a viable and credible mechanism for effecting judicial discipline and removal and, in so doing, has moved the Colorado judicial system a step closer to effective administration of justice.

Stanley D. Neeleman
David C. Miller

[44] Frankel, *Removal of Judges: California Tackles an Old Problem*, 49 A.B.A.J. 166 (1963); *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149 (1966).

APPENDIX

RULES OF PROCEDURE COMMISSION ON JUDICIAL QUALIFICATIONS

ADOPTED BY THE COLORADO SUPREME COURT MAY 18, 1967

1. Definitions

In these rules, unless the context or subject matter otherwise requires:

(a) "Commission" means the commission on judicial qualifications.

(b) "Judge" means a justice or judge of any court of record of this state, except county judges of the city and county of Denver.

(c) "Chairman" includes the acting chairman.

(d) "Masters" means special masters appointed by the supreme court upon request of the commission.

(e) "Presiding master" means the master so designated by the supreme court or, in the absence of such designation, the judge first named in the order appointing masters.

(f) "Examiner" means the counsel designated by the commission to gather and present evidence before the masters or commission on the charges against a judge.

(g) "Shall" is mandatory and "may" is permissive.

(h) "Mail" and "mailed" includes registered or certified mail.

(i) The masculine gender includes the feminine gender.

2. Interested Party

A judge who is a member of the commission or of the supreme court may not participate as such in any proceedings involving his own censure, removal, or retirement.

3. Confidentiality of Proceedings

All papers filed with and proceedings before the commission, or before the masters appointed by the supreme court pursuant to rule 8, shall be confidential.

4. Defamatory Material

The filing of papers with or the giving of testimony before the commission, or before the masters appointed by the supreme court pursuant to rule 8, shall be privileged in any action for defamation. No other publication of such papers or proceedings shall be so privileged, except that the record filed by the commission in the supreme court continues to be privileged.

5. Preliminary Investigation

(a) The commission, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of willful misconduct in office, willful and persistent failure

to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that he has a disability that seriously interferes with the performance of his duties and is or is likely to become permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. The commission, without receiving a verified statement, may make such a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and the name of the person making the verified statement, if any, or that the investigation is on the commission's own motion, and shall be afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose. Such notice shall be given by prepaid registered or certified mail addressed to the judge at his chambers and at his last known residence.

(c) If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified.

6. Notice of Formal Proceedings

(a) After the preliminary investigation has been completed, if the commission concludes that formal proceedings should be instituted, the commission shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. Such proceedings shall be entitled:

"BEFORE THE COMMISSION ON JUDICIAL QUALIFICATIONS
Inquiry Concerning a Judge, No. _____."

(b) The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within fifteen days after service of notice upon him.

(c) The notice shall be served by the personal service of a copy thereof upon the judge, but if it appears to the chairman of the commission upon affidavit that, after reasonable effort for a period of ten days, personal service could not be had, service may be made upon the judge by mailing, by prepaid registered or certified mail, copies of the notice addressed to the judge at his chambers and at his last known residence.

7. Answer

Within fifteen days after service of the notice of formal proceedings, the judge may file with the commission a legible answer which shall be verified.

8. Setting for Hearing before Commission or Masters

Upon the filing of an answer or upon expiration of the time for its filing, the commission shall order a hearing to be held before it concerning the censure, removal, or retirement of the judge, or the commission may request the supreme court to appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in such matter, and to report thereon to the commission. The commission shall set a time and place for hearing before itself or before the masters and shall give notice of such hearing by registered or certified mail to the judge at least twenty days prior to the date set.

9. Hearing

(a) At the time and place set for hearing, the commission, or the masters, when the hearing is before masters, shall proceed with the hearing whether or not the judge has filed an answer or appears at

the hearing. The examiner shall present the case in support of the charges in the notice of formal proceedings.

(b) The failure of the judge to answer or to appear at the hearing shall not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for censure, removal, or retirement. The failure of the judge to testify in his own behalf or to submit to a medical examination requested by the commission or the masters may be considered, unless it appears that such failure was due to circumstances beyond his control.

(c) A verbatim record shall be kept of the proceedings of the hearing.

(d) When the hearing is before the commission, not less than five members shall be present when the evidence is produced.

10. Evidence

At a hearing before the commission or masters, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

11. Procedural Rights of Judge

(a) In proceedings involving his censure, removal, or retirement, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter.

(b) When a transcript of the testimony has been prepared at the expense of the commission, a copy thereof shall, upon request, be available for use by the judge and his counsel in connection with the proceedings, or the judge may arrange to procure a copy at his expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at his expense.

(c) Except as herein otherwise provided, whenever these rules provide for giving notice or sending any matter to the judge, such notice or matter shall be sent to the judge at his residence unless he requests otherwise, and a copy thereof shall be mailed to his counsel of record.

(d) If the judge is adjudged insane or incompetent, or if it appears to the commission at any time during the proceedings that he is not competent to act for himself, the commission shall appoint a guardian ad litem unless the judge has a guardian who will represent him. In the appointment of such guardian ad litem, consideration may be given to the wishes of the members of the judge's immediate family. The guardian or guardian ad litem may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent; and, whenever these rules provide for serving or giving notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the guardian or guardian ad litem.

12. Amendments to Notice or Answer

The masters, at any time prior to the conclusion of the hearing, or the commission, at any time prior to its determination may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or

after the commencement of the hearing. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

13. Report of Masters

(a) After the conclusion of the hearing before masters, they shall promptly prepare and transmit to the commission a report which shall contain a brief statement of the proceedings had and their findings of fact on the issues presented by the notice of formal proceedings and the answer thereto, or if there be no answer, their findings of fact with respect to the allegations in the notice of formal proceedings. When the findings support the grounds alleged for censure, removal, or retirement, the report shall be accompanied by an original and four copies of a transcript of the proceedings before the masters.

(b) Upon receiving the report of the masters, the commission shall promptly mail a copy to the judge.

14. Objections to Report of Masters

Within fifteen days after mailing of the copy of the masters' report to the judge, the examiner or the judge may file with the commission a statement of objections to the report of the masters, setting forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for censure, removal, or retirement. A copy of such statement, when filed by the examiner, shall be sent by registered or certified mail to the judge.

15. Appearance before Commission

If no statement of objections to the report of the masters is filed within the time provided, the commission may adopt the findings of the masters without a hearing. If such statement is filed, or if the commission in the absence of such statement proposes to modify or reject the findings of the masters, the commission shall give the judge and the examiner an opportunity to be heard orally before the commission, and written notice of the time and place of such hearing shall be sent by registered or certified mail to the judge at least ten days prior thereto.

16. Extension of Time

The chairman of the commission may extend for periods not to exceed thirty days in the aggregate the time for filing an answer, for the commencement of a hearing before the commission, and for filing a statement of objections to the report of the masters, and the presiding master may similarly extend the time for the commencement of a hearing before masters.

17. Hearing Additional Evidence

(a) The commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of hearing and shall indicate the matters on which the evidence is to be taken. A copy of such order shall be sent by registered or certified mail to the judge at least ten days prior to the date of hearing.

(b) In any case in which masters have been appointed, the hearing of additional evidence shall be before such masters, and the proceedings therein shall be in conformance with the provisions of rules 9 to 15, inclusive.

18. Commission Recommendations

(a) If the commission finds good cause, it shall recommend to the supreme court the censure, removal, or retirment of the judge. The affirmative vote of five members of the commission who have considered the record, and at least three of whom where present when the evidence was produced, is required for a recommendation of censure, removal, or retirement of a judge or for dismissal of the proceedings.

(b) The commission, with good cause, may also recommend to the supreme court that a judge be temporarily suspended from performing judicial duties without loss of compensation, pending final disposition by the supreme court of a commission recommendation for censure, removal, or retirement. A recommendation for temporary suspension shall require the affirmative vote of five members of the commission who have considered the record, at least three of whom were present when the evidence was produced.

19. Record of Commission Proceedings

The commission shall keep a record of all proceedings concerning a judge. The commission's determination shall be entered in the record and notice thereof shall be sent by registered or certified mail to the judge. In all proceedings resulting in a recommendation to the supreme court for censure, removal, or retirement, the commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceedings.

20. Certification of Commission Recommendation to Supreme Court

Upon making a determination recommending the censure, removal, or retirement of a judge, the commission shall promptly file a copy of the recommendation, certified by the chairman or secretary of the commission, together with the transcript and the findings and conclusions, with the clerk of the supreme court and shall immediately send by registered or certified mail to the judge notice of such filing together with a copy of such recommendation, findings, and conclusions.

21. Review of Commission Proceedings

(a) A petition to the supreme court to modify or reject the recommendation of the commission for censure, removal, or retirement of a judge may be filed within thirty days after the filing with the clerk of the supreme court of a certified copy of the recommendation complained of. The petition shall be verified, shall be based on the record, shall specify the grounds relied on, and shall be accompanied by petitioner's brief and proof of service of three copies of the petition and of the brief on the commission. Within twenty days after service on the commission, the commission shall serve and file a respondent's brief. Within fifteen days after service of such brief, the petitioner may file a reply brief, of which three copies shall be served on the commission.

(b) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the commission.

(c) The Rules of Civil Procedure in appellate proceedings before the supreme court shall apply to proceedings in the supreme court for review of a recommendation of the commission, except where express provision is made to the contrary or where the application of a particular rule would be clearly impracticable, inappropriate, or inconsistent.

THE LOST LETTER TECHNIQUE: A NEW APPROACH TO THE STUDY OF BLACK ATTITUDES IN DENVER

INTRODUCTION

AS a result of the barriers of discrimination and hatred that have restricted the black man in his attempt to better his standard of living, several groups have arisen in the black community in an attempt to free him. Two of these groups are the N.A.A.C.P. and the Black Panthers. The N.A.A.C.P. is seen by most people as a moderate organization dedicated to bettering the economic and social conditions of the black man by working within the framework of the American legal system. Since its founding early in the Twentieth Century, the N.A.A.C.P. has championed the cause of the American Negro and has brought about significant changes in American society by helping to strike down racial barriers. Through its peaceful methods, it has attained many of its goals and has attracted widespread support among both Negroes and whites.

However, there are many blacks who feel that the N.A.A.C.P. is moving too slowly. Many black action groups have been organized, the best known of which is the Black Panthers. The Panthers are avowed revolutionaries who will not wait out the slow evolution of society that accompanies tremendous social change. From its humble beginnings in the early 1960's in Oakland, California, the Panther party has grown rapidly in membership to a few thousand blacks, mostly young. The Panthers demand action now. They feel that their race has been trodden upon too often and too long, and that the only way meaningful change will be made is through violent destruction of the white power structure in the United States.

The contrast between the two organizations has generated a great deal of controversy in both black and white communities as to which group has gained the most widespread acceptance by the Negro population and, concomitantly, which approach to the black-white problem is, therefore, likely to prevail. Because of the social and legal implications inherent in such a controversy, it was decided to conduct a study to determine the attitudes of Denver's black community toward both organizations. This article sets forth the results of that study and suggests some conclusions which can be drawn therefrom.

I. THE LOST LETTER TECHNIQUE

When it was decided to study black attitudes in the metropolitan Denver area towards the Black Panthers and the more moderate

N.A.A.C.P., there was a conscious desire to avoid some of the problems generally encountered by researchers. For example, a person confronted with interviews and questionnaires is immediately aware that he is in a special situation. He knows that he has been chosen as part of a study and that his response will be intensively scrutinized and evaluated. As a result, his statements do not always reflect his actual opinions. The problem becomes more acute in research concerning politically sensitive issues and is further increased when racial overtones exist, *i.e.*, when white interviewers attempt an attitude survey among black respondents. The significance of this latter problem is underscored by the recent feelings of resentment toward constant study by governmental and other institutional groups evidenced in black communities.

