For some time now there has been an agitation for loosening of the statutory bans on criminal abortion. Many respected and influential voices have been raised in support of this movement but there is no indication that it has originated in any ground swell of discontent with the existing laws. Unlike the penal code lifted out of Exodus in the Connecticut Blue Laws,1 the abortion laws of the states generally were adopted in a moderate first form and, for the most part, have had no substantial amendment except to tighten them. The relevant sections of the Model Penal Code, tentatively approved by the American Law Institute in 1959, are a violent departure from all existing laws.

Section 207.11. Abortion and Related Offenses.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if:

(a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape by force or its equivalent as defined in Section 207.4(1) or from incest as defined in Section 207.3; and

* This is the first installment of a two-part article; the second part will appear in the spring issue.

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(b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the licensed hospital where it was to be performed, or in such other place as may be designated by law.

Justification of abortion is an affirmative defense.2

Enactment of this section, so different in form from existing laws and employing terms new to the law of abortion, would build up a large body of case law, if only by way of definition.

The full content and implications of this proposed statute are startling; its undeclared purpose, or that of its framers, is even more so. To make possible an appraisal of the whole argument offered for its adoption, it will be necessary not merely to analyze section 207.11 and to compare it with existing abortion laws, but also to trace the history of such legislation, to consider the status of abortion as a common-law crime, to look at the biological concepts which gave it definite form in the common law, as well as the Aristotelian philosophy and Christian moral concepts which inspired them. We shall look for evidence of a Natural Law against abortion in the laws and common thought of peoples who have gone before us, so that we may determine whether the proponents of the new law are correct in saying that the only opposition to induced abortion is that of dogmatic religion and a population minority.3 In doing so we will glance at the Roman Law of Rome and the Roman Law of the Code, and the development of the Canon Law which grew up in its shadow. We will see that none of the modern legislation in the United States and England can be traced to any political influence of the Catholic Church but that on the contrary much of it was the product of a political system in which members of that church were allowed no part.

To make such a review possible we have found it necessary to bring together in their present form the existing abortion laws of all the States and of England and the text of the initial legislation in each.4

I

The first word which stands out in section 207.11 is "justified." Existing abortion statutes, as will be seen hereafter, commonly use a negative in dealing with the protection of the life of the mother: the statute shall

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2 Model Penal Code § 207.11(1), (2) (Tent. Draft No. 9, 1959).
3 Model Penal Code § 207.11, comment (Tent. Draft No. 9, 1959).
4 Discussion of the legislative background of the abortion laws as well as a collection of such statutes will appear in Part Two.
not apply if, the act shall be punished unless, and so on. Here, however, we have a declaration in positive terms. The circumstances set out will justify the act, but *justify* is not defined.

We may assume that the term is not used in the early sense, preserved in Scottish law, to punish by death, or arbitrarily. Certainly the definition of the Council of Trent would not be applied in an American statute, but the meaning assigned by the Reformers might be: "Justification is thus a forensic term. . . . To justify, signifies not to make the offender righteous, but to treat him as if he were righteous, to deliver him from the accusation of the law by the bestowal of a pardon." As we still have pleas in justification, a judicial definition under this (proposed) statute would more probably be a showing of facts exculpating or furnishing adequate grounds for what one has done.

However, a new, uniform penal statute will be far more widely read than any of its predecessor laws. Most important, it will at once become required reading for medical practitioners and students who, like the doctors' patients, will hardly recognize "justified" as a legal term of art, but can be expected to take it in what has become its most common sense, i.e., to show an action to be just, reasonable and righteous. We cannot shut our eyes to the fact that Americans today are looking more and more to Government to define right and wrong for them. One who reads the mass of quotations hereinafter collected from representative medical writers must be impressed by the frequency with which medical writers and practitioners withhold approval of some abortions, only because not authorized by existing laws. These laws, while withholding their operation from therapeutic abortions (in varying degrees), do not commit any state to an ethical judgment upon them. There are many considerations which do, and should, restrain the state from undertaking to punish by penal law various offenses against commonly recognized morality.

Another term which is not defined is "grave" or "gravely." There would be an extremely wide range of definition by medical men, and we could scarcely expect that all, or even most, state courts would find and adopt the sense intended by the architects of the Model Penal Code.

More than one conservative legislature sought to hold divorce in check by authorizing decrees only in cases of proved adultery or of persistent physical abuse by husbands. The latter was meant to be ground for a

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decrease when it was shown that such cruelty was habitual and had been made a part of the couple's manner of life. An apt term to describe it was the adjective "repeated"—happening again and again indefinitely. The state courts quickly decided that they preferred to make it a participle in the phrase "extreme and repeated cruelty," so that the second cruel act was "repeated cruelty" and ground for divorce.

What would "gravely" impair health? What would be a "grave" physical or mental defect? The Oxford Dictionary says: "Of diseases or symptoms, threatening a fatal result, serious."8 The Century makes it "weighty, important."9 Webster is substantially the same.10 By the most commonly used medical dictionary it is made only "severe or serious."11 Obviously the proposed statute would give remarkable leeway to the judgment of the individual medic.

Donnelly has emphasized the increasing tendency to include as valid indications such reasons as any threat to the general health of the mother or a remote threat to the life of the mother. It has been said with a certain element of truth that any pregnancy actually could be considered as a threat to the mother's health or life or both; hence, it is easy to see how rationalization can be over-used and how physicians may vary widely in their opinion.12

"Health" is defined by Dorland as "a normal condition of body and mind, i.e., with all the parts functioning normally"; but "normal" is defined only as "agreeing with the regular and established type."13 Oxford defines health as "soundness of body; that condition in which its functions are duly discharged"14 and "normal" as regular, usual. Webster makes health the state of being hale or sound in body, mind or soul, especially freedom from physical disease or pain.15 But when we come to "mental health" and, more emphatically, "mental defect" (congenital), we are really lost. Until legislature or court decides in favor of analyst or of organicist, there can be no authoritative definition, and every individual practitioner will be left to define for himself.

9 2 Century, op. cit. supra note 7, at 680.
10 2 Webster's New International Dictionary of the English Language 1095 (2d ed. 1958).
13 Dorland, op. cit. supra note 11, at 645, 995.
14 1 Oxford, op. cit. supra note 8, at 878.
15 2 Webster's, op. cit. supra note 10, at 1150.
II

The foregoing objections to undefined terms could probably be met by reshaping the language of the section. We should now like to consider more fundamental ones.

The American medical profession is a distinguished one. In spite of occasional errors and lapses it has held to its lofty traditions remarkably well—better perhaps than the legal profession. It has worked hard to repress quacks and criminal abortionists, and in general to separate the sheep from the goats. But the goats, unable to get admission to any medical society, can still pass qualifying examinations, obtain and keep state licenses to practice medicine so long as they avoid successful prosecution for any misconduct giving ground for revocation of license.

The Model Code makes no distinction between these two groups, and probably no legislature could do so. A Chicago quack, who could have made his mark in legitimate practice, but not as large an income, was for years a target of the decent profession; but he beat every effort to revoke his license and died several years ago in control of the biggest medical office in Chicago. He and others of his type would be given the same authority to do therapeutic abortions as the most respected leader of the profession. They could supply all the signatures asked for any statements to be filed. They have access to licensed hospitals, some of them well equipped. They would not even have to examine the patient who came to them for an abortion, since the Model Code does not require that the certificate filed state any ground for the belief in the justifying circumstances. One charged with a capital offense must be indicted, the indictment tested for sufficiency, an attorney provided for any defendant who cannot hire his own, time given for preparation of defense, must confront his accusers, have an open trial and a record made. The child in the womb, against whom no charge is made, is given no defender, no time, no hearing, no specifications to support the demand for his destruction. And the appeal, given as of right by most constitutions? Under section 207.11(2)(b), the unborn child could have no appeal even could he in some way have a recognized defender because there would be no record—no allegations and findings—to review.

There have always been evils from which men recoiled because they felt them to be evil and on consideration thought them to be evil, and which human communities have sought to prevent by penal laws, because their effect on the community was thought to be bad. There have always been and always will be violations of all these laws. There will always be murders, thefts, and other crimes known from the early
days of man. It is reasonable to expect that there will always be abortions, even though in some times and places they seem not to have been a problem and even though their frequency may again recede.

Protecting the life of the unborn child has been a major concern of the earliest laws known to us. It has continued to be an object of law-making in every subsequent civilization which has contributed to our own because it springs from a universal feeling which in the past has ceased to move men only when a nation was in decay.

The mere fact that a thing is wrong does not require legislation to ban and punish it. Various considerations could make initiation of such laws unwise. Repeal of existing laws is another matter. When the common judgment of moral laws and of the welfare of the social and political community have been embodied in penal statutes which have over the years proved their place in the popular consciousness by judicial interpretation, re-enactments, codification, amendments to clarify, strengthen and improve procedurally, the moral judgment becomes identified with the statutes. In that situation repeal takes on the character of a vindication of the acts which had previously been condemned. Today far too many look to the statute as their moral determinant; the morality of an act is determined by Government and moral laws are recognized only as embodied in penal codes. And the remarks of medical writers over the last century (as quoted hereinafter) show convincingly that a vocal part of the medical profession has been thinking in the same terms—in terms of the statutory ban alone, and making no further inquiry into moral values.

The earliest English writer on medical jurisprudence, in his lectures under the Acts of 1803, 1822, 1828 and 1837, would have no truck with any induced abortion. After the enactment of the Offences against the Person Act of 1861, his reprobation was contracted to the terms of the statute, and he was ready to urge further loosening of the legal restrictions.

Many medical practitioners, as shown by statements of Dr. Alan Guttmacher and others in this country, and Dr. Bourne in England

16 Taylor, Medical Jurisprudence 594 (1844).
17 24 & 25 Vict., c. 100.
20 The King v. Bourne, [1939] 1 K.B. 687 (1938). This case will be discussed in Part Two of this article.
openly perform what they consider therapeutic abortions according to their own judgment, in violation of existing statutes.

No profession is a guarantee of character. One who is ruthless, mercenary and dishonest will be ruthless, mercenary and dishonest whether he makes his profession medicine or law or physics or embezzlement. He can be counted on to exploit fully any weakening in law enforcement effected by honest and able medical men who step out of their character as medical men to work social justice in individual cases.

In commenting on the terminology of section 207.11 we made no reference to the phrase “substantial risk.” The reason is that, somewhat like the therapeutic abortionist, we can see no cure but excision.

Would the determination of substantial risk be made on a statistical basis? If so, what percentage of mortality and morbidity would establish substantial risk? The obstetrician does not abort statistics, but a living fetus. No statistics in medicine are complete or really integrated. Figures for a specific area over a specific period of time, especially if based on uniformly correct methods of observation and reporting, can give us averages which will have value for a variety of purposes. But an average is not an individual human being. If statistics showed that an average of 99 in every 100 died of a certain condition, it would not mean that the chances of living were 99 to 1 against any particular one of those patients.

A patient’s doctor may benefit by familiarity with the available statistics, which may serve as an alert and move him to special preparations, but each doctor must determine from his own study of his own patient whether his patient will be the one survivor or one of the 99 if the averages remain unchanged. If his observation suggests a poor prognosis if pregnancy be continued, just how poor must it be to create a “substantial risk”? Neither the Model Penal Code nor any professional code fixes any standard—it is all left to the individual judgment of two men, who may have no judgment at all, or no experience with the complication on which a therapeutic abortion would be based.

The two physicians required to file their opinion are not required to be specialists; the Code does not even specify an obstetrician; and it contains not even a suggestion that one be a qualified internist or one with any knowledge or experience in the complicating disease or condition, although the complication is the heart of the matter.

Section 207.11(2)(a), in addition to authorizing induced abortion to protect the mother—the only “therapeutic abortion”—goes on to provide
for legal abortion to avoid risk of a defective infant, a eugenic consideration; and to abort any fetus or embryo resulting from rape, a social consideration; or from incest, a combination of social and eugenic considerations. None of these could constitute a medical indication for abortion, but some medical literature has a bearing on them. They will be considered hereafter, but first we should like to discuss the basic medical element and Therapeutic Abortion (hereinafter designated as TA).

When a permission to procure an abortion or to destroy fetal life is stated or implied in an American statute, it is invariably based upon a supposed medical necessity. It would be reasonable then to expect that a movement to facilitate TA would bespeak a growing demand by the medical profession—a general demand for more general use of such therapy in the complications of pregnancy already recognized as medical “indications” for emptying the womb, or for recognition of new medical indications. We find on the contrary that medical opinion is ever more sceptical, more critical of the therapy of abortion and embryotomy.

III

In 1860 Pennsylvania enacted its first statute defining and punishing abortion.21 Its terms followed closely those of the British Act of July 17, 1837.22 At that time Hugh L. Hodge, M.D., had been giving a course of lectures at the University of Pennsylvania in which he declared the idea of induced abortion to be unthinkable for decent medical men; he made a single exception, in the case of a contracted pelvis making a normal delivery impossible.23 These lectures were reprinted a number of times, as late as 1872. In 1844 Alfred S. Taylor, M.D., published in London his Medical Jurisprudence, in which his views on abortion seemed very similar to those of Dr. Hodge. In 1865, after passage of the Offences against the Person Act of 1861,24 he published The Principles and Practice of Medical Jurisprudence. He then declared that the use of the word “unlawfully” in the Act of 1861 impliedly authorized abortion to save the life or health of the mother. He never was able to support this contention by any authority.25

22 7 Will. 4 & 1 Vict., c. 85, § 6.
23 Foeticide, or Criminal Abortion: A Lecture Introductory to the Course on Obstetrics (4th ed. 1872); Principles and Practice of Obstetrics 301 (1864).
24 24 & 25 Vict., c. 100.
The artificial interruption of pregnancy because of anatomical impediments to normal delivery was early supplanted by Caesarean section. So, the first "indication" to obtain respectable support in modern times was also the first abandoned. Meanwhile, however, German medical men were asserting their right to induce abortions whenever they thought it necessary for the protection of the mother's life. Specifically, they declared that a surgical emptying of the womb in advance of viability was "indicated" in a list of complicated ailments which had grown by the turn of the century to include all tuberculosis, and heart and kidney defects. That was a period of strong German influence on American medicine, and reputable medical men in this country began to speak and write of TA as indicated by every complication of pregnancy, and then by ailments having no direct relation to pregnancy, which could be thought of as endangering the life of the mother.

As a lawyer, and not a physician, I shall confine myself to calling medical writers as witnesses. Explanation of certain terms repeatedly used by them may be of help to the average reader. *Expectant treatment* is essentially waiting and watching. *Conservative* means directed at preserving. *Parity* has no relation to equality but indicates a woman's status as to pregnancies: one never pregnant is nullipara, one who has had a number of pregnancies multipara, or specifically para-2, para-3 et cetera. *Trimester*, for a period of 3 months, is not a medical term but seems to be used chiefly by medical men.

The pregnant woman may suffer from any of the diseases which might be contracted by the nonpregnant, but the effect on her may not be the same. There are other ailments peculiar to pregnancy: ectopic pregnancy, hydatidiform mole (rapid growth fills uterus), (poly-) hydramnios (accumulation of amniotic fluid), and hyperemesis gravidarum (excessive vomiting); abruptio placentae (premature separation), placenta praevia (blocking the outlet from the uterus); preeclampsia, eclampsia, toxemias and hemorrhages peculiar to pregnancy, with uncertain elements as to their cause and relationship.

The first edition of Williams' *Obstetrics* appeared in 1903. It listed the recognized indications for TA as follows:

Hydropsis Gravidarum "is the best recognized";
Chorea of grave type;

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26 Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 278 (1936).
* Appended to this article is a Glossary containing the more frequently used medical terms.
27 Williams, Obstetrics 338-45 (1st ed. 1903).
(Cardiac lesions may call for premature labor);
Early Hemorrhage, if not followed by expulsion of ovum;
Late Hemorrhage, most often due to Placenta Praevia; to be done at once;
Acute Nephritis not responding to treatment, regardless of fetus;
Toxemia not responding to treatment, regardless of fetus;
Infected Uterus, from an incomplete abortion;
Hydramnios, always; urgent;
Placenta Praevia, as soon as diagnosis certain;
Hydatidiform Mole (occasional) to be done at once regardless of pregnancy;
Diabetes, if condition is alarming, as pregnancy sometimes had bad effect on
Diabetes;
Infected Uterus, from an incomplete abortion;
Hydramnios, always; urgent;
Placenta Praevia, as soon as diagnosis certain;
Hydatidiform Mole (occasional) to be done at once regardless of pregnancy;
Diabetes, if condition is alarming, as pregnancy sometimes had bad effect on
Diabetes;
Carcinoma of Cervix;
Uterine Myomata.
(Eclampsia considered only as a danger of final months, and as calling for accouchement forcé, not TA; Pernicious Anemia and Leukemia occasionally call for induction of premature labor);
(Neither Contracted Pelvis nor Incarceration of Retroflexed Uterus is now recognized as an indication).

This list does not include tuberculosis. Ten years later DeLee first published his textbook. He commented on the improvement in general therapy and the lessening occasions for TA, then listed the indications given by Williams, with the exception of diabetes and placenta praevia (listed by DeLee as reasons for premature labor) and tumors and uterine infection. He added tuberculosis and toxic goiter; and he made leukemia and pernicious anemia indications for TA instead of for premature labor only—an important change since premature labor means a viable infant. In general terms he added "other diseases" jeopardizing the mother.

Ten or fifteen years later, we are told in a much cited report, the commonly used indications for TA included hyperemesis, chorea and other nervous disorders, heart disease in general, nephritis, diabetes, cancer and other neoplasms, anemias, thyroid disfunction and tuberculosis, and also hypertension, myasthenia gravis and psychiatric conditions.

Taussig tabulated a number of German, Italian and Czech reports for the period from 1917 to 1925, to show TA in 507 cases, divided among Tuberculosis (268), Heart (82), Kidney (36), Nervous and Mental (36), Hyperemesis (9), and other indications (76).  

30 Taussig, op. cit. supra note 26, at 282.
Thirty years ago Professor E. Cova declared in the principal address to the Italian Congress of Obstetrics and Gynecology meeting in Milan, that the recognized indications for TA had been greatly reduced, but that any use of it represented a failure of medical science. He urged all possible effort towards its early complete abandonment.\(^\text{31}\)

But Taussig expanded the earlier lists, extending them to diseases, systemic and of various organs, such as the liver, which had seldom been thought of as having any relation to pregnancy;\(^\text{32}\) and in the 1940's, according to a report cited by Te Linde, the New York Lying-In Hospital listed 44 separate indications.\(^\text{33}\)

In 1931 the Margaret Hague Maternity Hospital had opened in Jersey City as one of America's great hospitals. Dr. S. A. Cosgrove, head of Obstetrics at Columbia University, was medical director from its opening until a few years ago. He had 1 TA among the first 4,000 deliveries. When he reported this, other hospitals were doing from 1 in 600 to 1 in 100. His report jolted the medical profession into serious inquiry and resulted in abandonment of many of the indications accepted up to that time.

Greenhill in his 1951 revision of DeLee reduces the original DeLee list: "Therapeutic abortion is rarely indicated and medical therapy has improved so much that few affections justify its performance. The following are considered indications" for TA: (1) hyperemesis, with hepatic and renal involvement; (2) advanced TB (rarely); (3) heart disease (rarely); (4) disease of kidneys; (5) German measles; (6) record of previous erythroblastotic babies, if husband homozygous; (7) some neurologic disorders such as Huntington's Chorea; (8) nervous diseases such as multiple sclerosis (rarely); (9) diseases of ovum, such as hydatidiform mole.\(^\text{34}\)

He also declares however: "There is hardly any condition affecting the pregnant woman that may not be an indication for emptying the uterus."\(^\text{35}\)

Others were drastically reducing the list of indications, chiefly by confining more general ones to rare forms, to rare occasions, to special conditions, syndromes et cetera.\(^\text{36}\)

\(^{31}\) Address at Congress of Societa Italiana di Ostetricia e Ginecologia, Milan, Jan. 30, 1932, as reported in 98 J.A.M.A. 1393 (1932).

\(^{32}\) Taussig, op. cit. supra note 26, at 292-307.

\(^{33}\) Te Linde, Operative Gynecology 477-78 (1946).


\(^{35}\) Id. at 972.

\(^{36}\) Heffernan and Lynch, supra note 29.
Meanwhile the Hague Maternity Hospital was delivering over 100,000 babies, with only 8 TA, and had abandoned the use of TA entirely in 1939. Its influence was being felt. In 1951 Dr. R. J. Heffernan, of Tufts, had declared to the Congress of the American College of Surgeons: "Anyone who performs a therapeutic abortion is either ignorant of modern medical methods of treating the complications of pregnancy or is unwilling to take the time to use them."37 And in a recent conversation with the author Dr. Heffernan reiterated this view with renewed emphasis.