In an effort to minimize such difficulties, the technique adopted for this study was one developed several years ago by Dr. Stanley Milgram of the City University of New York.[1] It utilizes the return of "lost letters" to determine how people feel and, more importantly, how they would act toward different political organizations. In essence, the technique measures attitudes without peoples' knowledge through their actions instead of their words.[2]

The technique is a simple one. The investigators distribute or drop a large number of letters, addressed and stamped, throughout the areas of the city under study. A person who finds one of these "lost letters" must decide what he is going to do with it — should he mail it, disregard it, or destroy it? Dr. Milgram has found that, "there is a widespread feeling among people that one *ought* to mail such a letter."[3] However, when a person finds a letter addressed to a highly objectionable organization, he may not mail it at all. Thus, by varying the addresses on the letters and later calculating the percentage returned for each address, one can measure sentiment towards an organization. As Dr. Milgram states:

> The technique gets around certain problems inherent in the survey interview — the usual method of assessing attitudes. When a research team wants to test public sentiment on a social issue, it ordinarily chooses a representative group of persons from the community, and questions them. The methods for selecting a representative sample have

[1] Professor Milgram directs the doctoral program in social psychology at the university and is also professor of psychology.

[2] S. Milgram, *The Lost Letter Technique,* PSYCHOLOGY TODAY June, 1969, at 30. Dr. Milgram describes the technique as follows:

> The technique was one that would measure attitudes without people's knowledge, through their actions instead of their words. The lost-letter technique was one solution. Lost letters have been used to inflame a populace and to study personal honesty, but we were interested in using the returns as a clue to how people felt and, more important, how they would act toward different political organizations. The information we gathered would be sociological, not psychological. We could not know about the individuals who returned the letters, but we would have a return rate specific to each organization, and thus useful for certain purposes. The nature of the procedure guaranteed the anonymity of those who took part. *Id.* at 32.

[3] *Id.* at 30.

> been worked out in a very careful fashion, and are so effective that a sample of only 1,200 persons can be used to predict national trends with great accuracy. But it remains true that once the person is selected for questioning, the information must come through a structured conversation. The resulting measurements measure only what the person *says*. This exclusive focus on verbal accounts, though of great utility, seems an unwise fixation in any scientific social psychology. It ought to be possible to measure deeds on a large scale and in a way that permits experimental variation.[4]

Using the lost letter technique, the respondent is not asked to speak. Rather his act or failure to act in response to an issue with social and political connotations speaks for him. This overt behavior will then reveal something about the manner in which he relates to a particular organization. In a subtle way, he is, in effect, asked to either aid the organization or to hinder it; and, thus, he will hopefully reveal his actual feelings and attitudes toward the organization.

Dr. Milgram has employed the technique in several studies. In the first, carried out in New Haven, Connecticut, in 1963, the members of his research team addressed 100 envelopes to each of two organizations that would doubtless prove unpopular with New Haven-ites: *Friends of the Nazi Party* and *Friends of the Communist Party.* As a control, they addressed 100 more envelopes to an organization about which they expected people to feel positively — *Medical Research Associates* — and 100 to a private person, *Mr. Walter Carnap.*[5]

The envelopes were all addressed to the same Post Office box in New Haven, and all contained identical letters. The letter was straightforward but was so designed as to interact suggestively with the four organizations. The letters were distributed in ten pre-selected districts in New Haven: along sidewalks, in outdoor phone booths, in shops, and under automobile windshields (with a note attached saying "found near your car"). Each letter had been unobstrusively coded for a section of the city.

In a few days the letters came in and, as predicted, in unequal numbers. Whereas 72 percent of the *Medical Research* letters and 71 percent of the *personal letters* came back, only 25 percent of the *Nazi* and *Communist* letters were returned. "The initial results and the discrepant return rates showed that the basic premise of the technique held up: the probability of lost letters being returned depends on the political and social attributes of the organization to which they are addressed."[6]

The New Haven study showed the technique could work. Dr. Milgram next wanted to see if it could be applied to a current social issue. Therefore, in 1963, at the peak of racial tension in the South, a research team armed with a batch of letters addressed to pro-civil rights

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[4] *Id.*

[5] *Id.* at 31.

[6] *Id.* at 33.

groups and anti-civil rights groups went to South Carolina and dispersed the letters in black and white neighborhoods in several tobacco towns. In black neighborhoods, the pro-civil rights letters were returned in greater numbers, while letters addressed to the *Council for White Neighborhoods* came in more strongly from white residential areas. "Thus the technique seemed applicable to a real social issue and was also responsive to a demographic variable."[7]

However, the technique still had one serious shortcoming — there was no real evidence of its validity. What was needed was an objective criterion against which the results of a study could be measured, and the 1964 Presidential election provided that opportunity.

To test the validity of the technique, letters were distributed in several election wards in Boston addressed to the following: *Committee to Elect Goldwater, Committee to Defeat Goldwater, Committee to Elect Johnson,* and *Committee to Defeat Johnson.* The lost letter technique correctly predicted the outcome of the election in each of the wards! But it seems the technique only identified the trend, for it badly underestimated the strength of Johnson support. Overall, it only gave Johnson a 10 percent lead over Goldwater, when the actual election returns in these wards gave Johnson a margin closer to 60 percent.

> This suggests that the difference in return rates of letters will always be weaker than the extent of actual difference of community opinion. Even if a person plans to vote for Johnson, he may still be a good enough fellow to mail a pro-Goldwater letter. And some letters are always picked up and mailed by children, illiterates and street cleaners. There is a good deal of unwanted variance in the returns.[8]

In short, while there is some question about the degree of validity, the lost letter technique is a way in which social attitudes can be somewhat accurately measured without some of the problems inherent in other research techniques. Since it was decided to use the lost letter approach in comparing the attitudes of Denver blacks toward the Black Panthers and the N.A.A.C.P., it only remained to apply the technique to the study in question.

II. APPLICATION OF THE TECHNIQUE TO THE DENVER STUDY

In applying the lost letter technique to the purposes of the study, it first became necessary to define the areas in which the study was to be conducted. Using United States census tracts and areas surveyed by the Denver Planning Office,[9] specific segments of Denver County were defined for use in the study. The total number of Negroes within the

[7] *Id.*

[8] *Id.* at 66.

[9] United States census tracts 16, 31.01, 36.01, 23, 24.01, 24.02, 25 and Park Hill areas 1, 2, 3, 4, 5, 6, 7, and 8, which included census tracts 41.02, 42.03, 42.01, 42.02, and part of tract 41.01. Thus, a total of fifteen neighborhoods were used in the study.

specific areas was estimated to be 34,349, approximately 49.6 percent of the total black population of Denver County.[10]

The next step involved printing 400 envelopes and dividing them into four groups of 100 envelopes each, according to their fictitious addresses. The envelopes addressed to *Louis Campbell* and to *Medical Research Associates* served as the control letters, and those addressed to the *Friends of the Black Panthers* and *Friends of the N.A.A.C.P.* were used to measure the opinion of the community toward the two groups under study.

In order to get an even distribution of letters throughout the tracts, the total number of letters was divided into the total number of blacks in the areas surveyed, and a ratio of one letter to every 86 Negroes was derived. This figure was then divided into the absolute number of Negroes in each area,[11] giving the number of letters to be dropped in each tract. The letters were coded according to the areas in which they were dropped in order to determine what percentage of letters were returned by various income groups in the Negro community.[12]

The actual distribution of the letters involved traveling through the selected areas and placing the letters at various locations to give the appearance that the letters had been lost. The letters were left face-up on sidewalks and curbings, at cross walks and bus stops, and in telephone booths. Similar to the Milgram studies, some letters were dropped in stores and restaurants, and a few were placed under the windshield wipers of cars with a note scribbled on them "found next to your car."

To aid in "losing" the letters, several black children were employed. It was felt that in a black community, white people would obviously be more noticeable and would bring greater attention to themselves walking around dropping letters. In addition, by using people who were more familiar with the neighborhoods, the letters were dropped near heavily traveled streets and in facilities predominantly used by Negroes.

The letters were dropped in their respective neighborhoods between six and eight o'clock on Sunday evening, February 8, 1970. By dropping the letters at night, it was possible to put them in desired locations without the study participants appearing too conspicuous.

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[10] Total black population estimated in 1970 to be 69,219. Estimate prepared by Denver Planning Office.

[11] It was necessary to find out the absolute number of Negroes in each census tract. Using figures obtained from the Head Start study on percentage of Negroes in the tracts and multiplying those percentages by the absolute number of people in the tracts, the absolute number of blacks in each area was determined. In addition, the study by the Denver Planning Office of Park Hill gave the absolute numbers of Negroes in areas 1, 2, 3, 4, 5, 6, 7, and 8 of the geographic analysis.

[12] The United States census tracts used in the study were designated neighborhoods A-6 and were generally neighborhoods which reflected a low income level, according to the 1960 census which computed the median income of families in each census tract in Denver County. The Park Hill areas were designated neighborhoods H-O and reflect a higher income level.

The next step in the study was the collection of the mailed letters. Collections at the Post Office box were made on the afternoons of February 9th, 10th, 11th, 12th, 13th, and 16th. A total of 166 letters were collected, and all data was compiled from this total.

III. RESULTS

The following series of tables and graphs and the explanatory comments accompanying them constitute the net results obtained by the study. Table No. 1 consists of a complete breakdown of the data as to date of return, neighborhood, and type of letter returned. It should also be noted that neighborhoods labeled A-G correspond to the United States census tracts and the neighborhoods labeled H-O correspond to the Park Hill areas.

TABLE NO. 1

		NEIGHBORHOOD															
Addressee	Date returned	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	Total
Personal	2/9					1											1
	2/10	5	1	2	8	3	2		2	4	2	1	2	2	1	1	36
	2/11					1	1					1		1	1	1	6
	2/12		1	1				1		1	1						5
	2/13			1													1
	2/16																0
																	49
Medical Research Associates	2/9		1														1
	2/10	5	3	2	6	3	1	1	1	1	4	2	1	2	3		35
	2/11		2	2			3			2		1		1			11
	2/12			1	3	1	1			1							7
	2/13						1										1
	2/16			1	1											3	5
																	60
Friends of the NAACP	2/9										1						1
	2/10	2	2	2	5	2	3	1	1			2	1	1	1		23
	2/11			3					1	1	2						7
	2/12	1		1	2		1										5
	2/13																0
	2/16											1					1
																	37

Addressee	Date returned	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	Total
Friends of the Black Panthers	2/9								1								1
	2/10		2	2		2	2		1		2						11
	2/11				4		1			1	1						7
	2/12																0
	2/13						1										1
	2/16																0
																	20
Neighborhood Totals		13	12	18	29	13	17	3	7	11	13	8	4	7	6	5	166

Table No. 2 shows the breakdown of the letters according to the number received on each collection date. It should be noted that since the letters were dropped on Sunday night, it was to be expected that the largest return would be on Tuesday, February 10.

TABLE NO. 2

Collection Date	No. Collected
Mon., Feb. 9	4
Tues., Feb. 10	105
Wed., Feb. 11	31
Thurs., Feb. 12	17
Fri., Feb. 13	3
Mon., Feb. 16	6
Total	166

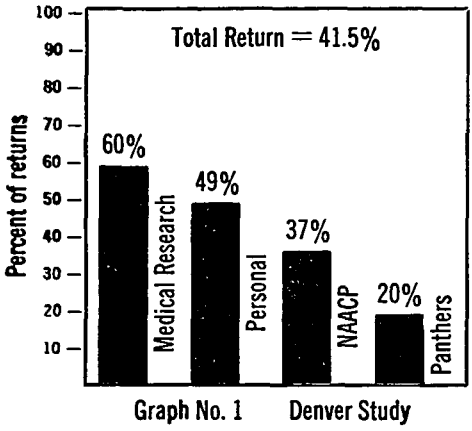
Table No. 3 analyzes the data with respect to neighborhood and type of letter. After each neighborhood is the total number of letters that were dropped in that area. By dividing this number by four, the number of letters in each category dropped in a particular neighborhood can be computed.[13] This number is then used to figure the percentage of return for each category in each neighborhood. For example, by looking at the chart one can see that 86 percent of the personal letters were returned from neighborhood A. The totals at the end of the table show the total number and percentage of return for a particular neighborhood. The average return rate for a neighborhood was 47 percent.