One writer after another testified to the need for more serious inquiry as to the recognized indications, and one after another of the indications began to disappear from the lists: "In conclusion, our experience at the University of Virginia Hospital, a general hospital of 600 beds, is that there are a certain number of pregnant women who must be aborted. The major proportion of these will have renal disease. Persons with cardiac disease and tuberculosis can now be carried through to term by means of skillful handling. Neuropsychiatric disease is not necessarily an indication . . . ."38

Eastman's revision in 1956 of the Williams Obstetrics listed the best established indications for TA: rheumatic heart disease with a history of previous decompensation; advanced hypertensive vascular disease; and carcinoma of the cervix. "Other indications are more debatable."39

Willson in 1958 approves TA only in extreme cases of chronic hypertension, cancer requiring hysterectomy, degenerative changes from diabetes, and certain conditions in tuberculosis and heart disease which appear to be non-medical.40

At an early date we find this broad statement:

Thus we may think it our duty to induce an abortion: (1) as a direct means of saving the life of the mother; (2) to do away with a condition which may threaten her life if gestation continues; and (3) to avoid certain dangers which may supervene if pregnancy is allowed to progress to full term.41

This seems hardly to accord with Hippocratic tradition. However, it does not seem to have had any immediate effect, at least on the utterances of other writers.

Any real understanding of the changing practice as to TA requires

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37 As reported, id. at 24.
38 Wilson, The Abortion Problem in the General Hospital, in Rosen, Therapeutic Abortion 189, 197 (1954).
40 Willson, Beecham, Forman and Carrington, Obstetrics and Gynecology 165 (1958).
41 Williams, Obstetrics 338 (1st ed. 1903).
consideration of the work and the writings on the individual indications which have at different times been recognized by the medical profession generally or by groups within it. We will take them up, roughly, in the order of their importance in the past, tracing in each instance the development of medical thought by noting, in text, both the writer and the period in which he wrote.

1. Tuberculosis

While labor should never be prematurely induced on the mother's account, in some cases it should be induced to save the child before the death of the mother.\textsuperscript{42} Williams, 1903.

Taussig says a group of German, Italian and Czech reports from 1917 to 1925 show 496 TA, of which 268 were for TB: "The most significant indication for therapeutic abortion in point of frequency, is tuberculosis of the lungs. The common observation that a tubercular process grew markedly worse in the course of a pregnancy . . . led, at the beginning of the century, to the almost unanimous opinion that patients who showed any evidence of tuberculosis . . . should be aborted without fail at the earliest possible moment. In the last three decades, however, more careful observations . . . have greatly modified this viewpoint.

"The gradual limitation of indications for interference has been partly the result of more accurate methods of diagnosis, partly due to improved methods of treatment, . . . and partly the outcome of a more careful follow-up of cases after abortion and after full-term pregnancy pointing to the questionable value of interference in many cases."\textsuperscript{43} Taussig, 1936.

"In fact the question of therapeutic abortion in tuberculosis of the lungs is intimately bound up with the social-economic status of the patient. In a poorly nourished woman with a large family, we must regard the saving of fetal life with less concern than in the woman who can and will carry out sanatorium treatment for the required period of time during and after her pregnancy, and for whom the saving of the child is a matter of great concern. . . . To summarize, then, it would seem reasonably certain that: (1) Pregnancy has an unfavorable effect on tuberculosis. (2) Latent tuberculosis does not justify interruption. (3) Active or progressive tuberculosis is an indication for interference. (4)

\textsuperscript{42} Id. at 344.

\textsuperscript{43} Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 292-93 (1936).
Therapeutic abortion, in two-thirds or more of these cases, will diminish the harmful effects of the pregnancy on the tubercular process."\textsuperscript{44} Taussig, 1936.

TA is indicated in some cases.\textsuperscript{45} Williams, ed. Stander, 1941.

"[I]f the patient with active tuberculosis becomes pregnant, abortion is not indicated; proper care will enable the patient to go through her pregnancy unharmed."\textsuperscript{46} DeLee, ed. Greenhill, 1943.

"When pregnancy gives evidence of activating the tuberculosis, therapeutic abortion is to be advised."\textsuperscript{47} Osler, ed. Christian, 1944.

"During the past decade there has been a definite swing to conservatism in the consideration of abortion in tuberculosis."\textsuperscript{48} Te Linde, 1946.

"If it [abortion] is to have any scientific justification, evidence must be sought showing that in general the harmful effects are avoided if the pregnancy is being interrupted. A study of the literature will soon convince any impartial person that no such evidence exists."\textsuperscript{49} Jacobs, 1946.

Recognized indications for TA: "(1) Tuberculosis—A most vehement controversy centers over tuberculosis as an indication for therapeutic abortion."\textsuperscript{50} Perlmutter, 1947.

In a group of tubercular mothers studied, mortality for those who went full term was 19.2%; that for those aborted in the first trimester was 38.5%.\textsuperscript{51} Barone, 1947.

"The preponderance of evidence indicates that pregnancy exerts no harmful effect on the course of tuberculosis and that abortion is of no therapeutic value."\textsuperscript{52} Bowles & Domzalski, 1949.

At Hague Maternity 128 tuberculosis cases showed no evidence that

\textsuperscript{44} Id. at 296-97. (Emphasis added.)

\textsuperscript{45} Williams, Obstetrics 1113 (8th ed. Stander 1941).


\textsuperscript{48} Te Linde, Operative Gynecology 478 (1946).


\textsuperscript{50} Perlmutter, Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945, 53 Am. J. Obst. & Gynec. 1008, 1012 (1947).

\textsuperscript{51} Barone, Fino and Hetherington, Pregnancy Complicating Tuberculosis, 54 Am. J. Obst. & Gynec. 475, 487 (1947).

\textsuperscript{52} Bowles and Domzalski, Changing Indications for Therapeutic Abortion in Pulmonary Tuberculosis, 9 Hawaiian Med. J. 17, 21 (1949).
pregnancy had any deleterious effect.\textsuperscript{53} Kruger, Cosgrove & Cosgrove, 1951.

A common indication around 1922-1927; discredited by elaborate studies 1930-1943.\textsuperscript{54} Heffernan & Lynch, 1952.

Study of 63 tuberculosis cases showed those who had TA to have a higher mortality than those going on to normal delivery.\textsuperscript{55} Schaefer & Epstein, 1952.

Of all (283) TA at Los Angeles County Hospital, 1931-1945, 61.5\% were for tuberculosis. Of 295 TA at Los Angeles County Hospital, 1931-1950, 59.5\% were for tuberculosis; but only 2 of the 12 TA done from 1946 to 1950 were for tuberculosis.\textsuperscript{56} Russell, 1953.

"As for pulmonary tuberculosis, countless recent studies demonstrate that pregnancy per se does not affect this disease process and as a consequence interruption of pregnancy on this account has been declining for some time. The development of thoracic surgery and antibiotic medication is giving this conservative trend additional impetus."\textsuperscript{57} Eastman, 1954.

"Even before the advent of the 'miracle drugs', the practice of allowing pregnancy to continue in women with pulmonary tuberculosis had become general. It had been determined that if the tuberculous pregnant woman was treated like the non-pregnant, with pneumothorax or even surgery if indicated, she did well. Therapeutic abortion was considered only for patients less than twelve weeks pregnant, with very active lesions. Since the introduction of streptomycin, para-amino salicylic acid and isoniazid, many of the very active, early cases will also be allowed to continue pregnancy. Today, tuberculosis only rarely necessitates abortion."\textsuperscript{58} Guttmacher, 1954.

"Advanced tuberculosis in the early months which does not respond

\textsuperscript{54} Heffernan and Lynch, Is Therapeutic Abortion Scientifically Justified?, 19 Linacre Q. 11, 13 (1952).
\textsuperscript{55} Schaefer and Epstein, Results Following Therapeutic Abortion in Pulmonary Tuberculosis, 63 Am. J. Obst. & Gynec. 129 (1952).
\textsuperscript{56} Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108 (1953).
\textsuperscript{57} Eastman, Obstetrical Foreword, in Rosen, Therapeutic Abortion xx (1954).
\textsuperscript{58} A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, id. at 18.
to treatment is considered to be an indication by some obstetricians, but this indication should be rare."59 Greenhill, 1955.

"There is no clear evidence that pregnancy per se affects pulmonary tuberculosis unfavorably. Nevertheless evaluation must be made of the additional strain of pregnancy, parturition and neo-natal care. . . . Termination of pregnancy because of active pulmonary tuberculosis is indicated in but relatively few patients."60 Watson, 1955.

TA for tuberculosis was never done at Margaret Hague Hospital; the hospital has found no evidence of any bad effect of pregnancy on tuberculosis, and has had no death from tuberculosis in its last 56,000 deliveries to the end of 1954.61 Donnelly, 1955.

Study of 401 full term pregnancies of 149 mothers with minimal tuberculosis, treated and arrested for a year or more before pregnancy, showed they "did best during and after pregnancy and had an excellent prognosis. . . . It was of interest that the number of children in the family did not appear to be an important factor . . . ."62 Meakins, 1956.

Of 64 TA at Mayo Clinic, 1945-1954, 6 (or 9%) were for tuberculosi. "Pulmonary tuberculosis is becoming a less common indication for therapeutic abortion. This is because of recent work showing that the tuberculous pregnant woman should be treated exactly like the non-pregnant tuberculous woman and the pregnancy itself has no deleterious effect on tuberculous lesions. [Kruger, Cosgrove and Cosgrove, Pregnancy and Tuberculosis (1951); Schaefer and Epstein, Results Following Therapeutic Abortion in Pulmonary Tuberculosis (1952)] Some still think that selected patients with tuberculosis should be aborted if they are seen in the first trimester."63 Nelson & Hunter, 1957.

Of 550 wives with tuberculosis of genitals, 74.3% were sterile, 18.4% had had a normal child, 5.3% had had an abortion, and 1.9% had had an ectopic pregnancy.64 Kovács & Gavallér, 1958.

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59 Greenhill, Obstetrics 329 (11th ed. 1955). (This is the 11th ed. of DeLee, Principles and Practice of Obstetrics.)
60 Watson, Outlines of Internal Medicine 88 (1955).
New York City TA for tuberculosis were 10.5% of all TA from 1943 to 1947; 9.5% of all from 1951-1953.\textsuperscript{65} Calderone, 1958.

"This has been a disappearing indication for therapeutic abortion since the monumental work of Schaefer \textit{et al.} [Schaefer and Epstein, Results Following Therapeutic Abortion in Pulmonary Tuberculosis, 63 Am. J. Obst. & Gynec. 129 (1952); Schaefer, Douglas and Dreishpoon, The Obstetric Management of the Tuberculous Patient, 1 Obst. & Gynec. 245 (1953)], showing so definitely that these patients get along as well or better than their nonpregnant sisters."\textsuperscript{66} Scherman, 1958.

"Women suffering from active tuberculosis often grow worse during and after pregnancy if they are not properly treated. For this reason early diagnosis is essential. . . . Because of these added difficulties, therapeutic abortion was recommended by most of the older authorities, [Citations omitted.] Recently, however, extensive joint studies by obstetricians and phthisiologists have cast considerable doubt on the wisdom of this advice [citing Kruger, 78 Va. Med. Monthly 417 (1951); Hill, 17 Am. Rev. Tuberc. 113 (1928); Beckman and Kirch, 135 Arch. Gynäk. 438 (1928); Mariette, 203 Am. J.M. Sc. 866 (1942)]." Follow-up records show the same course followed by tuberculosis among pregnant and non-pregnant women. "It may therefore be said that those qualified to render an opinion on the subject are skeptical of any good that may result from therapeutic interruption of pregnancy. \textit{Probably more women would be saved if greater care were given to the treatment of the tuberculosis and less attention paid to the complicating pregnancy.}"\textsuperscript{67} Beck & Rosenthal, 1958.

"This infection [pulmonary tuberculosis] is ordinarily not affected by pregnancy, and can be treated as successfully in gravid as in nonpregnant women. Therapeutic abortions therefore are not often necessary and should be considered only for the occasional patient who, because of poverty and a large family, cannot treat her TB properly. Under such circumstances the additional responsibility of caring for a new baby day and night may produce exacerbation of the infection."\textsuperscript{68} Willson, 1958. (This exception obviously represents not a series of clinical studies—a really impossible thing—but an inference in aid of a socio-economic reason for abortion.)

\textsuperscript{65} Calderone, Abortion in the United States 78 (1958).
\textsuperscript{66} Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 329 (1958).
\textsuperscript{67} Beck and Rosenthal, Obstetrical Practice 683 (7th ed. 1958).
\textsuperscript{68} Willson, Beecham, Forman and Carrington, Obstetrics and Gynecology 165 (1958). (Emphasis added.)
There is little evidence that pregnancy itself has a deleterious effect on pulmonary tuberculosis so long as the disease has been diagnosed and reasonable precautions are taken.69 Willson, 1958.

"With the success of chemotherapy, therapeutic abortion is seldom necessary. . . . There is little point in carrying out therapeutic abortion after the end of the third month of pregnancy. After that the operation involves as much strain as parturition."70 Crofton, 1958.

2. Heart

The quotations from 1903 to 1959 tell the story of the one-time indication of Heart Disease.

"Cardiac diseases occasionally demand the induction of premature labor."71 Williams, 1903.

Heart disease is an indication for TA only when the muscle is "badly" inefficient, as in advanced myocarditis and decompensation. Other heart conditions may call for induction of premature labor.72 DeLee, 1913.

Taussig says a group of German, Czech and Italian reports covering the period from 1917 to 1925 show 496 TA, of which 82 were based on heart diseases.73

A common indication around 1922-1927, but discredited earlier than tuberculosis as an indication for TA.74

"The conduct of pregnancy and labor complicated by heart disease has undergone much change in the last 10 years, since the cardiologists have taken a hand in the matter. They have shown us obstetricians that the heart can be treated successfully even though the woman is carrying the added burden of pregnancy."75 DeLee, 1928.

A report on 196 organic heart cases by Sloan Hospital for Women (N.Y.C.) concluded: "It is our experience that the response to medical treatment of the pregnant women with heart disease and circulatory stasis is satisfactory; often quite as satisfactory as in like conditions in the nonpregnant. . . . In a case in which compensation cannot be restored with thorough medical treatment, a grave situation is present. . . .

69 Id. at 214.
70 Crofton, Textbook of Medical Treatment 142 (7th ed. 1958).
71 Williams, Obstetrics 343 (1st ed. 1903).
73 Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 282 (1936).
75 DeLee, Yearbook of Obstetrics and Gynecology 50 (1927).
In this medical impasse, it is usually best to trust nature more and art less.”

Corwin, 1927.

A report on a study of the records of 45,320 deliveries in three hospitals concludes: “Prognosis is affected by the care given and the skill used in the treatment of an individual patient. . . . Undue pessimism as regards the prognosis of all cardiac patients who are pregnant is not justified by the facts; there appears to be too little faith in the ability of the heart to withstand pregnancy . . . .”

Reid, 1930.

Heart disease is rarely an indication.

A study of the records of 29 nulliparae and 41 parae-1 to -10 showed the average age at death for the former was 42.1 years, for the latter 42.0 years. The difference was called insignificant. However the authors went on to speculate that perhaps only the fittest rheumatic cardiaecs married and had children, and so they should show a longer average life than the nulliparae.

Gilchrist & Murray-Lyons, 1933.

A review of pertinent literature showed the same average age at death for primaparae and multiparae. “[W]hatever method is used, it fails to show conclusively that pregnancy materially alters the course of rheumatic heart disease.”

Jensen, 1938.

TA is indicated for some cardiovascular ailments.

Williams, ed. Stander, 1941.

A report on 568 cases of rheumatic heart with pregnancy, handled without TA, declares: “[I]t is probable that practically every pregnancy encountered in a patient with heart disease can be brought to a successful spontaneous termination if adequate prenatal care is instituted and if absolute bed rest is enforced when indicated.”

Gorenberg, 1943.

“[H]eart disease remains one of the more common causes for abortion, but there is much difference of opinion concerning it by obstetricians and internists. Cosgrove, for example, interrupts pregnancy only when there is actual heart failure. This seems to us to be an extreme point of view when one considers the high obstetric mortality with car-

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76 Corwin, Herrick, Valentine and Wilson, Pregnancy and Heart Disease, 13 Am. J. Obst. & Gynec. 617-18 (1927).
77 Reid, Prognosis of Heart Disease in Pregnancy, 19 Am. J. Obst. & Gynec. 63, 71 (1930).
78 Cova, Address at Congress of Societa Italiana di Ostetrica e Ginecologia, Milan, Jan. 30, 1932, as reported in 98 J.A.M.A. 1393-94 (1932).
79 Gilchrist and Murray-Lyons, Does Pregnancy Hasten the Fatal Termination in Rheumatic Heart Disease, 40 Edinburgh Med. J. 587, 588-96 (1933).
81 Williams, Obstetrics 1116 (8th ed. Stander 1941).
82 Gorenberg, Rheumatic Heart Disease, 45 J.A.M.A. 835, 840 (1943).
Cardiac disease was declared to be the complication recognized with "greatest unanimity" as an indication for TA. Perlmutter, 1947.
"Likewise heart disease is a rare indication." DeLee, ed. Greenhill, 1951.
"Heart disease should be a rare indication." Greenhill, 1955.
"In some clinics it is now the leading cause of maternal death and in others is exceeded only by hemorrhage as the leading cause." Of 295 TA at Los Angeles County Hospital from 1931 to 1950, 34 (11.2%) were for cardiac indications, 32 of these being rheumatic. During the period of 1946-1950, they made up half of the 12 TA. Russell, 1953.

The statistics of Corwin, Herrick, Valentine, and Wilson, 1927, bear out an opinion gained from seven years' experience that pregnancy and childbearing when properly supervised and safeguarded is not a great menace to the safety or life of the average ambulant case of heart disease. "The opinions of these eminent cardiologists support the contention that heart disease complicating pregnancy can be successfully managed by competent prenatal care. This involves an early evaluation of the cardiac status of the patient. In severe cases success depends upon teamwork." Heffernan & Lynch, 1952.

"Rheumatic heart disease with a history of previous cardiac failure constitutes the main exception to the observation made in the previous paragraph that 'pregnancy seldom aggravates organic disease'. Indeed, were it not for this particular complication, the word 'seldom' in the statement could well nigh be changed to 'never'. It must be recalled, however, that these grave cases represent only a small minority of the total rheumatic group and that the majority of gravidae in this general category can, with judicious care, be carried through several pregnancies safely. In the severer cases, furthermore, valvulotomy is becoming a sound alternative to therapeutic abortion, although the place of the

83 Te Linde, Operative Gynecology 478 (1946). (Emphasis added.)
87 Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 109-10 (1953).
88 Heffernan and Lynch, supra note 74, at 15.
operation in pregnancy has yet to be completely established.”

“Cardiac Disease. Fewer and fewer patients are being aborted for cardiac disease. Careful medical supervision with intelligent use of a salt-poor diet, weight control, diuretics, digitalis, antibiotics, anticoagulants, rest and improved anesthesia for delivery have made it possible for many cardiacs to have children who yesteryear would have been aborted, or who, unaborted, would perhaps have died. The care the patient takes of herself, and the quality of the medical care she receives, are almost as important as the gravity of the organic lesion. Even if the organic lesion is severe, the patient’s desires should be given great weight, for no physician is astute enough to guarantee the performance of any serious cardiac in pregnancy, labor and puerperium. If the patient is extremely desirous of continuing the pregnancy, is able and willing to cooperate to the full, and knows the approximate risk involved, most obstetricians will allow pregnancy to continue. So far as we know, if the cardiac patient survives her accouchement, the disease is not rendered worse by the experience. On the other hand, if the severe cardiac patient cannot avail herself of proper care, or is resistant to undertaking the risk pregnancy implies, abortion is justified.”

Guttmacher, 1954.

N.Y. City Health Dept.: TA for circulatory complications from 1943 to 1947 were 17.3%; from 1951 to 1953, 10.9%.

Margaret Hague Hospital had 2 TA for rheumatic heart disease, both in 1935; of these one mother died 4 days later. Since that time the hospital had over 500 cardiacs with no therapeutic abortions, and a maternal loss of 2 (.4%, as compared with 2.6% loss among all women, puberty to menopause), 1939-1952. A 10-year follow-up on all rheumatic cardiacs entering this hospital from 1937 to 1942 totalled 260, showed 188 still alive, those with most pregnancies having the longest life.

“IHeart disease should be a rare indication.”