[13] Since some numbers are not divisible by four, any area that contained a number of Negroes not evenly divisible by four was given extra letters, but no area received more than two extra letters having the same addressee.

Neighborhood	Total number of letters in neighborhood	PERSONAL		MEDICAL RESEARCH		FRIENDS OF N.A.A.C.P.		FRIENDS OF BLACK PANTHERS		TOTAL	
		no. returned	%	no. returned	%	no. returned	%	no. returned	%	no. returned	%
A	25	5	86	5	86	3	50	0	0	13	58
B	40	2	20	6	60	2	20	2	20	12	30
C	38	4	40	6	60	6	60	2	20	18	47
D	98	8	32	10	40	7	28	4	16	29	29
E	35	5	56	4	44	2	22	2	22	13	37
F	35	3	33	6	67	4	44	4	44	17	49
G	5	1	100	1	100	1	100	0	0	3	60
H	8	2	100	1	50	2	100	2	100	7	88
I	21	5	100	4	80	1	20	1	20	11	53
J	22	3	60	4	80	6	60	3	60	13	59
K	18	2	40	3	60	3	60	0	0	8	44
L	15	2	50	1	25	1	25	0	0	4	27
M	16	3	75	3	75	1	25	0	0	7	44
N	13	2	67	3	100	1	33	0	0	6	46
O	11	2	67	3	100	0	0	0	0	5	45

TABLE NO. 3

The following two bar graphs are, perhaps, the most revealing. Graph No. 1 shows the percentage of return for each group of addressed letters and total percentage of return. These figures constitute the essence of the results. Graph No. 2 shows the same information for Dr. Milgram's New Haven study. In both studies, 400 letters (100 for each group) were dropped. The slight difference in total return can be attributed to the inherent differences between a New Haven, Connecticut community and a black Denver community. This will become clearer with the later comparison of the lower income and the higher income black communities. This difference between communities can also be traced to the use of two low response groups in the New Haven study (Communists and Nazis) as compared to only one low response group in this study (Panthers).



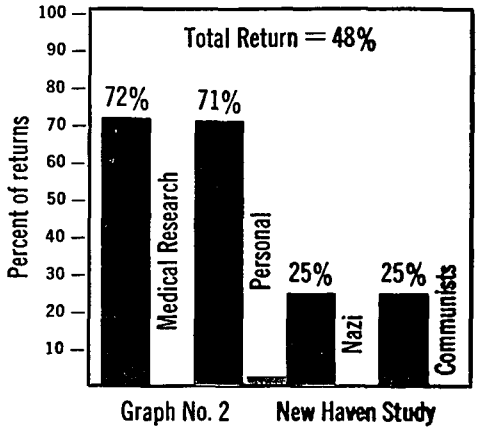


Table No. 4 compares the computed return for a given neighborhood with the actual return for that neighborhood and shows the discrepancy, if any, between the two. The computed return was arrived at by dividing the number of letters dropped in a neighborhood by the total number of letters dropped (400) and multiplying that figure by the total number of letters returned (166).[14]

Neighborhood	Computed Return	Actual Return	Discrepancy
A	10	13	+ 3
B	16	12	− 4
C	16	18	+ 2
D	41	29	−12
E	14	13	− 1
F	14	17	+ 3
G	2	3	+ 1
H	4	7	+ 3
I	8	11	+ 3
J	8	13	+ 5
K	8	8	0
L	6	4	− 2
M	6	7	+ 1
N	5	6	+ 1
O	4	5	+ 1

TABLE NO. 4

[14] For example, if 200 letters (or ½ of the total number of letters dropped) were dropped in neighborhood X, one would expect that about ½ of the letters returned (½ of 166 or 83) would be from X. This comparison shows if there were any areas that seriously strayed from the mark. As can be seen from the table, areas D (-12) and J (+5) are the only two serious deviants. Area D's low response could be the result of over-saturation of a small neighborhood that had a large population and consequently received a large number of letters (98).

The final two tables (Table No. 5 and Table No. 6) are concerned with the difference in results between the higher and the lower income neighborhoods. The higher income neighborhoods (Table No. 5) included areas H through O where the median family income is between $6,000 and $8,000. Generally, this is the area near Stapleton Airport. The lower income neighborhoods included areas A through G where the median family income is between $2,000 and $4,000 (except for area B which has a median family income between $4,000 and $6,000. This is the area on the eastern fringe of downtown Denver.

The results show almost no difference whatsoever between the Black Panther and the N.A.A.C.P. returns from the lower and higher income groups. There is, however, a considerable difference in percent of return of the control letters and in percent of total return with respect to the two income levels. It should be noted how the returns of the higher income group correspond to those in the New Haven study (see Graph No. 2). There seems to be a greater similarity between the higher income black community and the New Haven community as opposed to the lower income black community and the New Haven community.

Type of Letter	No. Returned	Total Dropped	%
Personal	21	31	68
Medical Research	22	31	71
N.A.A.C.P.	12	31	39
Panthers	6	31	19
Totals =	61	124	49

Table No. 5 Higher Income

Type of Letter	No. Returned	Total Dropped	%
Personal	28	69	41
Medical Research	38	69	55
N.A.A.C.P.	25	69	36
Panthers	14	69	20
Totals =	105	276	38

Table No. 6 Lower Income

CONCLUSION

The statistics from the survey indicate that the Negroes of Denver are more likely to support the N.A.A.C.P. than the Black Panthers by a ratio of almost two to one. Taken at face value, the statistics pose an interesting question: Why *do* the results suggest that Negroes favor the N.A.A.C.P. over the Black Panthers?

One rationale might be that Negroes in Denver have better living conditions and lead somewhat better lives than blacks in other metropolitan areas. At the 56th annual convention of the N.A.A.C.P. held in Denver in July, 1965, information was introduced which tended to show that Denver Negroes were "better off" than Negroes elsewhere:

> Discussions with persons identified with racial problems in Denver appeared to confirm the feelings of the Negro delegates. They said that the city and the state of Colorado, whose political lives were dominated by the Ku Klux Klan in the nineteen-twenties, had radically

changed in their treatment of Negroes. In part, this change was attributed to the leadership of Mayor Tom Currigan and his administration.

Mr. Currigan and his top officials have been intimately identified with the problems of race relations and have taken the initiative in the organizing efforts to solve these problems.

The size of the Negro community, estimated at 47,000 in a population of a million in the metropolitan Denver area, was said to have reduced the Negro problem to manageable proportions.

A third factor is that the many Federal agencies in Denver serve as the principal employers of Negroes. The estimated rate of Negro unemployment here is put at 8%, compared with rates as high as 20% in other urban centers.

Although a Negro slum area exists in Denver, many Negroes live in integrated sections, a situation that has been favored by the buyer's market in real estate here in recent years. It was also said that public accommodations were not a problem for Negroes here.

Defacto segregation in the schools follows the housing patterns, but the Board of Education is credited with making a determined effort to improve the quality of instruction in Negro schools.

Sebastian Owens, the Urban League's representative in Denver, said today that the League had received strong support from businesses and industry in testing Negro candidates for jobs.[15]

Because Denver Negroes are "better off," they would tend to be satisfied with the status quo and would not be willing to give up easily what has taken them so long to achieve. An indication of this feeling is the unwillingness of Denver's Negroes to riot. Indeed, there have only been two of what the National Advisory Committee on Civil Disorders calls "minor" disturbances in Denver since 1964.[16]

Another factor which may have controlled the behavior pattern of the Negro faced with the decision of whether or not to mail the lost letter, is that of familiarity with the organizations involved. The N.A.A.C.P. has been in existence for 60 years and has long been depicted by the news media as a respectable organization which has won many important battles for the Negro in the courts. In contrast, the Black Panther Party is barely four years old and has yet to make any decisive gains for blacks.

This general pattern of familiarity is reflected by the two organizations in Denver. The Denver chapter of the Black Panther Party has a very small membership and has received little publicity or notoriety. To the average Denver citizen, Black Panthers do not actively exist in the city. Contradistinctively, the N.A.A.C.P. has increased its prominence through local activity and by holding its national convention in Denver in 1965. Further, the Association continues to bring suits against local discriminatory business practices and exploitive merchants, attempting to make additional gains for black citizens.

[15] J. FRANKLIN & I. STARR, THE NEGRO IN 20TH CENTURY AMERICA 422 (1967).
[16] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS note 4 at 113 (1968).

Still another possible explanation for the result obtained by the study is the attitude of Denver Negroes toward violence and riots. When asked their views, 6 percent said they were pleased with violence whereas 77 percent were upset by it.[17] Another Denver survey conducted in 1966 concluded that 59 percent of the Negro population would tell their children not to become involved with the police.[18] Clearly those who favor violence are in the minority.

Hence, at the present time most blacks in Denver prefer to work within the legal system in order to achieve desired change. However, as frustration within the community increases, other means of effecting change may become more acceptable. It is the challenge of the legal system to provide and maintain adequate channels of communication and to provide legal accessibility in order to prevent the black community from turning to violence as a solution to its problems.

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Laird Milburn
Nelson Siegler
Doug Watson
Robert Zwicky

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[17] D. BAYLEY & H. MENDELSOHN, MINORITIES AND THE POLICE CONFRONTATION IN AMERICA 178 (1969).

[18] *Id.* at 121.

EQUAL EMPLOYMENT OPPORTUNITY LEGISLATION: A STUDY OF A RESPONSE TO A SOCIAL NEED

INTRODUCTION

AS the spontaneity of the 1960's fades, the 1970's will most likely evidence an institutionalization of social programs aimed at racial equality in all areas of American society. More particularly, as the excitement surrounding the "Philadelphia Plan"[1] dims, equal employment opportunity will become an accepted reality enforced by governmental sanction. Yet at the moment, the methods by which equal employment opportunity is brought about are still very much in flux; hence, it is the purpose of this article to set forth the current state of the law with respect to job discrimination in Colorado and to describe and evaluate the responses of a sample group of employers and employees who are affected by the implementation of such laws.

The article is based on a study which incorporated two levels of investigation: first, a comparison of the performance and operational techniques of two related governmental commissions—the Colorado Commission on Civil Right (C.C.R.C. — a state body) and the Equal Employment Opportunity Commission (E.E.O.C. — a federal organization); and second, an evaluation of public confidence in these commissions and their accomplishments. In order to compare the work of the state and federal bodies, information was gathered from staff members of the C.C.R.C. and the E.E.O.C. (which has a regional office in Albuquerque, New Mexico[2]) in a series of meetings. Of particular importance were the methods employed by each of these commissions in executing their respective legislative mandates; emphasis was placed on how the commissions attempted to control behavior patterns in the business community.

In order to evaluate public confidence in the work of the commissions, questionnaires were sent to the two groups affected by the legislation: employers and minority employees. More specifically, one questionnaire was mailed to 100 employers against whom complaints

[1] Exec. Order No. 11246, 3 C.F.R. 167 (Supp. 1965); *See also* Memorandum on Order Amending Philadelphia Plan Relating to Minority Group Employment Goals, June 27, 1969.

[2] The Albuquerque office of the E.E.O.C. administers a five state area encompassing Colorado, Arizona, New Mexico, Utah and Wyoming.

[3] The names and addresses were obtained through the cooperation of James F. Reynolds, Director of the Colorado Civil Rights Commission. At no time, however, were the authors allowed to examine the contents of any completed case file nor were they allowed to see any other confidential data.

had been filed under the equal employment provisions of the statutes. A second questionnaire was mailed to 100 persons who had filed complaints of discrimination with the C.C.R.C. While the response to the questionnaires was inadequate to develop definite conclusions,[4] the study did help to clarify the manner in which equal opportunity legislation has been implemented and the procedures which have resulted therefrom.

I. FUNCTIONAL ANALYSIS

In analysing the function of the two commissions, the most obvious place to begin is with the authorizing legislation. While this legislation is somewhat similar, important differences between the two can be noted, especially since the Colorado statute is regarded as stronger than its federal counterpart. It is also important to examine the manner in which the legislation has been implemented; hence, this section concludes with a comparison of the procedural aspects of the C.C.R.C. and the E.E.O.C.

A. *State and Federal Legislation*

1. The Colorado Commission

The creation of the Colorado Civil Rights Commission dates to the passage of the Colorado Antidiscrimination Act of 1957.[5] The Act provides for the establishment of a commission[6] which consists of seven members who are appointed by the Governor with the advice and consent of the Senate.[7] The Act also provides for a Civil Rights division which has, as its head, a coordinator of fair employment practices.[8]

The powers granted to the Colorado Civil Rights Commission are fairly broad and, in outlining these powers, the purpose of the legislation is made clear. The legislature has given the commission the power "[T]o receive, investigate, and pass upon complaints alleging discrimination in employment . . . or the existence of a discriminatory or unfair employment practice by a person, an employer, an employment agency, a labor organization, or the employees or members thereof . . . ."[9] Discriminatory and unfair employment practices with respect to employers are defined as "[refusing] to hire, to discharge, to promote or demote, or [discriminating] in matters of compensation

[4] Only 38 percent of the employers in the sample responded; only 20 percent of minority employees returned the questionnaire.

[5] COLO. REV. STAT. ANN. §§ 80-21-1 to- 8 (1963).

[6] *Id.* § 80-21-2 (8).

[7] COLO. REV. STAT. ANN. § 80-21-4 (Supp. 1969).

[8] *Id.* § 80-21-3.

[9] *Id.* § 80-21-5 (4).

against any person otherwise qualified, because of race, creed, color, sex, national origin or ancestry."[10]

The sanctions to be exercised by the commission are also broad in scope. For example, if, upon the investigation of a complaint of discrimination, the coordinator, a commissioner, or an investigating staff member determines that there is probable cause to believe that a discrimination charge is true, the legislation authorizes the commission to take steps to eliminate the probable discrimination by three means: conference, conciliation, or persuasion.[11] If these basically informal procedures do not prove adequate, then the commission is authorized to conduct a formal hearing on the complaint at which time evidence is reviewed and further testimony can be taken.[12] If, following the hearing, the commission finds that the respondent — the accused employer, union or employment agency — has engaged in or is engaged in discriminatory practices, then the commission can issue an order to the respondent to cease and desist from this action and to take the affirmative action as the commission deems necessary.[13]

2. The Federal Commission

The Equal Employment Opportunity Commission[14] is a creation of the Civil Rights Act of 1964[15] and is charged with the enforcement of the provisions of Title VII,[16] the express purposes of which prevent unlawful employment practices by employers, labor unions, and employment agencies.[17] The Commission itself is composed of five commissioners appointed by the President and headed by a Chairman who is also appointed by the President.[18] While the Commission is located in the District of Columbia, it is expressly permitted to set up state or regional offices to assist it in the implementation of the law.[19]

Similar to the C.C.R.C., the E.E.O.C. is empowered to investigate complaints of employment discrimination by acting in response to written complaints.[20] The complaints are investigated, and a finding is made as to whether there is probable cause to believe that a violation of Title VII has occurred.[21] If there is such probable cause, then "the Commission shall endeavor to eliminate any such alleged unlawful

[10] COLO. REV. STAT. ANN. § 80-21-6(2) (Supp. 1969).
[11] *Id.* § 80-21-7 (3).
[12] *Id.* § 80-21-7 (5).
[13] *Id.* § 80-21-7 (12).
[14] 42 U.S.C. § 2000 e-4 (1964).
[15] *Id.* § 2000 e.
[16] *Id.* § 2000 e-5.
[17] *Id.* § 2000 e-2(a)-(c).
[18] *Id.* § 2000 e-4(a).
[19] *Id.* § 2000 e-4(f).
[20] *Id.* § 2000 e-5(a).
[21] *Id.*

employment practice by informal methods of conference, conciliation and persuasion."[22] If these methods fail, Title VII provides that a civil action may be brought by the charging party[23] or by the E.E.O.C. itself (if charges were filed by a Commissioner) in a federal district court.[24] If the court then finds that the respondent has intentionally engaged in an unlawful employment practice, the court may enjoin the respondent from engaging in such practice and may order such affirmative action as may be appropriate.[25]

B. *Major Differences in the State and Federal Legislation*

It is immediately apparent that the Colorado legislation is stronger than its federal counterpart. Instead of having to resort to court procedures, the Colorado Civil Rights Commission can, after a hearing has been held, issue a cease-and-desist order to the respondent who has been found guilty of discriminatory or unfair employment practices.[26] The commission can also order the errant employer to take affirmative action, including the hiring or rehiring of the charging party and the upgrading of employees with or without back pay to the date of the violation of the law.[27]

At first glance, it seems that the E.E.O.C. has similar powers, albeit through the vehicle of the federal courts. It was found, however, that it is only when one of the Commissioners charges a respondent with a violation of Title VII that the case can be brought before a federal court. In the vast majority of cases when the Commission's limited powers of conciliation or persuasion fail, the charging party himself must seek counsel and bring suit as an individual. Since many of the charging parties are probably not indigent, they are ineligible for legal aid. And, since most of the suits involve small sums of money, the issue usually dies if the respondent becomes uncooperative.

A seemingly easy solution would be to have one of the E.E.O.C. Commissioners file a charge alleging the veracity of the complaint. Since the evidence brought out in the first investigation presumably *is* true, the Commission could bring the case to court and win easily. However, this solution ignores three factors. First, Title VII provides that the charge must be filed 90 days after the alleged violation.[28] In most cases, by the time the initial complaint is filed, investigated, and decided, the 90 day limit has been exceeded. Second, the Com-

[22] *Id.*

[23] *Id.* § 2000 e-5(e).

[24] *Id.*

[25] *Id.* § 2000 e-5(g).

[26] COLO. REV. STAT. ANN. § 80-21-7(12) (1963).

[27] *Id.*

[28] 42 U.S.C. § 2000 e-5(d) (1964).

mission itself has limited legal resources; and with a case load exceeding 11,000 complaints annually,[29] the Commission simply lacks the legal staff to bring cases to court, even if it were possible. Third, it is impossible to bring the cases to court since Title VII makes no provision for government lawyers to plead such cases unless the case is of general public importance and the Attorney General decides to intervene.[30]

There are other differences between these two legislative enactments. For example, there are mechanical differences, such as the limitations on filing complaints — six months for Colorado[31] and 90 days under Title VII[32] — as well as major substantive differences. Further, under Title VII the Commissioners themselves must decide on the merits of a complaint,[33] whereas under the Colorado statute the coordinator can conduct a hearing and decide upon the complaint's validity.[34] Commissioners serve the State of Colorado without compensation and do not work on a full-time basis.[35] Under Title VII, the five Commisisoners are salaried and work full-time in the pursuance of their duties.[36]

The scope of the Colorado statute is also somewhat broader than is that of Title VII. In Colorado, *all* employers are covered by the statute save religious organizations;[37] Title VII is limited to employers who employ more than 25 persons for more than 20 calendar weeks and who are engaged in industries affecting interstate commerce.[38] Title VII specifically excludes smaller employers, state and federal employers, corporations wholly owned by the United States Government, religious corporations, and several other residual groups.[39] There are many other dissimilarities between these two pieces of legislation; some of these become apparent when the implementation of the statutes is considered.

C. *Implementation: the E.E.O.C.*

The E.E.O.C.'s regional office in Albuquerque, New Mexico, is charged with the implementation of Title VII in the State of Colorado.

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[29] Based on information received from the E.E.O.C.'s Regional Office in Albuquerque, New Mexico.

[30] 42 U.S.C. § 2000 e-5(e).

[31] COLO. REV. STAT. ANN. § 80-21-7 (15) (1963).

[32] 42 U.S.C. § 2000 e-5(d) (1964).

[33] *Id.* § 2000 e-5(a).

[34] COLO. REV. STAT. ANN. § 80-21-7(5) (1963).

[35] *Id.* § 80-21-4.

[36] 42 U.S.C. § 2000 e-4(a) (1964).

[37] COLO. REV. STAT. ANN. § 80-21-2(15) (1963).

[38] 42 U.S.C. § 2000 e(b) (1964).

[39] *Id.*

The procedures which have been developed for handling complaints are described as follows.

First, Title VII provides that the complaint shall be deferred to the state for 60 days if the state has adequate machinery for handling discriminatory charges. This is not a hard and fast rule, however, and many exceptions are allowed.[40] The E.E.O.C. itself determines whether the rule is to be followed. In the Albuquerque office, for example, the deferral rule is followed with respect to Colorado, but complaints emanating from Arizona are not deferred. The reasons for this practice are not publicized but are grounded in both common sense and the spirit of the law. If the Commission feels that the state legislation is strong enough to be effective and that the state organization is performing its legislative mandate, then the E.E.O.C. is willing to defer. But if, as in some states, these requisites are thought to be lacking, then the Commission will refuse to defer investigation and will commence its own examination of the matter.

Assuming that the complaint is not deferred to the state, it will be assigned to one of the E.E.O.C.'s investigators. A letter will be sent to the respondent named in the complaint, informing him only that a charge has been filed against him and that a particular staff member of the Commission will contact him in the near future. The name of the person filing the charge and the specifications of the complaint are not revealed to protect the charging party against the alteration of records and against any rehearsal on the part of the respondent or his employees which might tend to destroy the objectivity of the proceedings.

The Albuquerque investigator then telephones both the respondent and the charging party to arrange for appointments. The charging party is almost invariably contacted first and meets with the investigator. The investigators talk freely and without great formality so that the problem will be thoroughly understood. After the investigator is fully advised of the situation, he prepares an affidavit for the charging party to sign, places the charging party under oath, and witnesses his signature. At this time the investigator asks for the names and addresses of any persons who can support the charging party's allegations (usually co-workers) and attempts to apprise himself of the attitudes he might expect to find at the respondent's place of business. On the average, this initial contact lasts two or three hours.

In order to gain the necessary information, the E.E.O.C. investigator has full and immediate powers of supoena.[41] Although the employer is not required to allow the investigator to interview employees during normal working hours, most are cooperative in this respect and

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[40] *Id.* § 2000 e-8(b).

[41] 42 U.S.C. § 2000 e-9(a) (1964).

will allow, at the investigator's request, the employee to be interviewed in a separate room. Affidavits are taken from employees who have something to offer which will help the investigation but the employer is not permitted to see these affidavits. After contacting those witnesses who might support the charging party's allegations and taking affidavits from them, the investigator proceeds to the respondent's office to officially serve the formal charge and to conduct the investigation.

While interviews are important, the E.E.O.C. seems to rely heavily on the respondent's records. Records most commonly examined and copied are the personnel file of the charging party, pay records, employment applications, job descriptions and personnel rosters which indicate racial distribution within plants or departments.