“IT is not often necessary to terminate pregnancy because of heart

89 Eastman, Obstetrical Foreword, in Rosen, Therapeutic Abortion xix-xx (1954).
91 Calderone, Abortion in the United States 78 (1958).
The disease if the patient can be treated properly. Termination can be considered for those with advanced lesions who can neither obtain sufficient rest nor follow an acceptable program of treatment. Willson, 1958.

Mayo Clinic, 1945-1954, had 64 TA, of which 9 (14%) were on cardiac indications. "In general, fewer and fewer patients are being aborted for cardiac reasons. Modern use of digitalis, diuretics, salt-free diets, control of weight, rest, and cardiac surgical procedures provides obvious reasons. . . . [T]he judicious use of therapeutic abortion still has a place in severe cardiac disease . . . . It is generally true that a cardiac patient will not have her longevity adversely affected by pregnancy if she survives the pregnancy." Nelson & Hunter, 1957.

A report on 210 cases of pregnancy with rheumatic heart disease shows that women with cardiac insufficiency tolerated labor well if properly attended before; bad effects, and sometimes death, if labor came on during an attack of heart failure. K'ang Yang Chu, 1957.

"As I see it there are only two medical indications for abortion that still need serious discussion, notably cardiac and hypertensive diseases." Donnelly, 1958.

Rheumatic heart disease is "the group which in the literature seems to be the most persistent. Even here many reports [Connell 1954; Glover, McDowell & O'Neill 1955; Gorenberg & Chesley 1953, 1954; Heffernan & Lynch 1953; Litzenberg 1955; Ullery 1954] have shown that with proper care, which might include constant hospitalization or bed rest, these patients can tolerate pregnancy with little or no resultant damage. It has been stated that even the most severely ill of these individuals when pregnant and at constant bed rest have no greater load or strain on the heart. Economically, of course, this becomes a problem, but are we to do a therapeutic abortion for socio-economic reasons?" Coronary artery disease is "a rare complication." Scherman, 1958.

C. L. Mendelson, 1952, "has found that coronary disease and preg-

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94 Willson, Beecham, Forman and Carrington, Obstetrics and Gynecology 165 (1958). (Emphasis added.)
97 Donnelly, as recorded in Calderone, op. cit. supra note 91, ch. 6 (Therapeutic Abortion in the United States), 102.
98 Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 326 (1958). (Footnotes omitted.)
Justifiable Abortion

...should be treated separately. He states that the pregnancy produces no increased strain on the coronary system and does not predispose to coronary occlusion. He thinks vaginal delivery is the best method. Scherman, 1958.

"According to Ullery [67 Am. J. Obst. & Gynec. 834 (1954)], this complication [congenital heart disease] if not too severe and if not associated with cyanosis can be carried frequently to a successful termination. With cardiac surgery and antibiotics to prevent subacute bacterial endocarditis, much can be done for these individuals." Scherman, 1958.

"Spontaneous Subarachnoid Hemorrhage. This uncommon complication is usually the result of rupture of a congenital cerebral aneurysm. . . . Mortality in these patients as in the un pregnant state is very high. . . . This condition always carries a high mortality in the non-pregnant state, and it is doubted that pregnancy not associated with hypertension adds materially to this risk. . . . It seems reasonable that these individuals should have cesarean sections . . . ." (It occurs usually near the end of term.) Scherman, 1958.

Calcific pericarditis is "usually not an indication for therapeutic abortion. . . . These cases are usually asymptomatic. They are usually the result of some past suppurative or tuberculous pericarditis . . . ." Scherman, 1958.

Mitr al stenosis is the only cardiac complication often found in women under 45. "At one time, mitral stenosis was so feared that women with this lesion were warned to remain single. If they married, the prevention of conception was recommended and when they became pregnant, abortion was advised. This attitude, however, is not justifiable at present since 70 to 90% of all pregnancies complicated by mitral stenosis terminate spontaneously without difficulty [Hamilton 1947]." With proper care the death rate is about the same as for the non-pregnant. "While many obstetricians and cardiologists advise therapeutic abortion and artificial interruption of pregnancy for those who are grouped in these unfavorable classes [the wholly incapacitated and those who suffer distress from the past exertion], recent reports of carefully conducted series of cardiac patients indicate that better results can be obtained by complete rest in

99 Ibid.
100 Ibid.

Id. at 326-2
Id. at 327.
bed with controlled cardiologic and obstetric management in a hospital than by the artificial termination of gestation.”


Heart, lung and kidney ailments are now of secondary importance for TA. Guttmacher, 1958.

A comparison of the mortality rate to 1951 of primiparae and multiparae delivered at Hague Maternity Hospital, 1937-1942, showed that mortality had not increased with the number of pregnancies, the highest being parae-1 and parae-5 (37% and 44%), with little difference among parae-2, -3, -4 and -6 (25%, 21%, 23%, 22%). Of the total 260, 129 had their first pregnancy during the period from 1937 to 1942. Their mortality rate decreased with each increase in parity, from 37.5% for parae-1 down to 11.1% for parae-4 and over. Donnelly, 1955.

“With due care and attention the great majority of cardiac patients can be safely shepherded through pregnancy.” Davidson, 1959. Yet Davidson advises early TA in heart cases because of the extra burden imposed by pregnancy, and comments that care of another “toddler” may be a greater burden than pregnancy.

3. Kidneys

The mention of Kidneys has always been frightening to Americans. However, we may expect to have continued mention of them by medical men through the foreseeable future, since they are both the source of many important diseases and a valuable indicator as to others.

Chronic nephritis was a common indication around 1922-1927. Chronic nephritis (Bright’s Disease) is a real danger and indication for TA—one of a diminishing few left. Cova, 1932.

Some kidney ailments are indications for TA. Williams, ed. Stander, 1941.

Chronic nephritis or hypertension frequently causes spontaneous

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4 Scope Weekly, April 2, 1958, p. 9.
5 Donnelly, supra note 92, at 116.
8 Cova, as reported in 98 J.A.M.A. 1393 (1932).
9 Williams, Obstetrics 1115 (8th ed. Stander 1941).
abortion. Most trouble, however, occurs after the fetus is viable and thus it creates no TA problem. Most chronic hypertensives go through several pregnancies to normal delivery of normal children without any deterioration in the condition of the mother.10 Browne, 1942.

"Disease of the kidneys . . . is a definite indication."11 DeLee, ed. Greenhill, 1951.

Chronic nephritis and glomerulonephritis were said to cause hypertension and kidney damage. The authors quote Browne, 1942, that there-in lies no TA indication; apparently these ailments are not affected by pregnancy. Mortality rates for England and Wales from 1911 to 1922 showed more deaths of men than of women from chronic nephritis. Women up to the age of 55, married and unmarried, showed the same mortality rate. Therapy is more effective than TA and avoids the danger of hemorrhage or infection.12 Heffernan & Lynch, 1952.

There was one TA for porphyrinuria (1932) among 295 TA at Los Angeles County Hospital, 1931-1950; 37 (12.5%) renal & hypertensive, including toxemias after nephrectomy, pyelitis (none since 1939) and renal tuberculosis.13 Russell, 1953.

"Kidney Lesions. The previous surgical removal of one kidney, or its congenital absence, does not interfere with pregnancy provided only that the remaining kidney has normal function. If, on the other hand, careful investigation shows even moderate impairment of the solitary kidney, pregnancy presents a serious hazard.

"Pyelitis. Before the sulfa and antibiotic era, intractable pyelitis often necessitated interruption of pregnancy. However, today this is almost never necessary.

"Nephrolithiasis [kidney stones] is usually not a serious complication of pregnancy. If, however, the condition is bad enough to necessitate surgical removal of the renal calculi, it is safer to terminate the pregnancy first.

"Acute Glomerulonephritis is a rare complication of pregnancy. Pregnancy may be allowed to continue without altering the prognosis for recovery."14 Guttmacher, 1954.

12 Heffernan and Lynch, supra note 7, at 11.
13 Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 110 (1953).
Pyelitis problems were for many years very difficult. However, since the introduction of sulfa drugs and other antibiotics, these former difficulties no longer seriously complicate pregnancies. There is now no need for TA at Margaret Hague Hospital.15 Donnelly, 1955.

Of 64 TA at Mayo Clinic, 1945-1954, 6 (9%) were due to renal disease. “Certain renal indications for abortion are accepted universally. Six (9 per cent) of our patients had renal disease. When grossly demonstrable renal impairment is present ... therapeutic abortion should be seriously considered. ... All 3 of the patients who had renal insufficiency have died of the renal disease. ... Active renal tuberculosis constitutes a justifiable reason for interruption of pregnancy.”16 Nelson & Hunter, 1957.

Psychiatric and eugenic indications and past or present malignancy have relegated “the old orthodox trio—heart, lung and kidney—to secondary importance.”17 Guttmacher, 1958.

“Chronic nephritis is one of the most widely accepted reasons for therapeutic abortion. Even here, the available information has not crystallized completely. Some authors [Heffernan and Lynch, What is the Status of Therapeutic Abortion in Modern Obstetrics? (1953)] have shown that the feared ‘decrease’ in the kidney’s performance, which was thought to occur in about 50% of pregnant nephritis patients, is in reality attributable to a recognized downward trend in nephritis in general and frequently has no connection with pregnancy.

“Hydronephrosis can usually be treated by ureteral or kidney pelvic catheterization without considering the pregnancy.

“Polycystic Kidneys. Most ... can be brought to a successful termination with the use of antibiotics to control infection as shown by Millar [60 J. Obst. & Gynaec. Brit. Emp. 868 (1953)] ... .

“Single Kidney. ... It is well known that hypertrophy and compensation of a remaining kidney occurs shortly after nephrectomy. Certainly ... [if no malignancy] there exists no indication for therapeutic abortion. ...

“Renal Stones. Medicine has progressed to the state where renal calculi can be treated by methods far superior to therapeutic abortion ... with surgery and antibiotics. ...

17 Scope Weekly, April 2, 1958, p. 9.
“Pyelonephritis. . . [G]enerally no longer acceptable by most authors as an indication for therapeutic abortion. Here again more practical means of therapy have been devised.”\textsuperscript{18} Scherman, 1958.

Nephritis with prolonged and marked albuminuria and tendency to anemia, edema and uremia may be aggravated by pregnancy, and the fetus may die. If these changes do not respond to treatment, TA is indicated.\textsuperscript{19} Beck \& Rosenthal, 1958.

“The immediate danger to the mother is not very great. A fairly large percentage of pregnancies, however, terminate prematurely or the fetus dies—death of the fetus and premature labor coming earlier and earlier with each successive pregnancy. . . . It is thought that pregnancy has a deleterious effect in nephritis and, accordingly, somewhat reduces the life expectancy of the mother. . . . Pyelitis complicates pregnancies about once in one hundred cases. . . . Pyelitis usually responds well to treatment without any ill effect on the mother or the child. . . . Rarely, the condition progresses in spite of all therapeutic measures and spontaneous premature labor follows.

“Many cases of pregnancy after nephrectomy have been reported and in most of them no great difficulty was encountered, aside from the occurrence of a slight albuminuria in the latter months. Pregnancy and labor, accordingly, should be allowed to take their natural courses, but under strict supervision. If renal insufficiency or infection develops, or symptoms of preeclampsia appear, the uterus should be emptied.”\textsuperscript{20} Beck \& Rosenthal, 1958.

Kidney diseases not discussed as an indication, except in relation to hypertension.\textsuperscript{21} Willson, 1958.

4. \textit{Hypertension}

Hypertension has been the subject of much study in connection with certain cardio-vascular and kidney ailments and diseases or symptoms peculiar to pregnancy, with reference particularly to identifying cause and effect.

“Essential or hormonal hypertension is a persisting, usually progressing, elevation of blood pressure due to constriction, at first functional, later organic, of arterioles widely distributed in the body, according to many investigators primarily of hormonal origin from renal

\textsuperscript{18} Scherman, Therapeutic Abortion, 11 Obst. \& Gynec. 323, 327-28 (1958).
\textsuperscript{19} Beck and Rosenthal, Obstetrical Practice 916 (7th ed. 1958).
\textsuperscript{20} Id. at 711-14.
\textsuperscript{21} Willson, Beecham, Forman and Carrington, Obstetrics and Gynecology 282-95 (1958).
ischemia (temporary lack of blood due to contraction of a blood vessel). It makes up a large percentage of patients with hypertension, some estimates rising to 95 per cent of patients seen in general medical practice. . . .

"Probably it is too early to say the mechanism of hypertension in man is understood, but much advance has been made from the fairly recent period of almost entire ignorance of the mechanism of essential hypertension. . . . However, at times autopsy study of patients, known to have had hypertension, fail to show other than very slight lesions in the arterial system.

"Consequently it is thought that in the beginning the vascular lesion is vasoconstrictive and so functional, not organic. Later the arterial lesions, just noted, appear and progress to make more permanent the peripheral resistance. . . . Lesions in the larger arteries appear to be the result of the strain on them by reason of the hypertension along with the degenerative influences that lead to arteriosclerosis without hypertension. The arteriolar lesions may be caused by inflammatory or degenerative toxic processes, or they may be the result of the hypertension; the latter seems now to be the more favored view. The trend of opinion is towards a hormone cause, the hormonal action originating in renal ischemia. . . .

"The cause of the hypertension should be discovered, if possible, for success of treatment of some forms depends in very large measure on cause."22 Osler, ed. Christian, 1944.

High blood pressure and hypertension were commonly taken as indications for TA around 1922-1927.23

Hypertension (chronic vascular hypertension) is not a disease, but is one manifestation of an abnormal vascular system. It occurs in later months of pregnancy, producing edema and high blood pressure. The treatment is usually the simple treatment for both of these conditions. TA if necessary; but it seldom is necessary before viability, even with superimposed acute toxemia.24 DeLee, ed. Greenhill, 1951.

A report on Los Angeles County Hospital from 1931 to 1950 lumps renal and hypertensive diseases as aggregating 37, or 12.5%, of the 295 TA. The group included toxemias after nephrectomy, pyelitis, renal

24 DeLee, op. cit. supra note 11, at 357-61.
tuberculosis. Since 1940 pyelitis was not commonly listed as indicating TA.\textsuperscript{25} Russell, 1953.

Chronic nephritis, or hypertension, frequently causes spontaneous abortion, but most trouble occurs after the fetus is viable. It creates no TA problem. Most chronic hypertensives go through several pregnancies to normal delivery of normal children, without any deterioration in the condition of the mother.\textsuperscript{26} Heffernan & Lynch, 1952.

"Contrary to previous belief, it is now well established that the great majority of women with uncomplicated essential hypertension can go through pregnancy without appreciable hazard as far as they themselves are concerned; moreover, numerous follow-up studies on such patients show that the pre-existing level of hypertension is not permanently affected by childbearing. It is true that there are certain exceptions to this generalization and that fetal outlook in such cases is less favorable than usual; nevertheless, it can be said without exaggeration that for every ten hypertensive women who would have been aborted in 1930, nine are enjoying successful pregnancies today and without residua of any kind."\textsuperscript{27} Eastman, 1954.

"Hypertensive-renal disease. The obstetrician is concerned with three forms of hypertension evidenced in pregnancy: preeclamptic toxemia, essential hypertension without evidence of renal involvement, and essential hypertension with evidence of renal involvement. It is rare for preeclampsia to necessitate therapeutic abortion, since it is notably a disease of the last trimester of pregnancy. In the exceptional case, the disease may be so severe at the 24th week, or even earlier, as to necessitate the interruption of pregnancy before viability. Not an insignificant proportion of these early cases of preeclampsia are associated with hydatidiform mole. Essential hypertension without renal involvement does not necessitate therapeutic abortion. Four out of every five such patients, when given good care, go through pregnancy satisfactorily with little additional rise of blood pressure. One patient in five will have a superimposed preeclampsia, but this does not usually occur until the 32nd or 33rd week; if pregnancy has to be interrupted then, the child is viable.

"On the other hand, cases of essential hypertension with evidence of renal impairment and associated vascular eyeground damage do badly

\textsuperscript{25} Russell, supra note 13, at 110.
\textsuperscript{26} Heffernan and Lynch, supra note 23, at 20.
\textsuperscript{27} Eastman, Obstetrical Foreword, in Rosen, op. cit. supra note 14, at xix.
during pregnancy. The fetal salvage in such cases is poor: Many have
an unexplained death in utero during the middle or later period of
gestation, while others develop abruption of the placenta in the last
trimester. In addition, this third form of pregnancy toxemia, hypertensive-renal disease[,] is aggravated by pregnancy and, if not interrupted
early, patients are frequently much worse after delivery. Unless they
insist on taking an extraordinary risk, interruption of pregnancy is not
only warranted, but necessary.”28 Guttmacher, 1954.

“Patients with fixed hypertension sometimes present complications
due to a superimposed toxemia of pregnancy which is an imminent
threat to the mother’s life. This is considered as an indication for the

A study of 301 pregnancies of 218 hypertensives at Margaret Hague
Maternity showed that two-thirds of them had no complicating pre
eclampsia and no TA, and no immediate maternal deaths. Among the
other third, complicated by preeclampsia, there was a 7% maternal
mortality. Half of the hospital’s 8 TA were for hypertensive disease;
2 of the 4 died at once; one died of a cerebral hemorrhage after 6 years;
the other (TA in 1931) subsequently had a normal full term baby in
1932, and thereafter an abortion and tubal ligation at another hospital,
an ectopic pregnancy, and another normal birth, and in 1952, twenty-
one years after the TA, she is still hypertensive, alive and well.

“We cannot expect to cure a patient of hypertension by abortion. The
most we can do is to cure a patient of a superimposed preeclampsia by
terminating pregnancy. Therefore, a hypertensive pregnancy should be
allowed to continue until there is evidence of a superimposed toxemia of
pregnancy. The pregnancy itself does not have a deleterious effect on
hypertensive disease. Chesley, on a follow-up of 218 patients over a
fourteen year period has shown that there is no increase in the annual
death rate of those hypertensives who have had 4, 3 or 2 pregnancies
over those who have had only one pregnancy. He concluded that repeated
pregnancies in hypertensive women have not significantly increased
their annual death rate. Therefore, we believe that if the patient has
hypertensive disease she should be allowed to continue in pregnancy
until there is a superimposition of preeclampsia—in other words until
they develop proteinuria, edema, or a further rise in blood pressure.”30
Donnelly, 1955.

29 Donnelly, supra note 15, at 115.
30 Ibid.
Hypertensive renal disease should be the most common indication, since few babies are ever salvaged and mothers are susceptible to serious complications, such as abruptio placentae.\textsuperscript{31} Greenhill, 1955.

Chronic hypertension. "If the systolic blood pressure is repeatedly over 200, if there is evidence of degenerative vascular change in the retinal vessels, and if renal function is considerably reduced, abortion should be considered."\textsuperscript{32} Willson, 1958.

Hypertensive cardiovascular disease. "Information regarding the effect of pregnancy on this disease is still in a state of confusion; however, much can be done for even the most severe cases with bed rest. A recent article by Taylor et al. covering a large group [4,432] seems to indicate that the fetal loss is not as severe as was originally thought."\textsuperscript{33} Scherman, 1958.

Most of the work being done today is directed to some means of saving the child, with TA considered as of no demonstrated value to the mother. In 2,705 deliveries at Jackson Memorial Hospital, Miami, 204 mothers showed toxemias of pregnancy, including 22 chronic hypertension, 145 preeclampsia, 3 eclampsia, 3 renal disease. One mother died; fetal mortality was 6.88%. Treatment was with hypotensive drugs et cetera.\textsuperscript{34} Novell & DeHaan, 1958.

Hypertensive vascular disease is very dangerous, inducing death in utero, abortions, premature deliveries and stillbirth. "After the fetus reaches a weight of 2500 gm., accordingly, it will be safer out of than in the uterus whenever preeclampsia develops or the hypertension increases or evidence of impairment of renal function is detected. As a consequence induction of labor or Caesarian section under local anesthesia frequently is indicated in the interest of the child. If preeclampsia or eclampsia are not superimposed on the hypertensive state, the risk to the mother is not greatly increased unless the condition has advanced sufficiently to cause cardiac and renal changes."\textsuperscript{35} Beck & Rosenthal, 1958.

\textsuperscript{31} Greenhill, Obstetrics 329 (11th ed. 1955).
\textsuperscript{32} Willson, Beecham, Forman and Carrington, op. cit. supra note 21, at 165.
\textsuperscript{33} Scherman, supra note 18, at 326.
\textsuperscript{34} Novell and DeHaan, Toxemia of Pregnancy: Treatment With Hypertensive Drugs and Relation to Anaphylaxis, 12 J. Obst. & Gynec. 154-53 (1958).
In Hypotensive drug therapy pregnancy should be terminated as soon as fetus is viable.\footnote{See Dieckmann and Harrod, Evaluation of Hypotensive Drug Therapy in Chronic Hypertensive Disease in Pregnancy, 76 Am. J. Obst. & Gynec. 374 (1938).} Dieckmann, 1958.

5. \textit{Hyperemesis Gravidarum}

TA is recommended whenever hyperemesis gravidarum has persisted until the woman is emaciated and near starvation. But it usually stops of itself, improves under treatment.\footnote{Williams, Obstetrics, 460-62 (1st ed. 1903).} Williams, 1903.

Therapeutic abortion is indicated by hyperemesis gravidarum and other forms of toxemia—a real but restricted indication.\footnote{DeLee, Principles and Practice of Obstetrics 1018 (1st ed. 1913).} DeLee, 1913.

This was a common indication for TA around 1922-1927.\footnote{Heffernan & Lynch, Is Therapeutic Abortion Scientifically Justified?, 19 Linacre Q. 11 (1952).} Heffernan & Lynch, 1952.

Hyperemesis gravidarum is rarely an indication for TA.\footnote{Cova, as reported in 98 J.A.M.A. 1393 (1932).} Cova, 1932.

Pregnancy toxemias: hyperemesis. The reflex or neurotic type is seldom a real toxemia; mild and easily corrected. Toxic form: "The experience of all large clinics has been that, if the case is admitted early and glycogen balance restored promptly, no serious damage is done, and abortion will not ordinarily be indicated. . . . Furthermore, there is no doubt that a considerable number of cases are aborted that would not have required such radical measures, had they been placed in suitable institutions under the latest treatment for this condition." It usually occurs during the first half of pregnancy.\footnote{Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 285-86 (1936).} Taussig, 1936.

Severe vomiting is an indication for TA.\footnote{Williams, Obstetrics 1113 (8th ed. Stander 1941).} Williams, ed. Stander, 1941.

"Hyperemesis gravidarum, for which many abortions have been done in the past, rarely necessitates the termination of pregnancy today. The patient can be kept hydrated and fed intravenously and supplied with vitamins parenterally \textit{sic} so that almost never is it necessary to terminate the pregnancy. In some cases in which the psyche plays an important role, the psychiatrist may persuade the patient to cease vomiting."\footnote{Te Linde, Operative Gynecology 478 (1946).} Te Linde, 1946.
“Hyperemesis gravidarum is a rare indication for abortion. When there is evidence of hepatic and renal involvement, one should not wait too long before emptying the uterus.”44 DeLee, ed. Greenhill, 1951.

The degree of hyperemesis gravidarum can make it dangerous. Most cases are due to neurological protest, others to toxemia; the third stage brings delirium, cyanosis, death. “During all this disturbance, local and general, the fetus is usually alive, and if delivered at term may be large and fat. The vomiting often ceases on the death of the fetus.” Treatment is psychological and by feeding. If loss of weight reaches 20 pounds, or there is persistent jaundice et cetera or psychosis, TA is indicated.45 DeLee, ed. Greenhill, 1951.

Nine of the total 295 TA at Los Angeles County Hospital from 1931 to 1950 were for hyperemesis gravidarum. All were done during the period 1931-1937. Since then it has been uniformly overcome with Dramamine or Thiamine.46 Russell, 1953.

“Therapeutic abortion for hyperemesis gravidarum has undergone a spectacular decline, so much so that it is today an almost forgotten procedure. Here again there has been no overt policy to force these women to continue through pregnancy, and certainly there is no evidence that the slightest hazard has been imposed upon them by this curtailment of operative interference. The fact is that obstetricians in current practice rarely see severe cases of hyperemesis gravidarum. Life-threatening examples of this disorder are simply not developing as they did a few years ago; and the issue of therapeutic abortion rarely comes up. For instance, during the past fifteen years in our clinic [Johns Hopkins], in the course of some 30,000 pregnancies followed, not a single interruption has been performed on this indication; but even more amazing is the fact that in only one or two instances was the process worrisome enough to suggest even consideration of interference. This is a curious and dramatic change; and in view of the fact that hyperemesis is largely a psychosomatic disorder, it is a change that bespeaks a wholesome and welcome alteration in present day attitudes of young women towards childbearing.”47 Eastman, 1954.

“Vomiting of pregnancy, hyperemesis gravidarum, rarely requires

45 Id. at 336-37.
46 Russell, Changing Indications for Therapeutic Abortion: Twenty Years’ Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 110 (1953).
47 Eastman, Obstetrical Foreword, in Rosen, Therapeutical Abortion xx (1954).
therapeutic abortion today. Before it was known that the liver necrosis associated with it was due to starvation, avitaminosis and dehydration, therapeutic abortion was often a life-saving measure. However, in two hospitals with which I have been closely associated for many years, only one abortion has been done for hyperemesis since 1937. During the 15 year period there were approximately 75,000 deliveries. The patient with hyperemesis is rarely seen nowadays who does not react favorably to hospitalization, intravenous fluids, parenteral vitamins, tube feeding and suggestive therapy, and who therefore has to be aborted.48

With the advent of antibiotic and hormonal therapy, hyperemesis gravidarum—or rather the pathophysiology underlying it—is now seldom to be considered a medical indication for the interruption of pregnancy.49 Rosen, 1954.

Through 1955, there had been only one TA at Margaret Hague Hospital for hyperemesis gravidarum; this occurred in 1939. In 1941 the same woman in the same condition was treated medically instead. She had a full term baby, with no impairment of her health. The hospital then withdrew its recognition of hyperemesis as an indication for TA. The hospital has never had a death from hyperemesis gravidarum since the time of its last (and only) TA for this cause in 1939.50 Donnelly, 1955.

"Hyperemesis gravidarum is now an extremely rare indication for terminating gestation, because nearly always it can be prevented or cured by medication and supportive therapy."51 Greenhill, 1955.

All of 360 cases of emesis in pregnant women were found due to neurosis and treated medically. Only 5.55% required TA. The stages were described as: (1) reflex changes; neurosis; (2) initial disturbance of nutrition and metabolism; toxemia; (3) profound disturbance of nutrition and metabolism; dystrophy.52 Lebedev, 1957.

Hyperemesis in almost every case is due to personality defects. Treatment, largely psychological, is discussed with no suggestion that TA be

48 A. F. Gutmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, id. at 17.
considered. Treatment is usually successful.63 Beck & Rosenthal, 1958. Hyperemesis not even discussed as an indication in Willson, 1958.54

6. Cancer and Other Neoplasms

"It is licit to excise a diseased uterus which is gravely dangerous, even though the operation will indirectly kill the fetus which is enclosed in the womb . . . . If . . . the fetus is near viability and an immediate hysterectomy would only probably, and not certainly, diminish the danger of death to the mother, the operation would be illicit."55 Suppose one 4 months pregnant has an ovarian tumor which her physician is convinced must be excised at once to save her life, but the operation may cause an abortion. "The physician may remove the ovarian tumor."56 Healy, 1956.

Cancers were a common indication for TA around 1922-1927.57 Taussig states in 1936 that neither myoma nor cervical cancer is ever an indication in itself for TA, and the patient should be treated just as if she were not pregnant. Ovarian dermoid requires TA because of danger of infection; a fibroid low on uterus requires TA because it would interfere with delivery; and TA is indicated for certain ovarian cysts because of the possibility of postpartum difficulties.58

Ten years later, however, Te Linde maintained that: "Myomata [muscular tumors], because of their size and position, may make the course of pregnancy dangerous; therefore they may call for abortion. . . . Cancer of the cervix, cancer of the ovary and cancer of the breast discovered during early pregnancy should be treated without attempting to save the fetus . . . ."59

Three of the 295 TA at Los Angeles County Hospital, 1931-1950, were for breast carcinoma—none since 1937; 1 for cervical carcinoma, in 1940; and 1 for sarcoma of the uterus in 1933.60 Russell, 1953.

In 1954 Dr. Guttmacher wrote: "Malignancy is increasing in importance as an indication for abortion. If a recent operation for proved

55 Healy, Medical Ethics 214-15 (1956).
56 Id. at 232-33.
58 Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 292 (1936).
59 Te Linde, Operative Gynecology 479 (1946).
60 Russell, supra note 46, at 110.
carcinoma of the breast has been performed, termination of pregnancy 
is thought mandatory. After a 'five-year cure period' the woman who 
is extremely anxious for a child is sometimes allowed to go through 
pregnancy. When breast carcinoma is discovered during pregnancy, most 
authorities advise immediate breast amputation followed by evacuation 
of the pregnancy. However, some will allow a pregnancy approaching 
viability to continue.

"Thyroid malignancies also contraindicate continuation of pregnancy. 
Carcinoma of the cervix discovered during pregnancy is ordinarily 
treated locally with radium, and the pregnancy allowed to continue. 
Delivery by Cesarean section than becomes necessary."63

During the 10 years from 1945 to 1954 at the Mayo Clinic, 8 of the 64 
TA done were for breast carcinoma. In a report by two staff members we 
find this comment: "Probably the best evidence that pregnancy may 
have a relatively unimportant effect on mammary carcinoma is West-
berg's comparison of 224 pregnant and nursing women who had mam-
mary carcinoma with a control group of 300 nonpregnant women with 
carcinoma of the breast. He concluded as follows: 'Nothing has been 
found to bear out the opinion that induced abortion should improve the 
prognosis. Nor does the prognosis seem to be dependent on the fact 
whether or not the patient nurses her offspring. It would thus seem that 
the pregnancy has no very great effect on the prognosis of breast cancer 
apart from the fact that the patients delay in consulting a doctor and 
that the doctor is inclined to postpone the surgery.'"64 Nelson & 
Hunter, 1957.

Five of the 64 TA at Mayo were for lymphoma. Of these the same 
authors say: "Two of the 5 were dead within six months. Therapeutic 
abortion is not justified in most cases of this type, but is in a few 

"With carcinoma of the uterus, ovaries, or lower bowel it often is 
necessary to remove the pregnant uterus as part of the treatment of 
the tumor. In some patients with cancer of the rectum or rectosigmoid, 
adequate removal is possible without disturbing the gravid uterus."66 
Willson, 1958.

"Pelvic tumor was at one time considered an indication for therapeuti

61 A. F. Guttmacher, supra note 48, at 18.
284, 288 (1957).
63 Id. at 289.
64 Willson, Beecham, Forman and Carrington, op. cit. supra note 54, at 165.
abortion. Now recourse is had instead to surgical removal or Caesarean section.”65 Beck & Rosenthal, 1958.

There still has never been a TA for any cancer at Margaret Hague Maternity Hospital. Patients are given the same treatment as if they were not pregnant.66 Donnelly, 1955.

7. Toxemias of Pregnancy

“The hypertensive type of toxemia constitutes the largest group requiring interruption. Since this type occurs most often in grand multiparae, the interruption is not as serious a calamity to the patient as when interruption becomes necessary in younger women with few or no children. It seems reasonable also to permit the multiparity to bolster the indications for abortions in this group.”67 Te Linde, 1946.

“The toxemias of pregnancy are in themselves on the decline in most parts of the United States because of the increased availability of antepartum care and the early treatment of the first signs of the disorder. Naturally a fall in the incidence of therapeutic abortion for this indication has followed.”68 Perlmutter, 1947.

At Mayo Clinic: “It appears significant that approximately two-thirds of the abortions for toxemia were done in the period representing the first half of this study (1945-1949), which indicates improving control and understanding of toxemia.”69 Nelson & Hunter, 1957.

(Seven TA [17%] for toxemia at Mayo, 1945-1954.)

Treatment of 331 cases of late toxemia with combination of hypertensive drugs reduced mortality by 50%.70 Beck, 1959.

Of 2,705 deliveries at Jackson Memorial Hospital, Miami, 204 (7.5%) showed some toxemia of pregnancy, including 145 preeclampsia, 3 eclampsia, 22 chronic hypertension, 3 renal disease, others 3. Infant mortality was 6.88%, but only 1 mother died.71 Novell & DeHaan, 1958.

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67 Te Linde, op. cit. supra note 59, at 478. (Emphasis added.)
69 Nelson and Hunter, supra note 62, at 286.
71 Novell and DeHaan, Toxemia of Pregnancy: Treatment With Hypertensive Drugs and Relation to Anaphylaxis, 12 Obst. & Gynec. 154, 155-59 (1958).
8. Anemia

A finding of anemia suggested a general weakness and inability to sustain any unusual burden. Pregnancy was considered such an unusual burden, and so it was thought that pregnancy and anemia were incompatible, and that removing this extra burden would substantially improve the patient’s prognosis. On this theory, with no real clinical evidence to support it, anemia was for some time, by some obstetricians, taken as an indication for TA.

Heffernan and Lynch report that anemias were a common indication for TA around 1922-1927.72

And the Stander edition of Williams in 1941 would still advise occasional TA for pernicious anemia.73

Pernicious anemia, on which the Germans have done so much work, is probably the most deadly of the anemias. The question, however, is whether pregnancy makes it worse or whether an abortion will bring improvement.

Hypochronic anemias are the most frequent ones in pregnancy. They appear about mid-term, with fatigue and loss of euphoria (sense of well-being); the symptoms disappear with the termination of pregnancy. The proper treatment is medical.74 Osler, ed. Christian, 1944.

Sickle-cell anemia is rather frequent among Negroes only.75 Osler, ed. Christian, 1944.

It responds poorly to surgery. It is not influenced by pregnancy.76 Heffernan & Lynch, 1952.

9. Asthma

One of the 295 TA at Los Angeles County Hospital, 1931-1950, was done for asthma. That was in 1936, and there have been none since.77 Russell, 1953.

A more recent textbook on Obstetrics declares that bronchial asthma

72 Heffernan and Lynch, supra note 57, at 11.
73 Williams, Obstetrics 1116 (8th ed. Stander 1941).
75 Id. at 944; Giorlando, Brandt and de Guzman, Sickle Cell Anemia in Pregnancy, 67 West. J. Surg., Obst. & Gynec. 253 (1959).
77 Russell, Changing Indications for Therapeutic Abortion: Twenty Years’ Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 110 (1953).
is usually *relieved* by pregnancy; occasionally aggravated. Therapy is discussed with no suggestion of TA in any case. Beck & Rosenthal, 1958.

10. Chorea

St. Vitus' Dance and other nervous ailments (often hereditary) were a common indication for TA around 1922-1927. Cova, 1932.


Toxic chorea occurring for the first time in pregnancy is fatal to 17%. It usually requires TA, *although that gives relief to but a small percentage*. It usually appears during the first half of pregnancy. Chorea recurrent from childhood is usually not a serious complication, and rarely calls for TA. Taussig, 1936.

Chorea occasionally taken as an indication for TA. Williams, ed. Stander, 1941.

"A choreic patient may become pregnant; more frequently the disease occurs during pregnancy, sometimes after delivery. . . . [TA] should not be done as a rule." Osler, ed. Christian, 1944.

Indications for TA include some neurologic disorders such as Huntington's chorea. DeLee, ed. Greenhill, 1951.

Chorea is to be treated by rest and medicines. "Abortion is not to be considered in the mild cases and is of questionable value in the severe ones. The latter not only are not improved, but often rapidly progress to a fatal termination after the pregnancy is interrupted." Beck & Rosenthal, 1958.

11. Diabetes

Diabetes was a common indication around 1922-1927. Occasionally its presence requires TA. Williams, ed. Stander, 1941.

"Diabetes. Ordinarily a diabetic patient does not require therapeutic abortion. The juvenile diabetic of long standing who shows marked
vascular pathology with ocular and renal involvement, may be the exception. Diabetics without extensive vascular damage are rarely made worse by pregnancy and delivery.\footnote{Guttmacher, 1954.}

"Diabetes—Pregnancy should often be terminated if there are advanced vascular degenerative changes or severe hypertension. This is particularly true if toxemia has developed in other pregnancies.\footnote{Willson, 1958.}

The indication set up by Guttmacher and Willson is actually not based on diabetes but on conditions of hypertension, toxemia et cetera ascribed to it.

Diabetes used to be regarded as a definite indication for abortion. Now, with the proper use of insulin and diet, TA in the interest of the mother "no longer is considered. Because the fetus tends to become excessive in size, and often dies in utero, pregnancy may be interrupted before term in the interest of the child."\footnote{Beck & Rosenthal, 1958.}

Improvement in handling diabetics is giving more fetal salvage at Providence Lying-In Hospital. Over 31-year period the loss was 28%; more recently 25%.\footnote{Jones, 1958.}

Insulin made pregnancy safe for the mother, but for a long time the fetal loss was 40%. Now, with care and an early Caesarean, the loss is brought down to 20%.\footnote{Dunlop, 1958.}

In 81 deliveries, only one of 58 diabetic mothers was lost. She had come to the clinic only once, in her 30th week, and took no treatment. She returned when already in labor, in diabetic coma, had a stillbirth, and died. If diabetes is controlled, there is no appreciable danger to the fetus before the 36th week, and slightly premature labor induced.\footnote{Garnet, 1960.}

12. Eclampsia

No therapeutic abortion on account of eclampsia; accouchement forcé (a premature birth) if condition of cervix permits.\footnote{Williams, 1903.}

Eclampsia usually develops quite late; seldom suggests TA.\footnote{Taussig, 1936.}
“Severe preeclamptics and eclamptics usually occur late in pregnancy, and when interruption becomes necessary, it often occurs after the fetus is viable.”96 Te Linde, 1946.

Eclampsia involves convulsions, edema, hypertension et cetera. In American hospitals maternal mortality is about 13%, fetal mortality 40%. Its cause is still debated. It is never an indication for TA.97 DeLee, ed. Greenhill, 1951.

No reference to TA because of eclampsia in Donnelly, Heffernan and Lynch, Russell, Scherman or Willson.

Two thirds of eclampsia cases occur during the last 2 months. In Denmark, in a 10-year survey of 737,701 deliveries, there were found 1,282 cases of eclampsia. “Labor occurs spontaneously and progresses rapidly in a large percentage of the cases of antepartum eclampsia. While the condition often is aggravated during the process of delivery, improvement usually follows within a few hours after the birth of the child.

“Improvement also occurs when the fetus dies in utero, and it may follow treatment in many of the cases in which the fetus continues to live. . . . Sooner or later, however, the convulsions and other manifestations of eclampsia recur, unless the fetus dies or the pregnancy is spontaneously or artificially terminated.”98 Beck & Rosenthal, 1958.

13. Ectopic Pregnancy

“[I]f the tube is at present in a gravely dangerous condition and if its excision cannot be delayed without a notable increase of danger to the mother, this Fallopian tube may be removed at once.”99 Healy, 1956.

“If an ectopic pregnancy is clinging to an ovary or to the woman’s viscera, may the surgeon remove it? . . . If at present the condition of the organ is actually pathological and if it is a grave threat to the mother’s life, that part of her body may licitly be removed in order to preserve the rest of the body.”100 (“That part of her body” refers to the ovary or viscera, not to the fetus.) Healy, 1956.

“Thus, the possible terminations of tubal pregnancy are as follows: 1. Tubal abortion (4 to 6 weeks); 2. Tubal rupture (2 to 4 weeks); 3. Secondary abdominal pregnancy (may go to term); 4. Intraliga-

96 Te Linde, Operative Gynecology 478 (1946).
97 DeLee, op. cit. supra note 84, at 349-57.
99 Healy, Medical Ethics 222 (1956).
100 Id. at 266.
mentary (rare); 5. Spontaneous regression. . . . The treatment for tubal pregnancy consists of surgical removal of the involved tube and the replacement of the blood lost as a result of the lesion. The patient with ruptured tubal pregnancy and massive intraperitoneal hemorrhage must be operated upon as soon as she can be transported to the hospital and the operating room can be prepared. . . . The treatment of abdominal pregnancy is prompt operation with removal of the fetus. Because the procedure usually is accompanied by excessive bleeding . . . [blood supply must be provided]." Willson, 1958.

Apparently there should be little difficulty in Catholic and non-Catholic medics working in harmony on tubal pregnancies which have not become abdominal. But that harmony does not extend to abdominal pregnancies, particularly as it is the abdominal which have a fair chance of going full term to delivery. A news service last July reported an abdominal pregnancy going full term to birth of a healthy infant in Des Moines. Some keen medical minds, however, have of late been challenging the pessimistic attitude toward tubal pregnancies, now becoming very frequent, and it may be that both moralist and obstetrician will have to give ground.

“It is for physicians accurately to present the facts to the moralist. He depends on them for medical information. Given the medical information necessary, he will then apply the ethical principles to the case . . . ." Healy, 1956.

14. Epilepsy

Epilepsy is an occasional indication for TA. Williams, ed. Stander, 1941.