The investigator is usually looking for evidence of discriminatory treatment. As one investigator remarked, "The fact that a charging party has been treated badly by his employer is not enough. What must be determined is whether the employer has treated only one group badly, as opposed to his treatment of the majority. If he treats everyone badly it is regretable but not a violation of Title VII." Hence records are very revealing. If a Negro has filed a charge against an employer because he was not hired, all the investigator need do is obtain the employer's reason for failure to hire. If the reason is that the Negro does not have a high school diploma and if a random examination of the personnel files reveals that many people are employed who do not have high school diplomas, then the employer's reason lacks validity. Or if the Negro was turned away because there were "no openings" and if the employer's records reveal that three whites were hired on the same day and after the Negro had applied, the conclusion is apparent. (The E.E.O.C. also requires that applications are to be kept on file for six months after submission and that job vacancies are to be filled with consideration given to all applications on file.) Further, if the records show, for example, that Chicanos are dismissed for fighting on the employer's premises while Anglos are only given reprimands, then, again, the conclusion of "probable cause" is easily reached.

Once the investigator has obtained the necessary information, he assembles all the data in a bureaucratically pre-determined order and writes a narrative explaining the data and relevancy of documents, including a short recommendation as to whether there should be a finding of probable cause.[42]

[42] As of February 2, 1970, this is no longer strictly true. Under a new system, the investigator writes a "statement of facts" which is mailed to the charging party and the respondent, each of whom has ten days in which to contest the facts. If no reply is forthcoming, the statement of facts is given to the decision-writing branch without a recommendation as to a finding of cause or no cause. The decision is then written in Albuquerque and forwarded to the Commissioners in Washington.

Prior to February 2, 1970,[43] these reports were all checked by the Albuquerque office Director, who would concur or not concur in the recommendation. They would then be sent to Washington where the decision was reviewed by one or more Commissioners. A *final* decision having been reached, letters would be posted from Washington to the charging party, the employer, and the Albuquerque regional office, informing all parties of the decision. This process was cumbersome, however, with a lag of some 18 months between transmittal of the file from Albuquerque and the decision in Washington. At one point, approximately 4,000 cases were piled in the hallways and offices of the E.E.O.C., awaiting decision.[44]

In Autumn, 1969, the decision-writing process was transferred to the field, and the Albuquerque office was divided into three branches: investigations, decision-writing, and conciliations. As a result of this restructuring, two alternatives are now possible. If the decision writer finds that there is no probable cause to believe a violation of Title VII has occurred, the charging party and employer are so notified immediately, and the case is closed. If, on the contrary, probable cause is found, then a meeting is arranged between a conciliator (rarely the same person who conducted the investigation) and the charging party to determine what the latter wants in the way of restitution. Acting as the charging party's agent, the conciliator prepares an agreement. Notably, one of the standard provisions in the agreement specifically states that the respondent denies having violated Title VII. Apparently this clause is inserted merely to assuage the feelings of the respondent, since all other clauses are predicated on the assumption that there is a wrong to be righted. Nevertheless, the proposed agreement is presented to the respondent at a place of the E.E.O.C.'s choosing. The respondent is shown the proposed agreement which often suggests affirmative action to be taken by the respondent which will affect the status of minorities as a group and which will usually contain specific redress for the particular charging party. The matter is then discussed with the E.E.O.C. representative, and specific terms in the agreement are negotiated on an individual and particularized basis.

If the two parties to the conciliation negotiations reach an agreement, the document is signed by both the respondent and the conciliator and is then presented to the charging party for his approval and signature. If the charging party is not satisfied with the resulting

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[43] *See* note 42 *supra.*

[44] In an effort to speed up this process, on February 2, 1970, the E.E.O.C. initiated a "predecision settlement" technique which offers the respondent an opportunity to settle the matter *without* a formal finding of "probable cause." This technique will be used when it is felt the "Statement of Facts" is so conclusive it lends itself to only one possible decision, i.e., against the respondent. If the respondent settles in this manner, he is spared the inconvenience of a formal conciliation process, as well as an official adverse decision.

agreement, he may refuse to sign. Until he does sign, there is no agreement, and further negotiations must then be undertaken in an attempt to bring the parties to accord.

In the alternative, the respondent once having met with the representative of the E.E.O.C. is under no obligation to accept any agreement whatsoever. He may simply refuse to negotiate any settlement without the attachment of any administrative liability, although as mentioned above,[45] the charging party himself may bring civil action.

To ascertain the success of these measures, one can look at the E.E.O.C statistics for fiscal year 1968 to see that of a total of 3,510 completed investigations,[46] 640 were brought to the conciliation stage. This figure presumably means that 2,770, or 82 percent, of the completed investigations resulted in a no probable cause decision. Of the 640 completed conciliations in 1968, 253 cases were regarded as fully successful, 53 were partially successful, and 334 were unsuccessful. Thus only 39 percent of the conciliations were optimally settled. Hence, of the total number of complaints investigated, only 0.9 percent resulted in a successful conciliation.[47]

D. *Implementation: C.C.R.C.*

Since the functions and procedures of the E.E.O.C. have been outlined at some length, the same is not necessary for the state commission. Their procedures are essentially the same although the similarity has only recently been achieved. The story behind the C.C.R.C.'s adoption of the E.E.O.C.'s methods helps to indicate another informal method by which these laws function.

Until August, 1969, the C.C.R.C. methods of investigation were rather loose. The investigator would be assigned to a complaint, and then he would be left to his own devices as to the form of investigation. The result was that the Colorado investigator would "drop in" on the respondent, ask a number of questions, talk to possible witnesses, perhaps look at some documents, and then return to the office to write his report. This report would be rather unstructured and generally based on hearsay evidence. Very few records were copied. Indeed, frequently no mention of records was made at all.

After the report was compiled, recommendation was made to the C.C.R.C. coordinator as to whether a finding of probable cause should be reached; and after the coordinator and the investigator had talked

[45] *See* text accompanying note 23 *supra.*

[46] Of charges falling within the jurisdiction of the Albuquerque office of the E.E.O.C. in fiscal year 1968, 329 were from Colorado. Other states contributed the following amounts: Arizona, 62; New Mexico, 114; Utah, 10; Wyoming, 3. Based on information received from the E.E.O.C.'s regional office in Albuquerque.

[47] No statistics were available from the E.E.O.C. specifically relating to Colorado with regard to conciliations.

things over, a decision was made. The conciliation, conference, hearing or dismissal process was then set in motion.

If all of this sounds somewhat slipshod, it was. Often after a dismissal by the C.C.R.C., the E.E.O.C. would assume jurisdiction of the case and would find clear evidence of discrimination. Further, in cases where there was no discrimination, the E.E.O.C. was unable to determine this from a review of the Colorado file and thus had to duplicate the investigation to reach the same result.

An ideal solution to this problem was proposed and adopted in the spring of 1969. A University of New Mexico law school graduate who had been working for the Albuquerque office of the E.E.O.C. on a part-time basis was selected to coordinate a cooperative effort between the state and federal governments. A budget was set up with E.E.O.C. funds, and the Colorado staff was instructed in the format and techniques that the E.E.O.C. had found useful in the past. Members of the Washington staff were flown into Denver to teach some of these methods, while members of the Albuquerque staff were assigned to accompany the Colorado investigators on actual investigations. Subsequent to these investigations, an informal meeting was held during which E.E.O.C. personnel would make suggestions as to technique and possible areas of improvement.

The end product of this effort has been beneficial to both commissions. Since Colorado now keeps files, complete with documentation, duplicate efforts by the E.E.O.C. are kept to a minimum. On the other hand, through the agreement mentioned above, Colorado now often redefers complaints to the E.E.O.C. for purposes of investigation. Thus, without any cost to the state, the C.C.R.C. has, in effect, more than doubled its staff and freed its own personnel to operate in other areas. The impression received was that the system was working quite well from all points of view, although this procedure was hardly envisioned in either authorizing statute.

E. *Some Conclusions*

It is difficult to reach a conclusion without a hypothesis. Nonetheless, an understanding of the implementation of the laws seeking to achieve equal employment opportunity in the state of Colorado has been achieved from this study. The legislation itself provides a mere skeleton, the bones of which must be covered and given shape by a great number of people. And while the skeleton remains unchanged, the flesh has often been altered and the body has received many transfusions along the way.

What has been attempted is a documentation of the response of two systems of government to a pressing social need. As has been shown, the need has been met thus far by means of a negative response, *i.e.*,

a response to complaints of discrimination after the fact. Nevertheless, it is a start.

Having come to an understanding of the situational context of the legislation and its implementation, the next section of this article studies the reaction to the legislation and its implementation by the two groups affected by it: employers and minority employees. While the results of the questionnaires are certainly not a basis for final conclusions, nonetheless the responses do indicate the difference in perspectives between those who enforce the legislation and those affected by it.[48]

II. Responses to the Questionnaires

The information contained herein analyzes the results of two questionnaires[49] which were mailed to 100 employers and 100 charging parties in Colorado. The necessary names and addresses were obtained through the courtesy of Mr. James Reynolds, Director of the Colorado Civil Rights Commission. The respondents were selected on a random basis from among those names in the C.C.R.C. files for the fiscal year 1969 since many of those persons filing or filed against in the state of Colorado were also involved with the E.E.O.C. in the same action. Further, due to the fact that the E.E.O.C. has traditionally been slow to render decisions,[50] it was felt that an older sample would lend itself to a more useful comparison than a recent sample.

The questionnaires were designed to provide a maximum opportunity for both charging parties and employers to indicate their satisfaction or displeasure with the present legislation and methods of implementation. It was suspected that the responses would be conditioned by the amount of success the respondents had had with their experience.

A. *The Response of Employers*[51]

The results of the questionnaire survey sent to respondent employers elucidated many trends and indications as to the perceived effects of equal employment laws. First, it appeared from the results of the survey that the larger the firm or company, the greater the probability of knowledge concerning equal employment laws. Second, the results indicated that the use by the E.E.O.C. and the C.C.R.C. of a method of surprise inspections to review records and observe company operations was greatly disfavored by employers. The responses indicated that this type of visit was instrumental in creating alienation among the employers toward the governmental commissions. No one wanted nor

[48] *See* note 4 *supra.*

[49] The two questionnaires are set out in the Appendix *infra.*

[50] *See* text accompanying note 44 *supra.*

[51] The data for this section is based on 38 responses. The percentages are based on the total number of responses per question.

liked the idea of a surprise visit; all the companies responding to the survey preferred to be contacted by letter or at least by phone.

A third and most important trend noted was the overwhelming feeling among employers that the investigators and investigations were biased against them.[52] Some respondents felt that they had been placed in a situation where one is guilty until proven innocent;[53] and the survey responses showed that winning or losing a claim with the commissions had no effect on the respondents' feelings with respect to a biased investigation.

A partial explanation of the feeling by employers that the investigations were biased stems from the fact that many of the investigators allegedly went beyond the scope of investigation for a particular complaint, *i.e.,* they "fished around." The employers felt that these activities went outside of the boundaries established by the equal employment laws. The following statement from one employer-respondent summarizes the impressions of most employers: "It was assumed by the investigators that if a complaint was filed, a violation must have occurred even though the company's ethnic balance from laborer through the supervisory level made this a remote possibility."

In addition to feeling that investigations were biased, a number of employers responding to the survey indicated that they were generally not happy with the present legislation and its implementation by the commissioners.[54] Some employers felt that they were doing an adequate job in the area of equal employment, but that other employers were not. A typical reaction from an employer who took this perspective was as follows:

> In our operation we employ all colors including green and purple. The labor supply available to us is guilty of using discrimination as a crutch to not do a satisfactory job, come to work regularly or complete an assigned work load. Our oldest employees are 50% Negroes and we feel that if these people can remain good employees, new employees cannot use discrimination as an excuse for not doing satisfactory work. There are many Denver firms who have no minority type employees at this date and we feel that any campaign should be directed at these persons.