The proper treatment for epilepsy in pregnancy is dietetic and medicinal. Osler, ed. Christian, 1944.

Of the 295 TA at Los Angeles County Hospital 1931-1950, 4 were for

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1 Willson, Beecham, Forman and Carrington, op. cit. supra note 89, at 172-76.
4 Williams, Obstetrics 575 (8th ed. Stander 1941).
epilepsy, but none have been done on account of epilepsy since 1942.6 Russell, 1953.

15. Hydatidiform Mole

Hydatidiform mole sometimes requires TA regardless of the stage of pregnancy.7 Williams, 1903.

This disease is an indication for TA.8 DeLee, 1913.

It nearly always means a dead fetus.9 Taussig, 1936.

"Diseases of the ovum, such as hydatidiform mole" indicate TA.10 DeLee, ed. Greenhill, 1951.

"A fully developed or typical hydatidiform mole is an uncommon entity, occurring about once in 2,000 deliveries. Hertig feels that this does not represent a true incidence figure . . . ."11 Willson, 1958.

A statistical survey showed 363 cases in 748,626 pregnancies. Of 55 cases only one had any embryo at all; generally there was no blood supply. The occasional normal fetus in a hydatidiform mole case is always a separate entity, meaning a twin pregnancy, with one placenta normal.12 "The embryo is usually absent or dead when the diagnosis of Hydatidiform Mole is made. One should have no scruples about emptying the uterus, accordingly, whenever this condition is recognized."13 Beck & Rosenthal, 1958.

When this condition occurs, empty uterus completely and watch patient for at least one year. "The hazards of hemorrhage and perforation by curettage of the uterus are quite great and therefore no evacuation of the uterus should be attempted without ample blood on hand." Ten times as frequent in the Philippines, Japan and China as in the United States.14 Buxton, 1959.

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7 Williams, op. cit. supra note 94, at 488-89.
8 DeLee, Principles and Practice of Obstetrics 1018 (1st ed. 1913).
9 Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 268 (1936).
13 Id. at 915.
16. Leukemia

Leukemia is an occasional indication for TA.\(^{15}\) Williams, ed. Stander, 1941.

In acute leukemia, 50% of fetuses die, and all mothers die within months after delivery; but it works just as rapidly in the nonpregnant. In chronic leukemia 75% of the infants survive, and two-thirds of the mothers survive more than a year after delivery. “Because pregnancy has little or no effect on the life expectancy of women afflicted with either acute or chronic leukemia, therapeutic abortion is not justifiable and premature interruption of pregnancy is not indicated, except to save the child when mother is moribund.”\(^{16}\) Beck & Rosenthal, 1958.

There is no evidence that TA has any effect on leukemia. The placenta provides an absolute protection for the fetus.\(^{17}\) Flint, 1959.

17. Liver

No liver disease is listed as an indication for TA in Williams, 1903, or in DeLee, 1913.

Icterus, acute yellow atrophy of the liver, usually found in the first half of pregnancy, calls for TA.\(^{18}\) Taussig, 1936.

Infectious hepatitis requires nourishment et cetera, not TA.\(^{19}\) DeLee, ed. Greenhill, 1951.

Infectious hepatitis: “Therapeutic interruption of pregnancy should be discouraged in the interests of both the mother and the baby.”\(^{20}\) Greenhill, 1955.

Infectious hepatitis is characterized by progressive deterioration. Fetus frequently dies; may be expelled prematurely before death of the mother; but it does not inherit the disease.\(^{21}\) Beck & Rosenthal, 1958.

There is no obstetrical complication directly attributable to epidemic hepatitis. Pregnancy caused no increase in morbidity. Susceptibility of mother is not related to her parity. It does more harm to the fetus in the first trimester but is harder on the mother in the later months; pre-

\(^{15}\) Williams, op. cit. supra note 4, at 1123.


\(^{18}\) Taussig, op. cit. supra note 9, at 288.

\(^{19}\) DeLee, op. cit. supra note 10, at 339.


mature delivery seemed to increase the danger to the mother.22 Peretz, 1959.

18. Nervous System: Myasthenia Gravis; Multiple Sclerosis

Two disorders of the nervous system have been taken many times as indications for TA. One, myasthenia gravis, is a syndrome of fatigue and progressive paralysis, especially of the muscles of the neck and face, with no sensory disturbance and no atrophy of any part. It is caused by a functional defect interfering with transmission of nerve impulses. The patient alternates between remissions and relapses. The other, multiple sclerosis, is an organic disease, marked by sclerotic patches here and there in the brain and spinal cord. It produces weakness, loss of coordination, convulsive jerky movements and mental symptoms. Its cause is not finally determined. The prognosis is always gloomy: it may go on for years, with remissions and relapses, but is progressive overall and incurable.

Myasthenia gravis was called a common indication for TA around 1922-1927.23

A standard textbook declared that the proper treatment is rest and medication. “Fewer things are more dramatic than the recovery of muscle power following injection of prostigmine.”24 Osler, ed. Christian, 1941.

In 1942 it was said that while TA was “frequently taken to be indicated” in myasthenia gravis the abortion was not necessary or advisable so long as the patient could be kept under prostigmine control.25 Viets, 1942.

The effort to establish multiple sclerosis as an indication came later. “The two commonest neurologic indications for therapeutic abortion in most reports appear to be multiple sclerosis and epilepsy, both of which indications are controversial. Because of some German literature of many years ago, there has been a trend to interrupt all pregnancies in women who have multiple sclerosis. However, most physicians today

favor a middle-of-the-road approach . . . .” One-third of all neurologic TA at Mayo were for multiple sclerosis. Nelson & Hunter, 1957.

In the 1951 edition of DeLee-Greenhill it was stated that “nervous diseases such as multiple sclerosis” were rarely to be taken as indications for TA.

In 1952 Heffernan and Lynch declared that there was no evidence that either pregnancy or its termination had any effect on multiple sclerosis, good or bad.

One of the studies rejecting the German theory was that of Sweeney, 1953.

Donnelly, in reporting that there had never been a TA at Margaret Hague Hospital on this indication, said that it had been introduced solely on the authority of an article by Van Hoesselin in a German periodical of 1904, and that the recommendation of TA in that article was based on observation of only 4 cases. Subsequent American studies on a more adequate scale had not supported Van Hoesselin.

Donnelly, 1955.

The 1958 edition of Beck and Rosenthal cites Sweeney in saying that “the former opinion that multiple sclerosis is an indication for abortion is open to question.”

19. **Preeclampsia**

Preeclampsia seems to be a sort of end product peculiar to pregnancy, a vicious combination of disorders threatening the mother ordinarily after the fetus has become viable.

Preeclampsia sometimes calls for TA. Williams, ed. Stander, 1941.

Preeclampsia usually occurs during the last 3 months. There is toxemia with violent effects. “The toxemia may affect the child in utero and result in spontaneous expulsion of a premature, stillborn baby.” To be treated by prophylaxis. If not controlled, induce delivery of live child.

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31 Obstetrical Practice 730 (7th ed.).
32 Williams, Obstetrics 1115 (8th ed. Stander 1941).
33 DeLee, op. cit. supra note 27, at 341-43.
No reference to TA for preeclampsia was found in Donnelly, Heffernan and Lynch, Russell, Scherman or Willson.

Commonly treated only as an involvement or result of hypertension or toxemias. "It is rare for preeclampsia to necessitate therapeutic abortion, since it is notably a disease of the last trimester of pregnancy. In the exceptional case, the disease may be so severe at the 24th week, or even earlier, as to necessitate interruption of pregnancy before viability. Not an insignificant proportion of these early cases of preeclampsia are associated with hydatidiform mole."34 Guttmacher, 1954.

"A sudden, pronounced rise in blood pressure, a marked increase in the proteinuria or the observation of greater edema of the fingers and face, indicate the necessity for the interruption of pregnancy. . . . Because the fetus frequently dies in severe preeclampsia, it usually is unwise to postpone the interruption in the interest of the child. If the fetus is not too premature it will have a better chance for survival out of, than in the uterus."35 Beck & Rosenthal, 1958.

A New Zealand team reported on the handling of 169 pregnancies with preeclamptic toxemia. There had been no TA, and the whole effort had been made to determine the optimum date for the delivery of viable infants.36 Carey & Liley, 1959.

20. Thyroid

Baselow's Disease (toxic goiter) is an indication for TA, as a disease jeopardizing the mother.37 DeLee, 1913.

Commonly taken as an indication for TA around 1922-1927.38 Goiter is rarely an indication for TA.39 Cova, 1932.

"Thyrotoxicosis can be treated medically or surgically during pregnancy as though no pregnancy existed; therefore abortion is not required."40 Guttmacher, 1954.

Thyrotoxicosis "can no longer be considered an indication for therapeutic abortion. The disease is treated as in the nonpregnant state, even including the use of radioactive iodine . . . . [Golpitto, Trends in

34 A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, Therapeutic Abortion 16 (1954).
38 Heffernan and Lynch, supra note 23, at 11.
39 Cova, as reported in 98 J.A.M.A. 1393 (1932).
40 A. F. Guttmacher, supra note 34, at 19.
Therapeutic Abortion (1954); Dailey and Benson, Hyperthyroidism in Pregnancy (1951).”

IV

A re-evaluation as to all of these complications of pregnancy is at first view encouraging. Yet as the incidence of recognized medical TA is reduced and effective medical treatment substituted, we find new indications of a wholly different sort being urged. Psychiatric indications had long been suggested without getting much attention. In recent years they have been widely invoked, but by obstetricians, rather than by psychiatrists. The judgment of the latter has been against induced abortion for psychotics and personalities which might easily become psychotic.

Psychiatric Indications

“The statistics presented show evidence of a very important trend in regard to therapeutic abortion. All major organic illnesses have shown a considerable decrease in frequency as indications. It shows, that, even in face of the serious complicating diseases, with competent care, disease and pregnancy are compatible in most instances.

“Only in the case of psychiatric indications has there been a failure to recognize this concept, and as a result there has been a continuous loss of fetal life due to this least severe of all indications. There has been a marked rise in psychiatric indications in the past few years.”

TA is not indicated for psychoses; they can usually go full term.

“At the present time there is no indication for performing therapeutic abortion in psychopathy per se. . . . There exist very few, if any, psychiatrists who . . . would feel a therapeutic abortion is indicated in any of the psychoneurotic reaction types.”

If economic or social pressures, or bodily or mental disease, result in TA, then there follows a change back to hormonal levels, physiologic processes and emotions; then through psychosomatic processes, ideas of guilt and the like all “might well disturb a poorly integrated personality even to psychotic proportions.”

42 Id. at 333.
43 Cova, as reported in 98 J.A.M.A. 1393, 1394 (1932).
45 Id. at 327.
Recognized indications for TA: neurology and psychiatry. “The trend in the evaluation of these disorders as an indication for therapeutic abortion has swung from comparative liberalism to marked conservatism in the past twenty years. There does not seem to be any one condition in neurology or psychiatry which absolutely indicates interruption.”46 Perlmutter, 1947.

“By and large, obstetricians have performed therapeutic abortion on psychiatric indications begrudgingly. They have been inclined to regard the indications which their psychiatric colleagues bring to them as too esoteric and intangible to be convincing; and the thought has not infrequently crossed their minds that a clever, scheming woman is simply trying to hoodwink both psychiatrist and obstetrician. The present volume goes far towards correcting these misapprehensions on the part of obstetricians. Indeed, from the statements and case histories which psychiatrists present in this volume, it is clear that their opinion is veering rapidly toward greater conservatism. The guilt complex which sometimes follows artificially produced abortion receives especial emphasis. Author after author uses such phrases as ‘the sense of guilt or inadequacy which appears directly related to an abortion’, ‘psychic “hangovers” from abortion’, ‘traumatic experience of an abortion’, ‘the effect of the termination on the integrity of the woman’s personality structure’, ‘emotional trauma which the woman will subsequently experience’, to say nothing of the stress laid on ‘exceedingly depressed hysterectomized patients’ and suicidal tendencies in vasectomized men. The feeling is growing apparently among the leaders in psychiatry that therapeutic abortion on psychiatric grounds is often a double edged sword and frequently carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of pregnancy.”47 Eastman, 1954.

“Whether the abortion has been ‘spontaneous’ or ‘therapeutic,’ the potential mother thereby deprived of motherhood is likely to behave in a peculiar way. She will feel both relieved and deprived. Just how she behaves will depend on the degree to which she feels herself responsible for the abortion. . . . It may be said that those who commit or request abortion and those who suffer or endure abortion appear to have a similar post-abortion hangover. Whatever the differences in conscious or unconscious motivations for abortion, the experience of abortion in-

47 Eastman, Obstetrical Foreword, in Rosen, op. cit. supra note 34, at xx-xxi.
evitably arouses an unconscious sense of guilt. Patients who voluntarily, or involuntarily, have gone through this experience should be apprised of this fact and encouraged to talk about their feelings. As physicians come to understand and to apply this knowledge in their daily practice, more children will be born and more healthy children will grow.  

Dunbar, 1954.

"The fact that no abortions have been done for neuropsychiatric reasons during the last two years at the University of Virginia Hospital means that a change of attitude has been successful in helping many people solve their problems in living, problems which seemed to be without solution at the time the case was presented. Neuropsychiatric disease is not necessarily an indication, since persons with serious reactions can be treated while pregnant by shock therapies as well as by psychotherapy. Readjustment of family attitudes frequently allays immediate panic and just as frequently makes the hated pregnancy become a cause for working out the elements behind family disunity."  

Wilson, 1954.

In the emotionally sick patient, "an abortion, whether self-induced or spontaneous, merely relieves the pressure temporarily ..."  

Rosen, 1954.

"In other words, we at times even see patients who state they wish an abortion, and who, if it be arranged for them, actually do have it but only as a face-saving device for themselves. Underneath it all, they actually desire pregnancy. We do not believe it possible to overemphasize this."  

Rosen, 1954.

No TA on account of mental disease has ever been done at Hague Maternity.  

Donnelly, 1955.

"The recent trend has been toward more liberal use of psychiatric indications, but they probably have been greatly overused. Russell reported that nervous and mental diseases made up 25 per cent of all indications for therapeutic abortion in 1950 in California, whereas renal and hypertensive causes made up only 20.9 per cent. Many qualified psychiatrists consider that therapeutic emptying of the uterus may result

48 Dunbar, A Psychosomatic Approach to Abortion and the Abortion Habit, in Rosen, id. at 27-31.
49 Wilson, The Abortion Problem in the General Hospital, in Rosen, id. at 197.
51 Id. at 241.
in deep emotional trauma to the patient and that a poorly integrated personality may be made worse and even psychotic by the procedure. Nelson & Hunter, 1957.

Report on 139 TA with 31,581 deliveries, as to psychiatric reasons (41 of 139): "In the literature this group constitutes the least logical and the most hazardous of all indications. . . . I feel that, except for the next group [neurologic], it is the least justifiable of all indications. Medical men have devised better treatment of severe diseases associated with pregnancy and have been able to markedly reduce the therapeutic abortion rate throughout the country only to find that this least justifiable of all indications, psychiatric reasons, has been allowed to run rampant. Throughout the country most authors [citing] report an increasing rate of therapeutic abortion for psychiatric reasons." Manic depressive psychosis and schizophrenia: "The problem here is one of institutional care and certainly therapeutic abortion will not solve it." Scherman, 1958.

However, neurotics were quickly substituted for psychotics; and in one writing after another we begin to find suggestions that the medical man should recognize unmedical indications—economic, social, the wish of the patient—to determine his course as a medical man.

It becomes hard for a layman to avoid a feeling that there is an element in the profession that wants induced abortions and is determined to find some justification for them. It is equally hard to avoid a feeling that the real pressure for liberalized abortion comes not from medical men, concerned with medical needs, but from involuntary parents of unwanted children.

"If therapeutic abortion were limited to those cases where the life of the mother was certainly and immediately imperiled, the number of such abortions would be exceedingly small . . . ."

"In general one might say that since the [First] World War there have been two movements running counter to each other. On the one hand physicians have declared with increased evidence that certain maternal conditions such as tuberculosis, heart disease, pernicious vomiting, etc., did not require therapeutic abortion as often as reports in previous decades would seem to have indicated. . . .

"The disastrous social-economic consequences of the War, necessitating the limitation of offspring at all hazards, have led a group of honest

54 Scherman, supra note 41, at 330-31.
and well-meaning physicians to advocate an extension of therapeutic indications to eugenic factors, to general debility, poverty and excessively large families. Some have even gone so far as to advocate the Soviet system of legalized abortion when desired by the mother . . . . The bulk of the profession, however, is at present definitely opposed to any such far-reaching extensions of indications, and in Russia, there is an ever increasing effort to reduce the practice, since at best it subjects the woman to some immediate danger and ultimately to the risk of considerable physical deterioration."55 Taussig, 1936.

"If one completely eliminates all socio-economic reasons, then one automatically eliminates therapeutic abortion for all fetal reasons and, for the most part, also eliminates most therapeutic abortions for any reason."56 Greenhill, 1958.

"To deny that these forces [economic pressure, social factors and convenience] had not influenced us would be incorrect; to accept them would be unwise; and the best course would be to view future indications in the light of strict medical principles. . . ."57 Moore & Randall, 1952.

The urge to save one's self from the burden of children is not peculiar to American women, and we find recourse to induced abortion among similar fractions in countries with such conflicting traditions as Germany and Israel.

"A survey shows that the attitude and experience on therapeutic abortion is the same in Germany as in Russia. Social indications are not acceptable, but may give some support to a medical indication. It is necessary to guard against doctors making pretense of the presence of basic disease merely as a cover for action on a social indication."58 Kraatz, 1958.

Induced abortion other than therapeutic abortion is illegal in Israel. Most abortions reported by hospitals are shown as spontaneous, but analysis shows this to be camouflage.59 Halevi & Brzezinski, 1958.

"In our country in the year 1953, socio-economic conditions per se never warrant therapeutic abortion. It is only human that they may

55 Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 278-79 (1936).
weigh heavily in the scale when other factors bring about consideration of abortion. For example, one is more prone to abort the cardiac patient who is unwed, on relief and already the mother of several children, than the woman with the same degree of cardiac pathology who is married, childless and well-to-do.\textsuperscript{60} Guttmacher, 1954.

“The majority of illegal abortions are performed because of unplanned pregnancies in married women in order to regulate the size of their family.”\textsuperscript{61} Willson, 1958.

“Social and economic considerations cannot always be ignored, although it goes without saying that by themselves they do not constitute a valid indication for interruption of pregnancy. All too often they exert strong influence in the decision. However, while such considerations alone should never justify therapeutic abortion, we believe that always to ignore them completely is wrong also, as occasionally these factors do play an important role.”\textsuperscript{62} Nelson & Hunter, 1957.

Mt. Sinai Hospital in New York allows TA (1958) only after unanimous approval by a board made up of its chief of Obstetrics and chief of Psychiatry, with three others appointed from Medicine, Surgery and Pediatrics. From November 1, 1952, through March 1, 1958, it had 22,000 deliveries, 125 TA, or 1:175. Only 21 requests for permission were denied. Indications were 42\% psychiatric, 26\% eugenic, 10\% past or present malignancy, 22\% other causes. “These three conditions accounted for almost four-fifths of the cases, relegating the old orthodox trio—heart, lung and kidney—to secondary importance.” Sterilization was favored during puerperium for women over 35 having 4 living children, and for those of all ages having 6 living children. Others could be sterilized on approval of the chief of Obstetrics.\textsuperscript{63} Guttmacher, 1958.

“Most recent writers [Heffernan and Lynch 1953; Moore and Randall 1952; Taylor, Tillman and Blanchard 1954] stress the real need for disregarding socioeconomic and ‘convenience’ factors in therapeutic abortion.” (But case records have notations of large family, poverty, and the like. Are these indications for TA? If they are not indications, why do they enter into the thought and consideration of a specific problem?)

“If one completely eliminates all socioeconomic reasons, then one automatically eliminates therapeutic abortion for all fetal [\textit{i.e.}, genetic] rea-

\begin{itemize}
  \item\textsuperscript{60} A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, Therapeutic Abortions 21 (1954).
  \item\textsuperscript{61} Willson, Beecham, Forman & Carrington, Obstetrics and Gynecology 162 (1958).
  \item\textsuperscript{62} Nelson and Hunter, supra note 53, at 285.
  \item\textsuperscript{63} Scope Weekly, April 2, 1958, p. 9.
\end{itemize}
sons and, for the most part, also eliminates most therapeutic abortions for any reason. The efforts of many workers have shown that with adequate hospitalization and treatment similar cases to those which in the past have been aborted can be carried to normal termination with little or no increase over their aborted counterpart in maternal morbidity or mortality.\textsuperscript{64} Scherman, 1958.

At a Planned Parenthood seminar on abortion, New York, 1958, Dr. Kinsey insisted that the greatest number of induced abortions were found among those using contraceptives who grew careless.\textsuperscript{65} V

TA acts on the fetus only to destroy it; that can hardly be called therapy as to the infant. Abortion can only be considered therapeutic as to the mother if in a substantial percentage of cases it substantially increases her length of life or restores her to good health. There are no adequate figures to show this result.

\textit{Effect of TA on the Mother}

"The induction of abortion is attended by a certain, though in proper hands small, mortality. The dangers of infection . . . are not always avoidable . . . . I consider the operation of induced abortion one of the most dangerous in obstetrics."\textsuperscript{66} DeLee, 1913.

Soap pastes were introduced in Germany as abortifacients about 1930. They were soon attacked in German and other medical periodicals, and then in the \textit{American Medical Association Journal}. The United States Food and Drug Administration, after long investigation, banned the use of them as posing a serious danger to health and to life.\textsuperscript{67} Weilerstein, 1944. This \textit{cremor saponis} is now being used in authorized Scandinavian clinics.

"According to mortality statistics there were 1,815 recorded deaths assignable to abortion in 1940. Obviously this figure represents only a fraction of the actual deaths, and by no means would it make the estimated figure of 9,480 appear unreasonable.

"Morbidity presents a much more important problem than mortality. It is impossible to estimate its incidence accurately. The number of

\textsuperscript{64} Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 333-34 (1958).
\textsuperscript{65} Kinsey, as recorded in Calderone, Abortion in the United States, ch. 8 (Abortion and Contraception), 156 (1958).
\textsuperscript{66} DeLee, Principles and Practice of Obstetrics 1019 (1st ed. 1913).
\textsuperscript{67} Weilerstein, Intrauterine Pastes, 125 J.A.M.A. 205-07 (1944).
women who suffer from chronic pelvic discomfort, sterility, ectopic pregnancy, surgical ablation of ovarian tissue and neuroses as a result of abortions is very many times the number who lose their lives as a result of abortion. Even when therapeutic abortions are done under the best of conditions, as in the abortaria of Russia, there is an aftermath which made the authorities question the wisdom of legalizing them.\textsuperscript{68} Te Linde, 1946.

The New York Department of Health recorded 3,592 TA from 1943 to 1947; 1 in 250 mothers died within 1 month.\textsuperscript{69} Tietze, 1950.

Maternal mortality rate of TB patients is slightly higher in hospitals permitting TA than in hospitals not permitting TA.\textsuperscript{70} Heffernan & Lynch, 1953.

Of a total of 295 TA at Los Angeles County Hospital, 1931-1950, 21 died an average of 6.8 years later of the disease taken as an indication; 4 died without leaving the hospital.\textsuperscript{71} Russell, 1953.

"[T]he mortality rate on hospital services, where this operation is performed under ideal conditions for therapeutic reasons and on the recommendation of reputable physicians and hospital boards, is no higher than the mortality rate in other hospitals where this operation is not performed.\textsuperscript{72} Fisher, 1954.

"Whether the abortion has been 'spontaneous' or 'therapeutic,' the potential mother thereby deprived of motherhood is likely to behave in a peculiar way. She will feel both relieved and deprived. Just how she behaves will depend on the degree to which she feels herself responsible for the abortion.\textsuperscript{73} Dunbar, 1954.

"Summary. It may be said that those who commit or request abortion and those who suffer or endure abortion appear to have a similar post-abortion hangover. Whatever the differences in conscious or unconscious motivations for abortion, the experience of abortion inevitably arouses an unconscious sense of guilt. Patients who voluntarily, or involuntarily, have gone through this experience should be apprised of this fact and

\textsuperscript{68} Te Linde, Operative Gynecology 475 (1946).
\textsuperscript{69} Tietze, Therapeutic Abortions in New York City, 1943-1947, 60 Am. J. Obst. & Gynec. 146, 147, 151 (1950).
\textsuperscript{70} Heffernan and Lynch, What is the Status of Therapeutic Abortion in Modern Obstetrics?, 66 Am. J. Obst. & Gynec. 335, 336 (1953).
\textsuperscript{71} Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 109, 111 (1953).
\textsuperscript{72} Fisher, Criminal Abortion, in Rosen, op. cit. supra note 60, at 9.
\textsuperscript{73} Dunbar, A Psychosomatic Approach to Abortion and the Abortion Habit, in Rosen, id. at 27.
encouraged to talk about their feelings. As physicians come to understand and to apply this knowledge in their daily practice, more children will be born and more healthy children will grow.74 Dunbar, 1954.

Of the 8 TA done at Margaret Hague Hospital 4 were for hypertensive disease; 2 of the 4 died at once; another died from cerebral hemorrhage 6 years later. The other one (1931) later had an abortion elsewhere, then a tubal ligation, 2 full term healthy babies after an ectopic pregnancy, and after the normal birth in 1952 was "still hypertensive, alive and well." Of 218 hypertensives studied here, two-thirds, with no superimposed preeclampsia, had no deaths; among the other third, complicated by preeclampsia, 6 died. Hypertension without complications is not affected by pregnancy, and abortion will not cure it; abortion may effect a cure in preeclampsia cases. The hospital had 2 TA for rheumatic heart disease, both in 1935, none thereafter. This was ruled out as an indication following the report of Gorenberg and McGearry in 1941. Of over 500 cardiacs, 1939-1952, only 2 mothers were lost, or 0.4%. The annual death rate for all rheumatic cardiacs, 1939-1952, was 2.6%. A ten year follow-up of the 260 entering here between 1937 and 1942 showed 188 still alive, with those having most pregnancies having the longest life.75 Donnelly, 1955.

"No deaths occurred as a result of the procedure itself, although 1 patient died 6 days after curettage. This patient had malignant hypertension and uremia and we consider that she would have died regardless of treatment."76 (Then why kill the child?) Nelson & Hunter, 1957.

"Therapeutic abortion always entails risk to the mother."77 Donnelly, 1958.

"Maternal death rates vary considerably in different parts of the country and with different classes of patients. The mortality is higher in no-white ward patients than in either white ward or white private patients. This undoubtedly occurs because the former include the most impoverished and least well-educated people in our country. There is a higher incidence of medical complications such as essential hypertension, anemia, malnutrition, and toxemia among others, and they often remain untreated. These patients frequently do not seek prenatal care, enter-

74 Id. at 31.
77 Donnelly, as recorded in Calderone, op. cit. supra note 65, ch. 6 (Therapeutic Abortion in the United States), 103.
ing the hospital late in pregnancy, attend irregularly, and cannot afford adequate diets and medications. The death rate is highest in urban communities and in the southeastern states where the concentration of non-white patients and those of low economic status is greatest. It is of interest that the largest proportion of home deliveries and of births which are not attended by physicians also occur in the deep south. Maternal mortality is lowest in the Northwest, parts of New England, and the upper Midwest, where the population is more homogeneous, with fewer Negroes and less poverty and malnutrition. Reduction in maternal mortality therefore must be a concern of educators, sociologists and economists, as well as of physicians.

“The maternal death rate, which is expressed as the number of maternal deaths per 10,000 live births, was 58 in 1935, but by 1953 had been reduced to 6.1. Approximately 37 per cent of the deaths in 1935 were caused by abortion, ectopic pregnancy, or other hemorrhage, 27 per cent by infection, 22 per cent by toxemia, and the remainder by miscellaneous conditions. Hemorrhage, toxemia, and infection are still the most frequent causes of death in pregnant or recently delivered women, but those from hemorrhage and toxemia now occur more often than those due to infection. Although the reduction has been remarkable, many deaths which do occur could be avoided by more careful management. A most disturbing fact is the increasing number of deaths from anesthesia, almost all of which are caused by errors in the choice of the agent or in its administration. Willson, 1958.

VI

No physician would be justified, ethically or legally, in considering an induced abortion except in the case of a complication of pregnancy which created a serious danger to the mother, and one which there was no reasonable hope of averting or overcoming by any other therapy however costly in time and effort.

From a purely medical standpoint, the obvious first step in any consideration of TA must be a determination that the TA will actually be therapeutic and not simply abortion. In other words, there must be a finding grounded in direct experience or adequately documented authority that the termination of pregnancy can be expected to remove the danger to the life of the mother without doing her any serious harm. Yet a faithful search of medical literature will disclose amazingly little evi-

idence that TA is so effective in any of the situations in which it has commonly been used. It will disclose an equally amazing assortment of cases in which it has been used, and is being used, as the answer to complications which had never been recognized as indications for abortion. Surely a surgical or medical destruction of an infant life can find little justification, medically, in a vague hope on the part of a physician, or argument from analogy, or his feeling that there’s no harm in trying. There are reports, chiefly from Scandinavia, which recount numerous induced abortions and boast of a low rate of mortality from the abortions, but without reporting their demonstrated effect in overcoming dangerous complicating diseases. Actually all but a small part of the authorized abortions performed under the laws of the Scandinavian countries are based on nonmedical grounds.

The doctor represents both mother and child, not merely the mother or the one who pays him; and so he has the duty to protect both lives. If not, if his duty is only to the mother, or primarily to the mother, he is certainly disqualified by interest from acting in a judicial capacity between mother and child. Here there is obvious need for a guardian or attorney to defend the interest—the right to life—of the child.

If we read the outstanding medical commentators of recent years, we find little evidence of any general professional demand for greater liberty in doing induced abortion.

“Until as recently as the past decade, therapeutic abortion was a relatively common procedure, well accepted by the majority of physicians as properly indicated for the preservation of the mother’s life or immediate health in certain complicated pregnancies. . . . During the past 10 years, however, there has been a growing appreciation of the fact that many indications for therapeutic abortions are no longer tenable in the light of continuing advances in medical and surgical knowledge. This realization has stimulated many institutions and organizations to study this procedure carefully and to reevaluate their methods of managing the associated problems.” 79 Russell, 1953.

“Modern medicine is a fluid science: there is, as a result, an ever-changing list of abnormal conditions for which abortion is currently indicated. Some long authenticated indications have virtually disappeared, while others are increasing in importance or being newly introduced. On the whole, the over-all frequency of therapeutic abortion is on the decline. This is due to two facts: first, cures have been discovered for a number

79 Russell, supra note 71, at 108.
of conditions which previously could be cured only by termination of pregnancy; and, second, there has been a change in medical philosophy. Two decades ago the accepted attitude of the physician was that, if a pregnant woman were ill, the thing to do would be to rid her of her pregnancy. Today, it is felt that unless the pregnancy itself intensifies the illness, nothing is accomplished by abortion."80 Guttmacher, 1954.

"As mentioned repeatedly in this volume, the incidence of therapeutic abortion because of organic disease has fallen dramatically during the past decade or so. This change has not come about through any outright endeavor on the part of the obstetricians to curtail interference with gestation, but has stemmed almost entirely from the gradual realization, based on extensive clinical experience, that pregnancy, if properly managed, seldom aggravates organic disease.

"Let us consider, for example, the three conditions which have long constituted the most frequent indications for therapeutic abortion on a physical basis, namely, essential hypertension, rheumatic heart disease and pulmonary tuberculosis."81 Eastman, 1954.

"Therapeutic abortion is a greatly abused operation and the incidence of the procedure the country over is much higher than it should be."82 Williams, ed. Eastman, 1956.

"Therapeutic abortion is becoming less frequent as medical and obstetric knowledge progresses. As Eastman has pointed out in the foreword to a book by Rosen, this change also has come about from the realization that pregnancy, if properly managed, seldom aggravates organic disease."83 Nelson & Hunter, 1957.

"Most gynecologic conditions can be corrected by medical rather than surgical treatment, and many can be managed by the family physician who will take time to examine his patients and make accurate diagnoses."84 Willson, 1958.

"Occasionally it is necessary to terminate a pregnancy which is endangering the life and health of a mother. This is called therapeutic abortion. That the need for therapeutic termination of pregnancy is limited is indicated by the fact that Cosgrove and Carter reported an incidence of only 1 in every 16,750 deliveries at the Margaret Hague Maternity Hos-

81 Eastman, Obstetrical Foreward, in Rosen, id. at xix.
82 Williams, Obstetrics 1077 (11th ed. Eastman 1956).
83 Nelson and Hunter, supra note 76, at 284.
84 Willson, Beecham, Forman and Carrington, op. cit. supra note 78, at 15.
pital. This figure is much lower than the average, which has been about 1 in 200 deliveries. During recent years, as newer methods for controlling acute and chronic disease processes have been developed, the need for therapeutic abortion has markedly decreased. . . . There still are a few patients in whom we believe therapeutic termination of pregnancy to be warranted."85 Willson, 1958.

"We must assume that the decreased incidence of therapeutic abortion in the past few years has not been due to a general decrease in complicated pregnancies, nor to a change in the type of these complications, but rather to a better understanding of such complications and a greater realization that with correct therapy the disease and pregnancy are compatible.

"Throughout the country there has been a great effort in recent years in an attempt to halt, or at least decrease, the loss of human life that occurs in an estimated 18,000 therapeutic abortions a year."86 Scherman, 1958.

"The statistics presented show evidence of a very important trend in regard to therapeutic abortion. All major organic illnesses have shown a considerable decrease in frequency as indications. It shows that, even in the face of the serious complicating diseases, with competent care, disease and pregnancy are compatible in most instances."87 Scherman, 1958.

"Treatment of the conditions which are aggravated by pregnancy has been so improved that they are now managed satisfactorily without interfering with the gestation. Therapeutic abortion accordingly is rarely justifiable."88 Beck & Rosenthal, 1958.

"For years medicine has taught that pregnancy, though a normal physiologic process, is such a tremendous burden that it adds an unbearable load to any ill, diseased or handicapped person and, therefore, the two are not compatible. . . . In most instances no one has ever been able to define what the burden consisted of, but these statements were accepted. They were accepted by men who, for the most part, were dedicated to saving lives and who, when faced with such a seemingly overwhelming problem, took the only known way out by destroying the part of that problem which could not resist, while hoping to save that

85 Id. at 164-65.
86 Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 325 (1958).
87 Id. at 333.
portion which could go on living and in the future bespeak not the evil but only the life-saving efforts of the man of science. . . .

"In recent years the existence of these accepted terms of burden, strain, and load have been disproved in association with most diseases and, in the rare instances where they do exist, better methods of combating them have been found."89 Scherman, 1958.

VII

We believe that our extracts from the medical literature of recent years, with flash-back to the turn of the century, are representative of the best medical thought during those years. We believe further that any review of that literature must make clear:

(1) that the medical consensus on the medical reasons for induced abortion was originally built up to a large extent on hasty impressions and reactions, without real evidence of therapeutic gain and with no attempt to tabulate the immediate and delayed effects on maternal mortality and morbidity of such operations, and comparatively, the mortality and morbidity of women not so operated upon, from complications recognized as indications for TA;

(2) that the predominant medical thought, based on more carefully observed experience, has reduced the recognized indications year by year until few are now recognized at all and that more and more doctors have come to reject the idea of TA entirely;

(3) that thousands of infant lives have been destroyed on supposed indications whose recognition is now considered erroneous;

(4) that there is not now and never has been a uniform attitude based on a uniform judgment towards TA; and

(5) that there is no swelling demand from medical men for greater freedom in ordering abortion on medical grounds, but that the present pressure is for freedom to have abortions for the convenience of the mother.

TA is grabbing at the easiest way, instead of striving for the best way. When TA is banned, medics have usually, under pressure of necessity, found a right way. Medical history justifies the belief that if TA is prohibited, the progress of medicine will remove the hazard the TA was designed to avoid; but if TA becomes the common practice, medical progress as to these conditions will become a dead-end street. There will be no study or thought given to how to avoid harm from a normal term

89 Scherman, supra note 86, at 323-24.
delivery in any particular situation if there are never to be any normal deliveries in such a situation.

Before Semmelweiss (1847) and O. W. Holmes (1843), the percentage of puerperal (childbed) fever deaths might have justified abortion in every pregnancy, if the argument for TA is sound at all.

There are no real statistics or direct medical findings to support most of the accepted medical "indications." They are based on reports of a small number of cases by individual doctors or teams, usually on maternity sections of single small hospitals or selected cases in individual hospitals (the German report on 4 cases) and the hospitals have seldom been chosen as representative. Outstanding exceptions are the maternity cases of such really big hospitals as the Margaret Hague Maternity and the Los Angeles County Hospital.

Thousands of unborn infants have been slaughtered already on "indications" which are now recognized as offering no special threat to the pregnant, most of them now successfully treated without loss of the child. They were destroyed in the womb on the basis of general, or dominant, medical opinion at the time, yet all are now discredited. The "indications" of today are entitled to no greater respect as a basis for legislation. The purely medical have been almost wholly abandoned, with a shift to protection of mental health on which psychiatrists are not agreed but to which most are opposed. The further shift to neurotic indications has become a medical man's judgment of the economic and social or purely selfish factors which he believes to be responsible for the patient's condition.

The destruction of the unborn child was authorized to save the life of the mother. Now we are asked to give the practice legal authority, to prevent any disturbance of mental or emotional poise, through shame, dread of the burden of caring for the child or on the basis of similar considerations. Such considerations are not an excuse for TA anywhere in the United States, and they should not come to be.

How many mothers at some time during pregnancy threaten abortion or suicide? How many of these, even at the time of depression, would actually attempt it and not have a crushing reaction after this moment of strain had passed?

A mother who would sacrifice the life of her unborn child for her own health is lacking in something. If there could be any authority to destroy an innocent life for social considerations, it would still be in the interests of society to sacrifice such a mother rather than the child who might otherwise prove to be normal and decent and an asset.
Many medical practitioners never have a case in which they would justify a TA; yet each feels very strongly that he should be free to have a TA performed if and when he may get a case in which he believes the TA necessary for the mother. This is a natural feeling, but it is only a feeling, which need not obstruct or cramp any of his work. And in any event it should not be allowed to obscure several patent facts:

(1) that in medical practice as in other professions not all members are equally ethical;

(2) that the difference in diligence, patience and general attitude towards interference with pregnancy on the part of different medical men makes any uniform handling rationally inconceivable;

(3) that the availability of the easy method of TA to meet any combination of pregnancy with complicating disease would offer a constant temptation to resort to TA when other but more difficult or time consuming methods would fully protect the mother without sacrifice of her child;

(4) that practitioners for whom TA was not available have met the challenge by working out successful medical treatment for complications once regarded as impossible of management except by TA;

(5) that the average practitioner may make a mistake in determining the necessity for TA in a particular case;

(6) that a consultant who may get his case-taking and anamnesis from the physician calling him may err in consequence;

(7) that after a particular indication for TA has been proven both unnecessary and harmful, it will be a matter of years before the whole profession abandons it; and

(8) that the end does not justify the means.

If an underwriters' engineer were authorized, with the endorsement of one associate, to destroy every building he labeled a fire hazard, without giving any reason therefor, he might do much good to the city at large, like an MD with unrestricted authority to order TA with the endorsement of another MD but without a statement of his reason. But he might make errors of judgment, not appealable if no reason is given or required; he might be competent to recognize the danger in the existing structure, but incompetent to recognize a practical way of removing the danger without destroying the building; he might tear down a building that was not actually a fire hazard, to benefit an adjoining property. Less ethical engineers might destroy buildings for even less ethical reasons, and the owners of the buildings destroyed would have to stand the loss.
VIII

In addition to the indications just discussed, there is mention made today of factors, not strictly medical, which also are said to be reasons for TA. It is our purpose to take up these here.

Eugenic Abortions

“Therapeutic abortion for eugenic reasons, for faulty germ plasm, is far less common than preconceptional sterilization in such cases. . . . Each such case must be submitted to the most searching scrutiny. After such scrutiny, few pregnancies merit interruption.”90 Guttmacher, 1954.

“There are frequent statements in the literature, and especially in the older literature, to the effect that patients with schizophrenia, manic-depressive psychosis, some neuroses, epilepsy and diabetes should not have children because of the inheritable nature of their diseases. There are even not infrequent recommendations to the effect that these conditions per se constitute sufficient reason for interrupting a given pregnancy. For obvious reasons, we do not feel that these particular articles merit the emphasis of bibliographic reference. What seems biological inheritance, as Meyers and Murdock both stress in their chapters elsewhere in this book, in these diseases may frequently be familial and cultural environment.”91 Rosen, 1954.

Huntington’s Chorea means progressive deterioration; it is hereditary, but may skip a generation. “Since pregnancy does not impair the health of the choreic or endanger her life, there is no legal reason for therapeutic abortion.”92 Greenhill, 1955.