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[52] One employer stated:

> The laws appear to be presumptive in labeling employers' en masse as discriminatory and apathetic. The implementation of bits and pieces of legislation engenders little but negative reaction on the part of employers. The mechanics are vague and emotional, and the structure populated by the inept and biased, generally with no training or professional background, resulting in a gross miscarriage of the intent of the laws.

[53] One employer responded: "I felt the investigators were prejudiced as they were of the same race [as that of the charging party] and because of their questions and general attitudes."

[54] An employer answering the questionnaire replied that:

> There is little or no recognition of good practices or accomplishments with individuals. The present program accentuates the negative, *i.e.,* complaints. There is a great need for good educational programs within this area. Dealing almost wholly with individual problems does not result in examining the whole matter of remedies in depth.

Another point of view expressed by the employers was that while the legislation was acceptable, its implementation was insufficient. Indeed, a majority of employer-respondents felt that the investigations were a waste of time and questioned the usefulness of the whole investigative process. As one respondent indicated: "The basic laws are good but the time factor involved for completing cases and arriving at decisions is too lengthy and very time consuming." As an alternative to the investigation, the employers generally felt that they could accomplish the same results as the commissions by themselves without governmental interference or intrusion. One employer stated that "we feel we are not only working within the meaning and intent of the law but also doing additional things not required by law."

With respect to change or reform of the laws, when the responses of those in favor of abolishing the laws and those in favor of weakening the laws are combined,[55] the trend suggests that a large number of respondents (60 percent) want the present laws changed. Here again, one might speculate that respondent employers either do not understand the problem, do not recognize the problem, or possibly recognize and understand the problem of discrimination but still discriminate. In any event, based upon the survey responses, many employers find the laws acceptable but would *prefer* to have them weakened or abolished.

Further, the laws and concomitant implementation have generally had little effect on hiring policies of employers and attitudes toward minority groups. Even after C.C.R.C. or E.E.O.C. investigations, a majority of respondents (68 percent) indicated that they made no change in hiring policies. Perhaps the most significant response was that 26 percent of the replying employers said that they would *not* hire *any* minority group members, although it should be noted that 47 percent said that they would be willing to hire additional minority workers.

B. *The Response of Minorities*[56]

As previously indicated, no conclusive results with so few minority employee responses can be stated. Nevertheless, it is worthy to note several high percentages in response to some of the questions, indicating, perhaps, that a larger sample would verify the inferences suggested.

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[55] Twenty-five percent of the respondents suggested abolishing the laws. Another 35 percent advocated weakening of the laws. Only 25 percent suggested that the laws be strengthened.

[56] The data for this section is based on 38 responses. The percentages are based on the total number of responses per question.

For example, 88 percent of those who filed complaints knew of the existence of agencies that dealt with job discrimination *before* their problem developed. Most of the complainants became aware of the governmental commissions through their friends, although it should be noted that the media also seemed to play an important part in informing the minorities of their rights.[57] Since a knowledge of the commissions' existence seemed to be directly related to the filing of complaints by minority workers, the inference suggested is that more publicity with respect to the work of the commissions would encourage wider recognition of job discrimination by minority employees and a greater awareness of grievance mechanisms.

Another objective of the questionnaire was to test the differences, if any, in the way minority employees who filed charges were treated by their employers or co-workers after filing complaints. Two-thirds of the sample said that their filing *did* make a difference; but only in one-third of the cases was the difference in treatment unfavorable. Conversely, two-thirds of those who were treated differently seemed to have received generally better treatment from employers and co-workers.

The questionnaire also attempted to measure the attitude of minority employees toward the commissions. The results of this survey indicate that while a majority of those filing complaints with the E.E.O.C. or the C.C.R.C. felt that their problems were understood by those taking the complaints, a significant number of respondents felt that the amount of time necessary for the investigation of complaints was excessive. When asked how long the investigation-decision process *should* take, the majority indicated that it should take about one month. A lesser number opted for one or two weeks. Significantly, none of those answering felt that the process should take longer than one month. Since not infrequently these proceedings take significantly longer,[58] perhaps the investigator should make clear to the charging party the amount of time which might elapse before a decision is made.

Even though some dissatisfaction existed among respondents due to the lengthy investigative process, there were indications that the work of the commissions received support from minority employees. Specifically, *none* of the persons replying to the questionnaire felt that the present laws did not work at all; all respondents thought that the laws worked well or that the laws worked "sometimes." Further, 70 percent of the minority employees responding indicated that they would not hesitate to file another complaint if they were discriminated against in the future.

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[57] The media given as choices to the respondents encluded television, newspapers and the *G.I. Forum*. Friends and relatives made up roughly 50 percent of the group making complainants aware of the commissions' existence.

[58] *See* text accompanying note 44 *supra*.

III. Conclusion

While the results of this study are inconclusive, there are certain inferences suggested by the frequency of responses to particular questions which may be valid. For example, a large number of employers have little or no confidence in the objectivity of the investigative process undertaken by the C.C.R.C. and the E.E.O.C. Many feel that the investigators are biased against employers, a factor which perhaps causes employers to label as invalid the work of the commissions. Further, the results indicate that the majority of the respondent employers want to either weaken or abolish the current laws.

In contrast, most of the minority employees want stronger laws. Yet this attitude does not cause minority workers to negate the work of the commissions; for employees generally have a more supportive attitude toward the present work of the E.E.O.C. and the C.C.R.C. than do the employers, although it should be noted that both employers and employees feel that the present investigation-decision process is too lengthy.

Hence, both employers and employees agree that improvements must be made in the present law although the definition of "improvement" depends upon the point of view, employers viewing "improvement" as a weakening of the laws and employees seeing it as a strengthening of the laws. Therefore, a great deal of the "self-interest" demonstrated by both groups must be overcome if the commissions are to be effective in their efforts to project an objective perspective. Perhaps as the commissions continue their efforts — trying new approaches, techniques, and procedures — a balance can be achieved which will gain at least a modicum of approval from both employers and employees and which will, at the same time, insure that equal employment becomes an accepted reality.

Appendix

Employers' Questionnaire

1. What is the size of your workforce? Over 50____ Under 50____
2. How many complaints, whether justified or not, were filed against you in 1968-1969?____
3. In answering the complaint(s) or in the investigation thereof, did you use the services of an attorney?
   Yes____ No____
   If yes: House counsel____ Firm____ Other____
4. Before your first contact with the Federal or State of Colorado agencies did you have a working knowledge of the equal employment opportunity laws? Yes____ No____

5. How were you initially contacted by the Colorado Civil Rights Commission about the complaint(s)?
   Phone call____ Appointment____
   Letter____ Suprise visit____
6. How were you initially contacted by the E.E.O.C.?
7. How would you wish to be contacted?
8. Do you feel that the investigator from the State Commission was biased in favor of the person who filed the complaint? Yes____ No____
9. Do you feel that the investigator from the E.E.O.C. was biased in favor of the person filing the complaint? Yes____ No____
10. Do you feel that the investigator from either the State or Federal government confined himself to the subject matter of the complaint? State: Yes____ No____ E.E.O.C.: Yes____ No____
11. Do you feel that the investigations were objective?
    State: Yes____ No____ E.E.O.C.: Yes____ No____
12. Did the investigators confine themselves to asking questions or did they look at company records as well?
    State: E.E.O.C.:
    Only asked questions____ Only asked questions____
    Looked at records____ Looked at records____
    Both____ Both____
13. If an employee feels that he has been discriminated against, do you maintain a place, office or person where he can file an in-house, non-union, complaint? Yes____ No____
14. Could you estimate how much money these investigations cost you or your company in terms of lost man/hours, attorney's fees, or other services?
    Negligible____ More than $100____
    More than $50____ More than $500____
    Unable to estimate____ Other____
15. Do you believe that the decisions resulting from these investigations were fair?
    E.E.O.C.: Yes____ No____ State: Yes ____No____
    No decision____
16. Did the person filing a complaint approach any of his supervisors with his problem before filing a complaint with the governmental agencies? Yes____ No____ Don't know____
17. If this person had approached a supervisor, do you think that the matter could have been resolved without government action?
    Yes____ No____ Don't know____

18. Do you think that a worthwhile purpose has been served in the investigation of the complaint?
    A worthwhile purpose was served____
    Not sure____
    The process was a waste of time____

19. Do you think that the present Civil Rights legislation is accomplishing its purpose in this area (to ensure equal employment opportunities regardless of race, color, etc.)?
    Definitely____ Sometimes____
    Not at all____ Don't know____

20. Do you feel that there is a need for this type of legislation in Colorado in the 1970's? Yes____ No____ Don't know____

21. Are the present laws fair to both the employers and to the minority-group employees? Yes____ No____ If no, would you care to explain?

22. If you had the power, would you
    Abolish the present laws____
    Strengthen the laws____
    Weaken the laws____
    Leave the laws as they are____
    Would you care to explain?

23. As a result of the investigation(s) have you made any changes in your personnel or hiring policies?
    Made some changes____
    Made no changes____
    Made substantial changes____
    Would you care to elaborate?

24. Has your experience with the Colorado Civil Rights Commission or the E.E.O.C. changed your attitudes towards the problems of your minority-group employees?

25. Has your experience with the present equal employment opportunity laws changed your attitudes towards the hiring of minority-group employees?
    Wish we could hire more____
    Indifferent____
    Rather not hire any____

26. Thank you for your cooperation. If there is anything you wish to add concerning the existing federal or state legislation or the implementation thereof, please feel free to do so. Your comments will be appreciated.

MINORITY EMPLOYEES' QUESTIONNAIRE

1. Sex: Male____ Female____
2. Age: Under 25____ 25-35____ 36-50____ Over 50____
3. How did you learn about the Colorado Civil Rights Commission?
   Friends____ T.V.____
   Relatives____ Radio____
   Co-workers____ Newspapers____
   Church____ Other (Specify)____
4. Were you encouraged by someone to file a complaint? If so, by whom?
5. How did you learn about the Equal Employment Opportunity Commission?
6. Did you know about these government agencies before you were discriminated against? Yes____ No____
7. How long was it before your problem developed and the time you filed a complaint?
8. About how long was it between the time you filed your complaint and the time you were informed about the decision?
9. Since filing your complaint, have you been treated differently by your co-workers? Yes____ No____
   your employer? Yes____ No____
10. If yo uanswered yes to question 9, in what way have you been treated differently?
    Better treatment____ Hostile treatment____
    Cold shoulder____ Other____
11. During the investigation of your complaint, did your employer or supervisor contact you about your complaint? Yes____ No____
12. Did your employer or supervisor contact you about your complaint *after* the investigation? Yes____ No____ If you answered yes, what did they contact you about?
13. Do you feel that the person who talked to you at the Colorado Civil Rights Commission understood your problem?
    Understood my problem____ Didn't understand____
    Partially understood____
14. Do you feel that the investigator from the Colorado Civil Rights Commission understood the problem? Understood my problem____
    Partially understood____ Didn't understand____
    Not contacted____

15. Do you think that the investigator from the Equal Employment Opportunities Commission understood your problem?
    Understood my problem____ Didn't understand____
    Partially understood____ Not contacted____

16. Do you think that the investigation of your complaint took too long? Yes____ No____

17. How long do you think it should take to investigate a complaint of discrimination and make a decision on it?
    One week____ One month____
    Two weeks____ Longer____

18. Do you think that the filing of a complaint helped you in any way? Yes____ No____ If yes, then how?

19. Do you think that the filing of a complaint has made any difference in the way other minority-group employees are treated where you work?
    Made things better____ Made no difference____
    Made things worse____ Better and worse____
    Could you be specific?

20. Do you think the present anti-discrimination laws work?
    Work well____ Don't work at all____ Work sometimes____

21. If your employer discriminates against you in the future will you file a complaint with the Colorado Civil Rights Commission?
    Yes____ No____ If no, why not?