There are just two conditions, or developments, which can be seriously considered today as eugenic reasons for induced abortion: RH factor difference and rubella (German measles) contracted by the mother before or during the first 3 months of pregnancy. Both were first the subject of report and discussion about twenty years ago. Apparently both will in a very short time have ceased to be a problem at all.

1. RH Factor

Rh factor difference may result in an erythroblastotic infant; it is suggested that this be recognized as a new indication for TA.93 Perlmutter, 1947.

90 A. F. Guttmacher, supra note 80, at 20.
An indication for TA "when the mother has delivered one or more erythroblastotic babies and her husband is homozygous. If he is heterozygous it need not be interrupted." DeLee, ed. Greenhill, 1951.

"Erythroblastosis Fetalis is usually not looked upon as an indication for therapeutic abortion. In serious instances of this disease the child is either stillborn, dies in the first few hours of life, or survives. When it survives, a good prognosis can be given for normalcy if, when indicated, copious exchange transfusion is promptly carried out." Guttmacher, 1954.

"If infants have been severely affected and have died in previous pregnancies despite good treatment, and if the father is homozygous Rh positive, termination can be considered because there is no way of preventing a recurrence." Willson, 1958. (Apparently this author would avoid the likelihood of a child being lost, by making certain of its destruction in advance. Others however had already taken a more cheerful view of this situation.)

"Since the permeability of the placenta to antibodies increases as pregnancy advances . . . it may be advisable to deliver some mothers several weeks before term . . . . When so indicated the pregnancy may be terminated by the induction of premature labor or by Caesarean section. On the other hand, the hazards of extreme prematurity must be avoided." Beck & Rosenthal, 1958.

Dr. Potter, who has done much work in this field, reported a year ago on 302 births to 241 women, complicated by Rh factor difference, but found so many other elements that she was unwilling to shape any conclusions. Potter, 1959.

"[I]t is important to stress that the term 'placental barrier' is no longer considered inclusive enough to represent the total maternal-fetal relationship involved in pregnancy. The amnion, membranous chorion, and decidua vera deserve consideration as well as the villus placenta and decidua basalis." From 1941 on, writers on Rh factor in erythroblastosis have offered different theories on how the barrier is crossed.

"It is my opinion that certain obstetric procedures, if used regularly, may decrease the incidence and severity of problems arising as a result of the passage of protein substances across the maternal-fetal barrier

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and that some obstetric procedures regularly practiced may be increasing the incidence and severity of these problems." Emphasis was placed on prenatal care; ascorbic acid and bioflavonoids were thought effective. Avoid amniotic fluid embolism by perforating sac to permit leakage. Abruptio placentae an extremely dangerous complication.99 Reilly, 1960.

A number of other reports indicating some success in overcoming this complication have been published during the last two years, which we have not had opportunity to study.

2. Rubella (German Measles)

An Australian report on rubella contracted during the first 3 months of pregnancy as causing a high percentage of fetal deaths, stillbirths and abnormal infants alarmed many American medics and moved them to accept such infection in early pregnancy as a new indication for TA. However they did so on a purely eugenic basis, as there has never been any suggestion that this complication could offer the least threat to the life or the physical or mental health of the mother.

Recognized indications for therapeutic abortion: Rubella. A high percentage of these cases "show severe congenital anomalies," on the basis of the study by C. H. Albraugh in 129 J.A.M.A. 719 (1945).100 (The relationship first discovered by Gregg in 1941.) Perlmutter, 1947.

Rubella was first taken as an indication on the basis of a report by Swan, Tostevin, Mayo and Black on 109 Australian cases to 1944 and 58 cases from 1945 to 1946.1

"German measles contracted before the end of the third month is an indication because most of the forthcoming babies will have congenital defects, particularly eye defects, heart disease, dental abnormalities and deaf mutism."2 DeLee, ed. Greenhill, 1951.

German measles contracted before the end of the third month may be an indication because many babies will have congenital defects et cetera.3 Greenhill, 1955.

Rubella and other virus infections have been taken as indications for TA in recent years.4 Heffernan & Lynch, 1952.

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100 Perlmutter, supra note 93, at 1015.

1 As reported in 134 J.A.M.A. 1579 (1947).
2 DeLee, op. cit. supra note 94, at 977.
3 Greenhill, op. cit. supra note 92, at 500.
Highly respected investigators expressed in 1953 a pessimistic view of prospects for the fetus when rubella is contracted early in pregnancy.\(^5\) Krugman, 1953.

"Since the initial work of the Australians in 1941, an immense literature has made it clear that at least 30% of children whose mothers have German measles before the 12th week of pregnancy are born with congenital abnormalities . . . congenital cataracts, deafness, or other serious defects. This appears true even when the infection antedates pregnancy by a few weeks. However, after the 16th week the embryo no longer seems sensitive to this maternal disease. The other exanthemata [eruptive diseases] have been carefully studied for similar harmful influences, but none has been found. In view of this, many obstetricians feel that if rubella is unqualifiedly diagnosed before the 12th week of pregnancy by a doctor experienced in infectious diseases, therapeutic abortion should be performed.\(^7\) Guttmacher, 1954.

"German Measles contracted before the end of the third month may be an indication, because many babies will have congenital defects, particularly eye defects, heart disease, dental abnormalities and deaf mutism."\(^7\) Greenhill, 1955.

Rubella in the first 4 months causes severe congenital defects in probably 1 out of 5 or 6 cases. Lundström (1952) reported stillbirths, prematures and other abnormalities in 17 of 579 who had rubella in the first 4 months; 6% among control group of 2,226. The chief abnormalities are cataracts, deaf-mutism, cardiac anomalies and mental retardation. A carrier of rubella can infect a pregnant woman before the carrier shows any external symptoms, and before the pregnancy is recognized. Gamma globulin from a healthy person is variable in effectiveness; "nor have the results with convalescent gamma globulin been any more consistent or reliable."\(^8\) Horstmann, 1956.

Horstmann cites the studies of Krugman and Ward published in 1953, but he did not have the benefit of their re-evaluation of 1958. Rubella and other diseases endanger the child but cause no increase in hazard to the mother.\(^9\) Beck & Rosenthal, 1958.

\(^{6}\) A. F. Guttmacher, supra note 95, at 21.
\(^{7}\) Greenhill, op. cit. supra note 92, at 500.
\(^{8}\) Horstmann, Rubella (German Measles), in Meakins, The Practice of Medicine 252 (6th ed. 1956).
Five years after their first report, Krugman and Ward had determined that the work done on this problem since 1953 required further consideration. They published the results of a re-evaluation showing only 0.9% contraction of rubella among 541 immunized pregnant women exposed to it, as against 11.2% for a control group of non-immunized pregnant and nonpregnant. Then as to the child: "The risk of congenital malformation resulting from a first trimester pregnancy complicated by rubella can best be determined by prospective studies. The early estimates of 90 or more per cent were derived from retrospective studies, which originated with the damaged infant; the normal infants, therefore, did not come to the attention of the observers. In recent years a number of surveys of the prospective type have been reported. . . . These studies have originated with the rubella infection in the pregnant woman, and have ended with the new-born infant—normal or abnormal. The accumulated data at the present time indicate that maternal rubella infection in the first trimester may be followed by congenital malformations in 10 to 12 per cent of cases."10 Krugman & Ward, 1958.

A distinguished Scottish physician writes quite differently. Rubella is transmitted by direct contact (possibly by bedding, clothing et cetera) only in the preliminary and eruptive stages. "The common abnormalities reported have been congenital cataracts, deafness and cardiac defects. . . . When a woman in the early months of pregnancy is exposed to the disease sero-prevention should be practiced. Gamma-globulin has been prepared from rubella convalescents and may be obtained from Blood Transfusion Centres. If not available, ordinary gamma-globulin in double the dose advised for measles (q.v.) should be given."11 There is no suggestion of TA. Anderson, 1958.

Two studies of rubella in small groups were published during 1959. One was on the rubella epidemic of 1955-1956 in Montreal. Of 31 mothers who went full term, 25 had normal, healthy infants; 3 infants were lost—one, a stillbirth, two (with heart defects and cataracts) dying within 3 weeks. The other 3 survived—one, with a heart defect and cataracts, one with microphthalmia but otherwise normal and healthy, and one with a heart murmur at 6 weeks but given a good prognosis.


Only 8 of the 31 had been given gamma globulin, and none had had convalescent serum.¹² Oxorn, 1959.

Two medics reported on the beginning of a more extensive study. This report was on 89 infected in the first trimester and a control group of 91 free of rubella. The control group had fewer fetal deaths; the infected 89 had fewer abnormal infants.¹³ Siegel & Greenberg, 1959.

Of course neither of these two reports dealt with a large enough number to have any great significance; but they give the most recent view of the work which is now occupying many in this field.

**Conclusion**

If TA is to continue to be recognized on a medical basis in spite of the medical testimony against it, we should recommend:

1. that it be confined to no-fee clinics;
2. that it be done only on the recorded judgment of the staff or a specially qualified committee, on specified medical grounds, reciting the facts of each case and the authority for holding that TA is necessary and will be beneficial in such case, without offsetting after-effects;
3. that such judgment be entered only after appearance of a public guardian or attorney for the unborn;
4. that a follow-up record on each patient be required, with a clearing house for reports of all cases and continuous revision of acceptable indications in the light of additional experience, development of therapies et cetera;
5. that the statutory excuse of necessity of TA for the preservation of the life of the mother be made an affirmative defense, to be proved by the defendant as a fact, not as a mere opinion;
6. that there be denied to any staff or committee the authority to approve TA in any case in which it is asked on social or other nonmedical grounds, or on a record in which entries have been made of such nonmedical elements.

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GLOSSARY

**abruptio placentae**: premature detachment of the placenta.

**accouchemenêt forcê**: artificially hastened delivery (usually by forceps).

**albuminuria**: the presence of albumin (a simple protein) in the urine, due to the presence of blood (or other albuminous fluid) escaping somewhere in the urinary tract.

**amnion**: the inner of the membranes composing the sac which envelops the fetus in the uterus.

**amniotic fluid**: fluid which surrounds the fetus and protects it from injury.

**anemia**: a condition caused by: reduction in amount of blood present; or deficiency in red-blood cells; or deficiency of hemoglobin.

**hypochronic anemia**: anemia marked by a lowered color index of the blood.

**pernicious anemia**: marked diminution of red corpuscles—usually fatal.

**sickle cell**: crescent shaped red blood cell peculiar to the Negro race.

**arteriolar lesions**: injury or damage to an arteriole (a minute artery continuous with the capillary network).

**arteriosclerosis**: hardening of arteries due to fibrous overgrowth of the inner coat of an artery.

**calcific pericarditis**: inflammation of the sac enclosing the heart, caused by lime or similar salt deposits.

**carcinoma**: cancer: malignant growth.

**chorea** (St. Vitus' Dance): a toxic or infectious disorder of the nervous system manifested by involuntary spasmodic movements of limbs or facial muscles.

**chorion**: outermost of the fetal envelopes derived from the ovum.

**curettage**: scraping of the interior of the uterus to remove new growths and abnormal tissues.

**cyanosis**: dark blue coloration of the skin due to deficient oxygenation of blood in the lungs or to a great reduction of blood in its passage through the capillaries.

**decompensation**: failure of counterbalancing of the circulation of the heart.

**dermoid**: (skin-like) a congenital tumor, the walls of which resemble skin and sometimes give origin to teeth or hair.

**dystrophy**: defective nutrition.

**eclampsia**: a disease occurring in the latter part of pregnancy and marked by convulsive seizure and coma. The toxemias (blood-poisonings) of pregnancy are preeclampsia (early stage) and eclampsia (final stage).

**ectopic pregnancy**: pregnancy outside the uterine cavity (e.g., tubal pregnancy).

**edema**: excess accumulation of watery fluid in the tissue spaces of the tissues.

**erythroblastosis**: an anemia of newborn children which develops when mother is an RH negative and develops antibodies against the fetus which is RH positive.

**exanthemata** (plural of exanthema): an eruption upon the skin.
fibroid tumor: tumor composed of fiber or fibrous connective tissues.
glomerulonephritis: inflammation of the kidneys with pronounced lesions of the blood vessels within the kidney.
glycogen: a carbohydrate readily converted into glucose.
hepatic: relating to the liver.
hepatitis (infectious): a virus-caused disease which attacks the liver.
hydatidiform mole: rapidly growing mass arising from the proliferation of the chorionic blood vessels. The mass fills the uterus.
hydronephrosis: enlargement of kidneys due to obstruction of the flow of urine.
hyperemesis gravidarum: pernicious vomiting during pregnancy.
hypertensive vascular disease: vascular disease marked by increased blood pressure.
hypertension: high arterial blood pressure.
hyperthyroidism: symptoms produced by excessive activity of the thyroid gland.
hypertrophy: general increase in size of organ, but not due to formation of a tumor.
hysterectomy: surgical removal of the uterus.
icterus: jaundice.
intraoperative: within the abdominal cavity.
ischemia: a local anemia due to obstruction of the blood supply.
mitr stenosis: a narrowing of the mitral valve in the heart.
myasthenia gravis: aggravated muscular weakness.
myoma (pl.: myomata): tumor composed of muscular tissues.
necrosis: death or degeneration of a specific group of cells.
neoplasm: new growths.
nephrectomy: surgical removal of a kidney.
nephritis: inflammation of the kidneys.
nephrolithiasis: kidney stones.
parenteral: relating to nourishment introduced by some method other than through the digestive tract and intestines (e.g., intravenous feeding).
peritoneum: the sac lining the abdominal cavity.
placenta: the organ on the wall of the uterus attached to the fetus by the umbilical cord, and through which the fetus is nourished.
placenta praevia: a condition whereby the placenta implants in the lower portion of the uterus and entirely or partially blocks the opening in the cervix.
polycystic: composed of many cysts.
polyhydramnios: an excess of amniotic fluid.
porphyrinuria: the excretion of porphyrin (an organic pigment) in the urine.
preeclampsia: the state or condition preceding eclampsia (marked by headache, vomiting etc.).
proteinuria: excretion of any protein in the urine.
psychosomatic: pertaining to influence of mind or higher functions of the brain (fear, desire etc.) upon body functions, especially in relation to disease.
puerperal fever: the post-natal presence of bacteria in the blood stream which causes a fever.
pyelitis (pyelonephritis): inflammation of the pelvis of a kidney.
rectosigmoid: the rectum and lower curved portion of the colon considered together.
renal: relating to the kidneys.
Rh factor (positive): a substance present in red blood cells in about 85% of human beings. Rh negative means the blood does not contain this substance.
rubella: German measles.
stasis: stagnation of blood or other fluids.
subarachnoid hemorrhage: hemorrhage below the middle membrane, or middle layer of membranes covering the brain or spinal cord.
syndrome: concurrence of symptoms.
systolic blood pressure: the blood pressure which is due to systole, i.e., the contraction phase of the heart beat.
thyrotoxicosis: poisoning by an excessive thyroid secretion.
toxemia: blood-poisoning.
trauma: a wound or injury, usually suddenly inflicted.
uterine myomata: tumors of the uterus.
vascular lesion: tearing of blood vessel.
vasoconstrictive: causing narrowing of the blood vessels.
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INVESTIGATIONS UNDER LANDRUM-GRIFFIN

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Concerned by the sweeping investigatory powers some would cede to the Secretary of Labor under the Labor-Management Reporting and Disclosure Act of 1959, the authors strongly contend that the Secretary's right of investigation flows not from the act's record-keeping requirement but from the more restrictive provisions of section 601. Following an appraisal of analogous provisions in other statutes, Messrs. Rosenblum and Silverstein predict what rights will be accorded those subject to investigation under Landrum-Giffin and suggest realistic legal approaches by which these rights may be secured.

INTRODUCTION

It would seem that any discussion of the scope and enforcement of the investigatory power given the Secretary of Labor by the Labor-Management Reporting and Disclosure Act of 1959 should commence with section 601, entitled "Investigations." Yet the suggestion has recently been made by at least two representatives of the Secretary that insofar as the records of persons required to file reports are concerned, the investigatory powers conferred upon the Secretary by section 206 of

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1 Sec. 601. (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except Title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereeto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

2 Sec. 206. Every person required to file any report under this title shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and com-
Title II are as complete as section 601, more direct and much faster in achieving results. Briefly stated, the position taken is that the Secretary, by resort to vouchers, worksheets and receipts, has the right to have verified, explained or checked the various reports and documents required to be filed, and that this right of access is available without subpoena. If this position is well taken, then at least with respect to persons required to file reports (as contrasted with others not so required), the Secretary of Labor has a handy investigatory tool unencumbered by problems of immunity raised under section 601.

The purpose of this article is to demonstrate briefly that no independent right of investigation may be derived from section 206, but that the investigatory power of the Secretary exists solely by virtue of section 601, with the limitations inherent in this latter section. These limitations will be discussed in the form of requirements to be followed by the Secretary in the exercise of his investigatory power; against this background, the immunities and procedural rights of those subjected to investigation will be developed at length.

I

The Respective Roles of Sections 206 and 601

Nothing in the legislative history of section 206, the treatment of its prototype in the Fair Labor Standards Act,3 or its plain wording, title and juxtaposition in the statutory scheme of Landrum-Griffin justifies the conclusion that this section gives to the Secretary an independent right of investigation. In the first place, section 206 is the ultimate revision of a similar section in the rejected Kennedy-Ervin bill4 which "did not require the making and preservation of these basic records with respect

3 Sec. 11. (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

to conflict-of-interest reports by union officials.\textsuperscript{5} When this section was in committee in the Senate, the requirement was extended to conflict-of-interest reports, and the provision as extended was retained in the conference report and in the final bill. Here, the emphasis was placed on broadening the record-keeping requirements. Also, when the bill was in the Senate, it was passed with the provision that the basic records be kept under conditions and for periods of time to be prescribed by the Secretary; but, emphasizing a fixed and required time for record retention, the conference report and final bill eliminated this discretionary authority and inserted the present five-year requirement to coincide with the length of the statute of limitations for criminally prosecuting perjury under federal law.\textsuperscript{6} In every instance, this section's legislative forerunners carried out its statutory heading dealing only with the retention of records. Nowhere does the legislative history indicate the grant of an independent investigative authority to the Secretary.

Additionally, section 11(c) of the Fair Labor Standards Act—after which the Senate version of section 206 (giving the Secretary discretionary authority) was patterned—has been consistently interpreted as one imposing only an affirmative duty on the employer to keep records, with penalties provided for violations.\textsuperscript{7} It has never been construed to broaden the Administrator's investigative powers. Lastly, section 206 itself is entitled "Retention of Records"; the only affirmative duty it imposes is that "every person required to file any report . . . shall keep such records available for examination . . . ." This is far removed from any requirement that such records—without more—be produced for examination. The adjective "available" means handy and accessible. To read the words "keep available" as meaning "make available" is to torture plain English; it would have been a simple task for Congress to have substituted the word "make" for "keep." As the legislative history of Landrum-Griffin amply reflects, Congress knew how to make much more difficult and complex substitutions to achieve its legislative end.

These considerations would seem to negate any congressional intent to do more than insist on minimum standards for retention so that the ability of the Secretary to effect his investigatory powers must derive from section 601, or not at all, where immunity considerations may or may not dictate various courses of action.

\textsuperscript{5} 105 Cong. Rec. 19761 (1959).
\textsuperscript{7} Mitchell v. Hertzke, 234 F.2d 183 (10th Cir. 1956).
II

Nature of the Investigatory Power Under Section 601

1. Requirement of Subpoena

In paragraph (a) of section 601 the Secretary is given the power to make investigations. It is also provided that in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary. Nothing is included to suggest that the investigative assertions of paragraph (a) are to be accomplished by means of the subpoena power given in paragraph (b) to the Secretary and such officers as are designated by him. This omission has given rise to the concern that paragraph (a) somehow grants independently to the Secretary a right of access, inspection and interrogation without need on his part to resort to the subpoena power of paragraph (b).

Aside from the fact that the subpoena as a judicial process does have certain limitations (such as relevancy, form, notice and others) to which objection can be made, whereas a right of inspection and access does not lend itself as easily to prior objection and restraint, the requirement of a subpoena can determine whether or not the immunity granted in a Landrum-Griffin investigation is real or mythical. This is an even greater concern under section 601 than under section 206 because the latter section is limited to persons "required to file any report" while the former speaks of "such persons as he may deem necessary." In short, if section 601(a) gives the Secretary investigatory powers without subpoena, it applies not only to persons upon whom the act imposes some duty, but also to third parties as witnesses who may not even be covered by its provisions.