22. If you had the power to do anything about the present anti-discrimination laws would you
    Strengthen the present laws____
    Weaken the present laws____
    Leave them alone____
    Other (Specific)

23. If there is anything you want to add to this sheet please feel free to do so. When you are through, please return this questionnaire in the envelope provided. Thank you.

Donald Lojek
John Martin
Jake Martinez
Gloria Monroe

COMMENT

CRIMINAL PROCEDURE — GUILTY PLEAS — Voluntariness Where Motivated by Desire to Escape Death Penalty Under Unconstitutional Statutory Scheme. — *Brady v. United States,* 397 U.S. 742 (1970); *Parker v. North Carolina,* 397 U.S. 790 (1970).

EARLY in 1959 Robert Brady was indicted in federal court for kidnapping and for failing to release the victim unharmed in violation of the Federal Kidnapping Act.[1] He faced a maximum penalty of death if the verdict of the jury should so recommend.[2] After his codefendant had confessed and on advice of counsel, Brady entered a plea of guilty. The plea was accepted, but only after the trial judge had twice questioned Brady concerning its voluntariness.[3] Brady was sentenced to 50 years (later reduced to 30 years) imprisonment.

Five years after Brady's conviction, 15 year old Charles Lee Parker was arrested in Roanoke Rapids, North Carolina, for suspicion of burglary. After being questioned, he was placed in a jail cell where he spent the night. The following morning after a short period of questioning, Parker confessed to burglary and rape. He was subsequently indicted for first degree burglary, an offense which carries a mandatory death sentence[4] unless the defendant pleads guilty or the jury recommends mercy.[5] On advice of counsel Parker pled guilty; and, following a series of questions by the trial judge as to its voluntariness,[6] the plea was accepted. Parker was thereupon sentenced to life imprisonment.[7]

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[1] 18 U.S.C. § 1201 (a)(1) (1964).

[2] *Id.* § 1201 (a)(1) to (2) (1964), provides that:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

[3] For a verbatim account of the exchange between Brady and the trial judge, see 397 U.S. at 743-44 n.2.

[4] N.C. GEN. STAT. § 14-52 (1969).

[5] N.C. GEN. STAT. § 15-162.1 (1965):

> In the event [a guilty] plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgement that the defendant be imprisoned for life in the State's prison.

[6] For a verbatim account of the exchange see Parker v. North Carolina, 397 U.S. at 793 n.3 (1970).

[7] *Id.* at 793.

In 1968, doubt was cast on the validity of the guilty pleas of Brady and Parker by the decision in the case of *United States v. Jackson*,[8] in which the Supreme Court invalidated the death penalty provision of the Federal Kidnapping Act on the ground that it imposed an impermissible burden upon the exercise of the Sixth Amendment right to trial by jury and the Fifth Amendment right not to plead guilty. The precise infirmity of the statutory provision considered in *Jackson* was that it immunized from the death sentence those willing to enter a guilty plea and, therefore, "needlessly" encouraged guilty pleas and jury waivers.[9] Relying on only the implications of *Jackson*,[10] Brady and Parker filed petitions in their respective forums seeking post-conviction relief on the ground that their guilty pleas were motivated by a desire to escape the death penalty, a motivation supplied by an impermissible, unconstitutional statutory scheme.[11] Both petitions were denied, Brady's by the lower federal courts[12] and Parker's by the North Carolina state courts.[13] On review, the Supreme Court *held* that neither the record in *Brady* nor in *Parker* revealed any basis for disturbing the judgments of the respective courts below, *i.e.*, that the petitioners' guilty pleas were tendered voluntarily and knowingly and were therefore valid.[14]

I. Guilty Pleas and the Constitution: The State of the Law Prior to Brady and Parker.

It has long been established that a plea of guilty constitutes a waiver of several fundamental constitutional rights[15] and is therefore subject to stringent safeguards.[16] A constitutionally valid guilty plea

[8] 390 U.S. 570 (1968).

[9] *Id.* at 583.

[10] It should be noted that the Court in *Jackson* was faced only with the question of the constitutionality of the death penalty provision of the Federal Kidnapping Act. The Court did not have before it a guilty plea tendered under that act because the defendant's motion to dismiss the indictment on the ground that the statute was unconstitutional had been granted by the district court; no plea was ever entered. Thus, the assumption by Brady and Parker that their guilty pleas were invalid for having been entered under constitutionally infirm statutory schemes was pure speculation and was not directly supported in *Jackson*.

[11] While the North Carolina statute under which Parker had been convicted was not directly affected by the decision in *Jackson*, the effect of the North Carolina statute was the same; and Parker was safe in assuming that it would be invalidated under the principle announced in *Jackson*. Indeed, the statute *was* invalidated on the basis of *Jackson* in *Alford v. North Carolina*, 405 F.2d 340, 345 (4th Cir. 1968), *rev'd on other grounds*, 39 U.S.L.W. 4001 (1970).

[12] Brady v. United States, 404 F.2d 601 (10th Cir. 1968).

[13] Parker v. State, 2 N.C. App. 27, 162 S.E.2d 526 (1968).

[14] Brady v. United States, 397 U.S. 742, 749 (1970); Parker v. North Carolina, 397 U.S. 790, 796 (1970).

[15] *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969): Expressly the right against self-incrimination, trial by jury, and confrontation of witnesses.

[16] *See* Boykin v. Alabama, 395 U.S. 238 (1969); Machibroda v. United States, 368 U.S. 487 (1962); Von Moltke v. Gillies, 332 U.S. 708 (1948); Kercheval v. United States, 274 U.S. 220 (1927).

must be knowingly and voluntarily tendered.[17] Although often discussed under the single generic heading of "voluntariness,"[18] these two requirements are separate and distinct elements, and an infirmity in either serves to vitiate a particular guilty plea.[19]

In order to constitute a "knowing" guilty plea, the defendant must be fully apprised "of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter . . . ."[20] Implicit in such a test is the requirement that the information upon which the defendant relies must not be false or misleading.[21]

The requirement that a guilty plea be entered voluntarily is a more illusive concept. From a philosophical point of view, the concept of voluntariness connotes the free exercise of a person's will; but what constitutes "free will" is open to alternative interpretations. On the one hand, it is possible to proceed from the premise that the mere existence of an extraneous inducement will be sufficient to deprive an act of its voluntariness. Under this view, a guilty plea would be involuntary unless motivated solely by the defendant's sense of guilt and remorse.[22] On the other hand, "free will" can be defined in terms of a rational choice between genuine alternatives.[23] With this interpretation, a guilty plea would be involuntary only when the impact of extraneous inducements is sufficient to cause the defendant to make an

[17] Boykin v. Alabama, 395 U.S. 238, 244 (1969); Machibroda v. United States, 368 U.S. 488, 493 (1962); Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Kercheval v. United States, 274 U.S. 220, 223 (1927).

[18] Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir. 1970).

[19] McCarthy v. United States, 394 U.S. 459, 467 (1962).

[20] Von Moltke v. Gillies, 332 U.S. 708, 724 (1948).

[21] *Id.* at 720. *See generally* Johnson v. Zerbst, 304 U.S. 458 (1938). Pursuant to such reasoning it has been held that a prosecutor's threat to bring charges not permitted by law or warranted by the evidence is tantamount to presenting a defendant with false and misleading information and a guilty plea tendered in reliance thereon is invalid. *Lassiter v. Turner,* 423 F.2d 897, 900 (4th Cir. 1970). Likewise where a prosecutor fails to keep a promise of leniency upon which the defendant relied in tendering his plea, the plea will not be allowed to stand. *Dillon v. United States,* 307 F.2d 445, 449 (9th Cir. 1962). This latter proposition probably has more to do with ethical due process than with the "knowing" requirement, but it is possible to argue that the element of deceit implicit in the broken promise is but another form of false and misleading information.

[22] Fortunately for the administration of justice in the United States, the courts have not embraced this argument; for roughly 90 percent of all convictions in the United States result from guilty pleas (D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (1966)), and most of these pleas are induced by permissible plea bargaining. Thus if the premise that "free will" is negated by the existence of of any extraneous inducement were adopted by the courts, plea bargaining would be inherently coercive, and the administration of justice in the United States would be greatly impaired; *but see* Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea — A Constitutional Examination,* 6 AM. CRIM. L. Q. 187 (1968).

[23] *See* Gilmore v. California, 364 F.2d 916 (9th Cir. 1966); Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963); Note, *The Unconstitutionality of Plea Bargaining,* 83 HARV. L. REV. 1387 (1970).

irrational choice.[24] This second view would require coercion-in-fact to render a guilty plea involuntary.

Judicial practice has drawn upon elements of both theories of voluntariness. For example, courts are often heard to say that it is necessary to look to all the relevant circumstances, *i.e.,* the "totality of factors," to determine whether or not the defendant was in fact coerced.[25] However, the inherent impropriety of a given inducement may compel the conclusion that, irrespective of its actual impact on the defendant's will, the mere presence of the inducement within his decision making milieu is sufficient to render a guilty plea invalid.[26] In other words, such an inducement is deemed to be coercive *per se.*

This dual approach to the problem of voluntariness is illustrated by the response of the lower courts to the decision in *United States v. Jackson.*[27] Prior to *Jackson,* the mere fact that a defendant's decision to plead guilty was motivated by his fear of the death penalty was generally held to be insufficient to render his plea invalid.[28] In the aftermath of *Jackson,* however, the courts were faced with the problem of deciding what effect an *unconstitutional* death penalty provision should have on the validity of a guilty plea made in fear thereof. Given the attitude of the courts toward improper inducements,[29] it might have been expected that the courts would conclude that statutory schemes such as that condemned in *Jackson* are inherently coercive and that all guilty pleas tendered thereunder should be declared invalid. However, inasmuch as express language in *Jackson* forbade such an interpretation,[30] the courts were forced to adopt alternative positions. From the quandary there emerged two distinct patterns.

The Fourth Circuit in the case of *Alford v. North Carolina*[31] opted for a "principal factor" test and held that a prisoner is entitled to relief if he can demonstrate that his plea was primarily the product of the

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[24] Note, *The Unconstitutionality of Plea Bargaining,* 83 HARV. L. REV. 1387, 1398 (1970).

[25] Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954); United States *ex rel.* Brock v. La Vallee, 306 F. Supp. 159, 165 (S.D.N.Y. 1969); McFarland v. United States, 284 F. Supp. 969, 977 (D. Md. 1968); United States v. Colson, 230 F. Supp. 953, 955 (S.D.N.Y. 1964); United States v. Tateo, 214 F. Supp. 560, 565 (S.D.N.Y. 1963).

[26] Euziere v. United States, 249 F.2d 293, 194-95 (10th Cir. 1957); United States v. Tateo, 214 F. Supp. 560, 567 (S.D.N.Y. 1963) [Promises of leniency or threats of harsher punishment by trial judge held to be coercive per se.]

[27] 390 U.S. 570 (1968).

[28] Gilmore v. California, 364 F.2d 916, 918 (9th Cir. 1966); Laboy v. New Jersey, 266 F. Supp. 581, 584 (D.N.J. 1967).

[29] *See* cases cited notes 21 & 26 *supra.*

[30] According to the Court "the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." 390 U.S. at 583.

[31] 405 F.2d 340 (4th Cir. 1968), *rev'd,* 39 U.S.L.W. 4001 (1970).

burdens placed upon him by the unconstitutional statutory scheme.[32] According to the court in *Alford,* when fear of an unconstitutional death penalty provision was the principal motivating factor in the defendant's decision to plead guilty, there is no need for a subjective inquiry into the voluntariness of the plea — the plea is invalid irrespective of whether or not the defendant was capable of making a rational choice.[33]

Other federal courts have refused to assign any special status to the constitutionally infirm death penalty and have continued to apply the subjective "totality of factors" test[34] in an effort to determine whether the defendant's will was actually overborne.[35] This position appears to be more in keeping with the underlying purpose of the *Jackson* rationale which was not to identify inherently coercive inducements and render guilty pleas entered in response thereto invalid, but rather to remove from the defendant's decisionmaking process inducements which needlessly penalize the assertion of constitutional rights.[36] It is this position which is endorsed by the Supreme Court in the instant cases.

II. BRADY AND PARKER: A CLARIFICATION

The Supreme Court's decision in the instant cases[37] essentially reaffirms the traditional "totality of factors" test and, at the same time, redefines in more precise terms what constitutes an involuntary guilty plea.[38] In arriving at its decision, the Court begins by reiterating what it said in *Jackson* concerning the effect of statutory schemes, such as those condemned, on a guilty plea made thereunder. According to the Court in *Brady*: "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not."[39] Thus the Court rejects out of hand the assertion that unconstitutional

[32] *Id.* at 347. For a discussion of the Supreme Court's reaction to the test devised by the Court of Appeals for the Fourth Circuit, see text accompanying notes 47 & 48, *infra.*

[33] Two district court cases which have applied the *Alford* test are *Quillien v. Leeke,* 303 F. Supp. 698 (D.S.C. 1969); *Shaw v. United States,* 299 F. Supp. 824 (S.D. Ga. 1969).

[34] *See* text accompanying note 25 *supra.*

[35] United States *ex rel.* Brock v. La Vallee, 306 F. Supp. 159, 165 (S.D.N.Y. 1969); Pindell v. United States, 296 F. Supp. 751, 753 (D. Conn. 1969); Wilson v. United States, 303 F. Supp. 1139, 1143 (W.D. Va. 1969); McFarland v. United States, 284 F. Supp. 969, 977 (D. Md. 1968).

[36] 390 U.S. 570, 583 (1968).

[37] Since the Court's views on the issue under consideration are more complete in *Brady* than in *Parker,* for purposes of analysis the *Brady* opinion will be used more extensively.

[38] A third case, *McMann v. Richardson,* 397 U.S. 759 (1970), decided on the same day as *Brady* and *Parker* also sheds light on the question of when a guilty plea is valid and when it is not; but inasmuch as it deals with the effect of an allegedly coerced confession on the validity of a guilty plea, it is beyond the scope of this comment.

[39] 397 U.S. 742, 747 (1970).

death penalty provisions are inherently coercive.[40] In so doing, the Court appears to be endorsing a concept of voluntariness which is based entirely on the impact of the inducement in question on the defendant's ability to make a rational choice.[41] In other words, the nature of the inducement has no bearing on the question of voluntariness.[42]

In many respects the Court's holding in these two cases was inevitable. In *Jackson* the Court had invalidated a statutory scheme which was said to encourage, as opposed to coerce, guilty pleas. Because the infirmity was said to be a tendency to encourage, the *Jackson* decision cast grave constitutional doubts on any and all inducements which are calculated to encourage guilty pleas, including the time-honored practice of plea bargaining.[43] If an unconstitutional death penalty provision and the practice of plea bargaining can be said to suffer from the same infirmity, it is clear that if the Court had held that all guilty pleas made in response to the encouragement offered by the unconstitutional statutory scheme are invalid, logic would compel the conclusion that guilty pleas made in response to like encouragement offered by plea bargaining would be equally invalid.

Of course at first glance the Court could have avoided this undesirable result by holding that the statute condemned in *Jackson* was infirm not only because it needlessly encouraged guilty pleas but also because the encouragement involved was the threat of death — a threat which, by its nature, is coercive. By emphasizing the gravity of the threat, the Court could have resolved most of the doubts concerning the constitutionality of plea bargaining without doing violence to its holding in *Jackson*. It would then have been free to invalidate the guilty pleas of Brady and Parker without the fear that its holding would be cited as justification for invalidating guilty pleas made in response to less offensive methods of encouragement. However, the Court would

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[40] As support for this proposition, the Court in *Brady* cites the case of *Laboy v. New Jersey*, 266 F. Supp. 581 (D.N.J. 1967), where a plea of *non vult* under a similar statute was held voluntary even though the defendant was obsessed by the fear of death to the extent of suffering a temporary breakdown. *Id.* at 747.

[41] That this indeed represents the Court's view is illustrated by a revealing passage in the text of the opinion. In rejecting Brady's contention that his plea was involuntary, the Court notes that there was no evidence "that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantage of pleading guilty." 397 U.S. 742, 750 (1970).

[42] Mr. Justice Brennan, in a separate opinion, attacks the Court's position in *Brady* and *Parker* on the ground that it is "totally without precedent." 397 U.S. 790, 800 n.2 (1970). However, as has been previously noted, courts have often considered the impact on the defendant's ability to make rational choices to be the controlling factor in the issue of voluntariness. *See* cases cited in note 23 *supra*. Where the Court's position does differ from that of other courts is in its reluctance to hold that an improper or illicit inducement is inherently coercive.

[43] *See* Note, *supra* note 23 at 1387.

still have been faced with the difficult task of showing how a statutory threat of the death penalty differs in its coercive effect from the plea bargaining situation in which the charges are reduced from first to second degree murder in return for a plea of guilty. Both inducements threaten the death penalty if the defendant goes to trial, and both offer a promise of leniency if he does not. Again logic would compel that if the death penalty provision is inherently coercive, so must be the plea bargaining situation when the threat of the death penalty is involved.

Thus no matter which way the court turned, a holding that a guilty plea is invalid if made within the context of the statutory scheme condemned in *Jackson* would have provided serious grounds for attacking other guilty pleas entered in response to a threat of greater punishment or an offer of leniency. The response of the Court to this dilemma was to revert to the "totality of factors" test[44] and to determine the question of voluntariness on the record.

III. THE IMPLICATIONS OF BRADY AND PARKER

The Court's clear emphasis on the impact (as opposed to the nature) of inducements on the rationality of choice in determining voluntariness is not likely to produce any appreciable change in the prevailing judicial approach to the question of validity of guilty pleas. If the holding is given broad interpretation, it may be that the inherent coerciveness of threats or promises by judges[45] will no longer be recognized, making it necessary to look to the impact of such inducements on the defendant's will to determine whether his ability to make a rational choice was actually overborne. On the other hand, because of the unequal bargaining power of the judge and defendant and because of the need to ensure impartiality, it may be that this apparent exception to the holding in the instant cases will be preserved.

As to unkept promises or threats by prosecutors, the requirement that the defendant be aware of all relevant circumstances, including the range of possible penalties, will serve to ensure that a guilty plea induced by deceit, whether intentional or unintentional, will not be sustained.[46]

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[44] "The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it." 397 U.S. 742, 749 (1970).

[45] *See* cases cited note 26 *supra.*

[46] Courts often hold that such promises or threats are coercive *per se,* but in fact the deception problem speaks to the knowledge requirement and not to the voluntariness requirement. Thus while deception will still have the effect of vitiating a guilty plea made in response thereto, courts will have to frame the infirmity in more precise terms.

CONCLUSION

In striking down the death penalty provision of the Federal Kidnapping Act in *United States v. Jackson,* the Supreme Court clearly manifested its disapproval of statutory schemes — and, by implication, of all official acts — which needlessly encourage the waiver of constitutional rights. What was not directly before the Court in *Jackson,* however, was the question of the validity of guilty pleas induced by such schemes. While it may have been logical to assume prior to *Brady* and *Parker* that had the *Jackson* Court been confronted with this question it would have opted for invalidity, the decisions in those cases expressly reject such a conclusion. Indeed, the decisions in *Brady* and *Parker* do not in any way affect the continued viability of *Jackson.* In *Brady* and *Parker* the Court merely answers the question left open in *Jackson* regarding the validity of guilty pleas tendered within the context of a constitutionally infirm statutory scheme.

By deciding the validity issue in *Brady* and *Parker* in terms of the "totality of factors" test, the Court has to a considerable extent clarified the concept of voluntariness: Only when an extraneous inducement, whether proper or *improper,* has the effect of rendering a defendant incapable of exercising rational choice will a guilty plea fail for involuntariness. This differs considerably from the "primary factor" test expounded by the Fourth Circuit in *Alford v. North Carolina*[47] and endorsed by the concurring and dissenting justices in the instant cases.[48] The primary difference between the two positions is one of emphasis. While both pay homage to some sort of "factors" test, the tack taken in *Alford* was to give conclusive weight to illicit inducements. Thus the emphasis there was on the nature of the inducement while the emphasis in the instant cases is on the impact of the inducement.

The Supreme Court recently had occasion to review the decision in *Alford,* and in so doing it expressly rejected the reasoning of the Court of Appeals for the Fourth Circuit.[49] Relying on its decision in *Brady,* the Court held that the standard for determining the validity of guilty pleas "remains, [sic] whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice

[47] 405 F.2d 340, 347 (4th Cir. 1968), *rev'd* 39 U.S.L.W. 4001 (1970).

[48] 397 U.S. 790, 808 (1970) wherein Mr. Justice Brennan stated: "If a particular defendant can demonstrate that the death penalty scheme exercised a significant influence upon his decision to plead guilty, then, under *Jackson,* he is entitled to reversal of the conviction based upon his illicitly produced plea."

[49] North Carolina v. Alford, 39 U.S.L.W. 4001, 4002 (1970).

. . . ."[50] Thus, the Supreme Court in *Alford* clearly reaffirmed the principles announced in *Brady* and *Parker* and left little doubt as to what constitutes the proper test for determining the validity of guilty pleas.

Despite its clarity of statement, the test endorsed by the Court in *Brady* and *Parker* is limited by the obvious difficulty of quantifying the impact of the various inducements so as to be able to ascertain whether or not a particular defendant was rendered incapable of rational choice. Perhaps as the lower courts begin to apply the test, the mechanics of application will come into more precise focus.[51]

[50] *Id.* at 4002. It should be noted that a factual variation in *Alford* raised an additional issue apart from the question of the voluntariness of Alford's plea. It seems that after his guilty plea had been tendered but before it had been accepted, Alford denied he had committed the murder for which he had been charged. Nevertheless he reaffirmed his desire to plead guilty in order to avoid a possible death sentence. In spite of Alford's protestations of innocence, the trial court, after considering the strength of the State's case, accepted his plea and sentenced him to 30 years imprisonment. Thus, on review the Supreme Court was faced with the issue of whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. In deciding this issue, the Court referred to language in *Brady* which in that context unequivocally stated that admission of guilt by the defendant is "[c]entral to the plea and is the foundation for entering judgment . . . ." 397 U.S. 742, 748. In an obvious attempt to get around what would otherwise be troublesome language, the Court in *Alford* qualifies the statement in *Brady* by stating that admission of guilt is *normally* central to the plea. 39 U.S.L.W. 4001, 4003 (1970). Having surmounted this obstacle, the Court then proceeds to hold that "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Id.* at 4004. Furthermore, a trial judge who accepts a plea which is accompanied by protestations of innocence does not commit constitutional error so long as he has reason to believe that there is a factual basis for the plea. *Id.*

[51] It should be noted that two recent cases decided by the Supreme Court ameliorate to some extent the magnitude of this problem. In *McCarthy v. United States,* 394 U.S. 459 (1969), the Court held that the trial court, before acepting a guilty plea, must comply with the provisions of Rule 11 of the Federal Rules of Civil Procedure and satisfy itself as to the voluntariness, intelligence, and factual basis of the plea. *Id.* at 467. Where this requirement is met the appellate courts will not disturb the judgment of the trial court unless there is a clear abuse of discretion. *Id.* at 470. In *Boykin v. Alabama,* 395 U.S. 238 (1969), this requirement was extended to state courts. *Id.* at 243. Thus at least as to guilty pleas made after *McCarthy* and *Boykin* the appellate courts will seldom have to undertake the task of ascertaining from the record the impact of any particular inducement on the defendant's freedom of choice.

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