In order to arrive at some conclusions concerning section 601(a) and (b), one must first turn to the legislative history of the section where it seems quite clear that the legislative intent was to confer upon the Secretary the same powers given to him in the Fair Labor Standards Act. The legislative counterpart of section 601(a) is found in section 11(a) of the Fair Labor Standards Act, and a provision substantially

8 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-19 (1958). See 105 Cong. Rec. 19768 (1959). 9 Sec. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall
identical to section 601(b) is section 9 of the same act. When read with section 11(c) of the Fair Labor Standards Act whose counterpart in Landrum-Griffin is section 206, these three sections of the Fair Labor Standards Act are seen to form an ancestral trilogy for those sections of Landrum-Griffin which are here being considered in connection with the Secretary’s investigative powers. It is then to the judicial construction of sections 9 and 11(a) of the Fair Labor Standards Act that one must turn in determining whether or not these sections—or their counterparts in Landrum-Griffin, paragraphs (a) and (b) of section 601—give to the Secretary any right of free access and inspection in aid of his investigatory powers, as contrasted with his clear right of subpoena. An additional consideration, of course, is that similar to section 601(b) of Landrum-Griffin, section 9 of the Fair Labor Standards Act incorporates by reference sections 9 and 10 of the Federal Trade Commission Act; utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act. 52 Stat. 1066 (1938), 29 U.S.C. § 211(a) (1958).

10 Scc. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children’s Bureau, and the industry committees. 52 Stat. 1065 (1938), 29 U.S.C. § 209 (1958).

11 Scc. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Scc. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense. If any corporation required by this Act to file any annual or special report shall fail to do so within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure.
hence, adjudicated cases under these latter sections must also be weighed.

In at least one case\textsuperscript{12} construing sections 9 and 11(a) of the Fair Labor Standards Act, the Supreme Court has indicated that it would not countenance any reading of section 11(a) which permitted to the Secretary investigatory powers that were not exercised under the subpoena power. If it can be assumed that Congress, when it enacted paragraph (a) of section 601 of the Labor-Management Act of 1959, also sought to enact and approve the judicial interpretation of its counterpart\textsuperscript{13} in the Fair Labor Standards Act, then the concern that section 601(a) gives investigatory powers without need for a subpoena appears to be unwarranted. When in \textit{Cudahy Packing Co. v. Holland}\textsuperscript{14} the Supreme Court had before it the issue of whether or not section 9 of the Fair Labor Standards Act permitted the Administrator to delegate his statutory power to issue a subpoena duces tecum, the Administrator argued that such a power was delegable by analogy to section 11(a) which allowed to the Administrator or his designated representatives a right of access, inspection and interrogation. Resorting to language now particularly appropriate to section 601(a) of Landrum-Griffin, the Court rejected the Administrator's argument:

The subpoena power differs materially in these respects from the power to gather data and make investigations which is expressly made delegable by § 11. \textit{Without the subpoena that power is, in effect, a power of inspection at the employer's place of business to be exercised only on his consent.}\textsuperscript{15}

Four years later in \textit{Oklahoma Press Publishing Co. v. Walling},\textsuperscript{16} the Supreme Court once again had occasion to consider the respective roles of sections 9 and 11(a) of the Fair Labor Standards Act. In this case the Administrator had sought to subpoena extensive records from several newspaper publishing corporations in order to determine whether there had occurred any violations of the act. In rejecting the corporations' argument that enforcement of the subpoenas would violate the intent of Congress that records could not be subpoenaed to secure information of a violation without a prior complaint that a violation in fact existed, the Supreme Court held that the subpoena power conferred by section 9 is given in aid of the investigation authorized by section 11. Later, when answering the corporations' standard arguments of inconvenience, expense

\textsuperscript{12} Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942).
\textsuperscript{14} 315 U.S. 357 (1942).
\textsuperscript{15} Id. at 364. (Emphasis added.)
\textsuperscript{16} 327 U.S. 186 (1946).
and harassment, the Court pointed out: "There is no harassment when the subpoena is issued and enforced according to law. The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision."¹⁷

Whether this case furthers the theory that section 11(a) grants no independent investigatory power may depend on the reader's bias; the language is elliptical at best. On the one hand, one might conclude that, section 9 being in aid of section 11, the latter section taken alone is sterile; that section 9 effects the broad authority given by section 11; and that such an interpretation is consistent with the earlier Cudahy Packing case. On the other hand, the Court appears to recognize more than one case of the Administrator's power to enter and inspect subject to judicial supervision. Is this the power to enter and inspect under section 9 as against "a corporation being investigated or proceeded against,"¹⁸ (which would fit the Oklahoma Press fact situation), or is the Court referring to a power granted independently by section 11(a)? Further, is the "judicial supervision" which regulates in all cases the right to inspect and enter the kind of supervision exercised by a court over a subpoena or a warrant (supportive of the sterility theory of section 11(a)), or does the Court mean the mandamus in support of the Administrator's right of access and inspection which the district courts may issue under section 9 of the Federal Trade Commission Act (neutral, if not supportive, of the theory that a right of entry and inspection under 11(a) is one of the cases referred to in the Oklahoma Press opinion authorizing the Administrator's independent right of entry and inspection)?

However, apart from all considerations of prior judicial construction of its statutory ancestor, section 601(a) on reason would not appear to be a grant of investigatory power independent of the subpoena. To read it otherwise would raise serious constitutional questions because it would give the Secretary the right to subject any "such person as he may deem necessary" to entry, inspection and interrogation. Since the inquiry would not be limited to "persons" covered by the act or to corporations being investigated, this construction raises constitutional problems of self-incrimination as well as of unlawful search and seizure, not only with respect to covered persons, but also with respect to third parties who might have had some dealing with others being investigated as first parties. Such persons (whether first parties or third parties) would not be testifying or producing documents in answer to a subpoena and would

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¹⁷ Id. at 217. (Emphasis added.)
therefore receive no immunity under section 601(b). Without unduly lengthening this discussion with citations and discussions of constitutional principles which condemn such an unlimited right of access by a governmental agency to the places, records and testimony of persons and witnesses, this writer suggests that the constitutionality of such power be tested by substituting the words "Federal Bureau of Investigation" for "Secretary" in section 601(a) and then reading that paragraph (aloud, if need be) as conferring an independent right of access. The mere sound of the words should do more than all the case citations one can possibly collect.

Even in Frank v. Maryland\(^\text{19}\) where the Supreme Court in a five-to-four decision affirmed the right of Baltimore's Commissioner of Health to demand entry to a residence where it was suspected a nuisance existed, the majority distinguished the dissent's asserted violation of fourth amendment rights (made pertinent by the due process clause of the fourteenth amendment) by pointing out (1) that no evidence for criminal prosecution was sought to be seized, and (2) that inspection without a warrant as an adjunct to a regulatory scheme of the community and not as a means of enforcing the criminal law has been a part of our American history and tradition. Mr. Justice Frankfurter made it clear that his opinion was based upon the exercise of the police power in aid of its concern for maintaining minimum standards of health. In view of the last sentence of 601(a) giving the Secretary authority to report any matter to interested officials and in view of the numerous criminal sanctions imposed throughout the act, it seems quite clear that the discovery of evidence for criminal prosecutions is one of the main purposes underlying the Secretary's investigatory powers. If this were not true, Congress would hardly have incorporated the immunity provisions of section 601(b). Thus the rationale of the Frank case gives little support to any independent right of access under 601(a). The difference between access by a health commissioner who can only order elimination of a nuisance affecting public health and access by the Secretary's representative who is directed to forward evidence to the Department of Justice for prosecution under the language of the last sentence of section 607\(^\text{20}\) is so substantial that the guarded majority opinion in Frank is, if

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\(^{19}\) 359 U.S. 360 (1959).

\(^{20}\) Sec. 607. . . . The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this Act or other Federal law. 73 Stat. 540 (1959), 29 U.S.C. § 527 (Supp. I, 1959).
anything, supportive of the sterility theory of section 601(a) (denying an independent right of access, inspection or interrogation to the Secretary unless effected by the clear subpoena power of 601(b)).

Thus far all consideration has been directed toward the grant of investigatory power under section 601(a). However the conclusions suggested earlier are far from controlling with respect to section 601 (b), which incorporates by reference sections 9 and 10 of the Federal Trade Commission Act. In section 9 there is given to the Commission or its duly authorized agents a specific right of access:

[F]or the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against . . . .

The key words to be noted are "any corporation being investigated or proceeded against." Unlike 601(a) there is no attempt to interfere with the privacy or constitutional rights of third parties, and even in those areas where such rights may be adversely affected to the point of bordering upon constitutional prohibitions, the right of access is limited to non-natural (i.e., corporate) persons being investigated or proceeded against.

On its face section 601(b) grants to the Secretary or his officers a right of access without subpoena, but it is so limited a right that it can affect only those employers who are being investigated or proceeded against under Landrum-Griffin. Presumably employers are the only class of persons under the act who would fit the qualification that they must exist as corporations or as unincorporated associations organized to carry on business for its own profit or that of its members. It is anomalous that by the wholesale incorporation of the provisions of section 9 of the Federal Trade Commission Act a much broader right of investigation has been bestowed on the Secretary with respect to corporations than to labor unions, individual officers and individual (as con-

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22 The word "corporation" in section 9 of the Federal Trade Commission Act is defined in section 4 as follows:

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

trasted with corporate) employers. In this respect the legislative history would indicate that the intent of the framers of Landrum-Griffin has been subverted, for it is doubtful whether they intended the Secretary to be more restricted in any respect in his investigations of labor unions than of employers. Unless the words "any corporation" can somehow be construed to mean "any person," this particular provision should give labor no concern. No matter how clear the animus of the framers may have been against labor, this seems a proper case as one pundit put it, "when the legislative history is ambiguous, the wording of the statute should be applied." It would seem impossible to read "corporation" in section 9 to include "labor unions and their officers" despite one's firm conviction that such a result would be more in accord with the legislative intent.\(^23\)

In FTC v. Hallmark, Inc. the Seventh Circuit pointed out the dual nature of the powers granted in section 9: "It is uncontested that Section 9 of the Federal Trade Commission Act . . . grants two kinds of powers; access and subpoena."\(^24\) This case affirmed the Second Circuit's earlier holding in FTC v. Tuttle\(^25\) and, together with FTC v. Bowman,\(^26\) makes it clear that the right here is one specifically limited to corporations. In Bowman the court stated:

> The defendant cites and relies upon the case of Federal Trade Commission v. Baltimore Grain Co. . . . In that case the Commission sought mandamus to compel the respondent corporations to permit the agents of the Commission to examine, inspect and copy their records and documents. That is not the situation here. Section 9 expressly limits such right in [the] case of a corporation being investigated or proceeded against.\(^27\)

At this late date no useful purpose would be served in exploring the constitutional problems involved in so broad a delegation by Congress of a right of access and inspection to the Federal Trade Commission. In FTC v. American Tobacco Co.\(^28\) this right of inspection was equated with the Commission's subpoena power, and in Oklahoma Press Publishing Co. v. Walling\(^29\) the fourth amendment was held to limit the Commission may issue antecedent to exercising this right of access to "any corporation being investigated." See 16 C.F.R. § 1.37 (1960).

\(^{23}\) The Rules of Practice for the Federal Trade Commission limit the notice which the Commission may issue antecedent to exercising this right of access to "any corporation being investigated." See 16 C.F.R. § 1.37 (1960).

\(^{24}\) 265 F.2d 433, 438 (1959).

\(^{25}\) 244 F.2d 605, cert. denied, 354 U.S. 925 (1957).

\(^{26}\) 248 F.2d 456 (7th Cir. 1957).

\(^{27}\) Id. at 458. (Emphasis added.)

\(^{28}\) 264 U.S. 298 (1924).

mission’s visitorial power over the corporations within its jurisdiction only to abuses of indefiniteness and unreasonable disclosure. In the last analysis, then, except for the form and the proper issuance of subpoenas, the same considerations of relevancy, materiality, definiteness and reasonableness that govern subpoenas are the existing checks on the Secretary’s right of access and inspection under section 601(b) as against corporations being investigated or proceeded against.

Traditionally, this right of inspection has been litigated by the Commission’s resort to mandamus although section 10 of the Federal Trade Commission Act makes it a felony for any person willfully to refuse to submit to the Commission or its agents—for the purpose of inspection and copying—any documents of a corporation subject to the act. No felony prosecutions based on such willful refusal have been found in the reported cases.

2. Requirement of Probable Cause

Section 601(a) gives the Secretary power to make an investigation “when he believes it necessary” to determine whether any person has violated or is about to violate any titles of the act except Title I. There is no requirement that the Secretary have probable cause to believe that any violation has occurred or is about to occur; he need only believe an investigation necessary to determine past or future violations. Hence nothing more than his simple curiosity can launch an investigation. At first blush, the delegation of such unfettered discretion based upon whim or curiosity would seem to run counter to our traditional separation of powers as an invasion of the judiciary by the executive branch and thus raise serious constitutional questions. However, after investigation and

[C]orporations cannot claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.


31 Ominously, the Rules of Practice for the Federal Trade Commission leave various courses of action open as against those who do not comply with investigational process (among which is the Commission’s right of access to documents of corporations being investigated):

§ 1.39. NONCOMPLIANCE WITH INVESTIGATIONAL PROCESS.

In case of failure to comply with Commission investigational processes appropriate action may be initiated by the Commission, including actions for enforcement by the Commission or Attorney General and forfeiture of penalties or criminal actions by the Attorney General.

16 C.F.R. § 1.39 (1960). (Emphasis added.)
research one can only conclude that these problems have been already neatly resolved by the Supreme Court in United States v. Morton Salt Co.\textsuperscript{32} in favor of the administrative body.

There can be no question that the omission of probable cause as a condition precedent to any investigation by the Secretary was intentional. The Senate bill eliminated these words from the earlier Kennedy-Ervin version\textsuperscript{33} of the same section,\textsuperscript{34} and it was this revised version which was ultimately accepted in the Conference Report.\textsuperscript{35} The words "probable cause" are used in the act in connection with investigations only \textit{after the fact} of the investigation to determine the Secretary's future course of conduct. Thus if he has investigated and found probable cause for a Title III or Title IV violation, he may bring an action in a United States district court.\textsuperscript{36} Furthermore, when seven Justices in the Morton Salt case (Justices Douglas and Minton not participating) approved the analogy of the investigatory power of the administrative commission to the traditional inquisitorial functions of the grand jury, they gave judicial blessing to the sweeping language found in section 601(a): "when he \textit{believes it necessary} in order to determine whether any person has violated or is about to violate any provision of this Act . . . ."\textsuperscript{37} This decision opened the door to administrative investigations based upon:

(a) suspicion:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous

\textsuperscript{32} 338 U.S. 632 (1950).
\textsuperscript{33} S. 505, 86th Cong., 1st Sess. (1959).
\textsuperscript{34} 105 Cong. Rec. 19768 (1959).
\textsuperscript{37} (Emphasis added.) This language has been traced at least as far back as the Emergency Price Control Act, 56 Stat. 33 (1942), 50 U.S.C. App. § 925(a) (Supp. V, 1951), and the Defense Production Act of 1950, 64 Stat. 817, 50 U.S.C. App. § 2156(a) (Supp. V, 1951). Query, whether or not the power to investigate and enjoin future violations may not rest on a much narrower constitutional basis where the commerce power \textit{i.e.}, Landrum–Griffin is involved than where the war power is concerned. No case has been found attacking this right of prospective enforcement on constitutional or other grounds.
to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.\textsuperscript{38}

(b) probability:
When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.\textsuperscript{39}

(c) curiosity:
Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.\textsuperscript{40}

Objections to a subpoena or notice to grant access under section 601(b) because it fails to spell out probable cause would seem, therefore, to be a waste of time and contrary to any statutory requirement.

3. Relevancy of Evidence Sought

The requirement of relevancy in a 601(b) investigation would seem primarily to concern only documentary evidence and records. No useful purpose would appear to be served by challenging the relevancy of oral testimony, since the witness (who would already be under oath and testifying when a supposedly irrelevant question is asked) is not further inconvenienced by answering and receives total immunity as to the matters about which he testifies—indeed an adequate compensation for the mere waiver of a relevancy objection. For this obvious reason, every reported decision on relevancy pertains only to the physical evidence sought under a subpoena ducet tecum.

The scope of the evidence which may be sought under this type of administrative investigation is quite broad and unquestionably more extensive than would be permitted by the usual rules of relevancy in a trial or adversary proceeding. Probably the best expression of the Supreme Court attitude on this issue is found in \textit{Endicott Johnson Corp. v. Perkins}: “The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary . . . .”\textsuperscript{41}

This statement reflects the general disposition of the courts underlying

\textsuperscript{38} 338 U.S. at 642-43. (Emphasis added.)
\textsuperscript{39} Id. at 643. (Emphasis added.)
\textsuperscript{40} Id. at 652. (Emphasis added.)
\textsuperscript{41} 317 U.S. 501, 509 (1943) (a decision defining the Secretary of Labor's investigative authority under the Walsh-Healy Public Contracts Act).
the more recent decisions on such investigations. They will not indulge in a detailed analysis of the relationship between the purpose of the inquiry and the nature of the records sought, and so long as the irrelevancy does not obviously appear from the face of the subpoena duces tecum, objections will not be sustained. Or stated another way: "It is not impossible that such facts will disclose a violation. No more need be said to sustain the demand for the cost records in question."43

A more specific definition of the loose limitations which apply in such cases was the analogy drawn by the Supreme Court in Oklahoma Press Publishing Co. v. Walling. This case likened the administrative investigation to a grand jury proceeding or a pre-trial discovery motion in a civil action. Thus evidence which might not meet the strict tests of competency or relevancy may nevertheless be demanded if it may reasonably lead to relevant evidence. The philosophy behind this wide latitude accorded the investigation is simple. The courts themselves could not possibly assume the burden of ruling on all the finer points of relevancy, particularly when they are not familiar with the subject matter of the inquiry. Furthermore, relevancy is frequently a matter which cannot be determined until the evidence or documents themselves are examined. Therefore, unless the irrelevancy is plain and obvious and the documents sought could not possibly disclose anything material, the subpoena duces tecum cannot be successfully resisted on grounds of irrelevancy.45

One further comment should here be added concerning possible objections to the unreasonableness or oppressiveness of a subpoena. This type of challenge would seem to be governed by the same rules of reasonableness as the courts apply to grand jury investigations. No useful purpose would be served by any discussion of the decisions in this field, as each particular case is apparently governed by its own facts and the rule of reason. Suffice it to say that the courts in the past have not hesitated to strike down an administrative subpoena if the production of documents thereby required would be unnecessarily oppressive.46

43 Westside Ford, Inc. v. United States, 206 F.2d 627, 634 (9th Cir. 1953).
44 327 U.S. 186 (1946).
45 So inflexible does the Supreme Court consider this principle that in FTC v. Crafts, 355 U.S. 9 (1957), the Court merely issued a per curiam reversal of a contrary lower court holding, citing only the Endicott Johnson and Oklahoma Publishing cases.
It is suggested, however, that the unreasonable and oppressive qualities must be quite patent before the courts will so act.

III

THE SELF-INCrimINATION PRIVILEGE AND STATUTORY IMMUNITY

The investigative features of the new law apply to the Secretary of Labor those provisions which sections 9 and 10 of the Federal Trade Commission Act apply to the Commission and, consequently, include the specific immunity provision of section 9:

No person shall be excused from attending and testifying or from producing documentary evidence before the commission [Secretary] or in obedience to the subpoena of the commission [Secretary] on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to crinmate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission [Secretary] in obedience to a subpoena issued by it . . . 47

This particular immunity statute is virtually identical with that contained in the Interstate Commerce Act,48 the constitutionality of which has been consistently affirmed by the Supreme Court since the landmark decision of Brown v. Walker.49 The general rule, first announced in that case and repeated so often that it is no longer subject to controversy, is that the immunity statute provides the witness with protection "co-extensive with the constitutional privilege against self-incrimination" and therefore totally displaces the privilege.50 However incontroversible this general rule may be, its application to specific cases has nevertheless given rise to two separate and irreconcilable philosophies in the Supreme Court decisions, both of which must be clearly understood to determine the effect of the present law.

The first theory, sometimes called the "exchange" theory, reasons that Congress intended to grant immunity only in those instances where the self-incrimination privilege could have been lawfully asserted. In other words, the immunity is exchanged for the privilege. Conversely, under this theory, if the privilege could not have been properly invoked, no immunity is conferred upon the witness by his testimony even though

49 161 U.S. 591 (1896).
the clear statutory language does not make this exception. This concept was first expressed by Mr. Justice Holmes in *Heike v. United States*,\(^{51}\) where immunity was denied because the transactions for which the defendant was prosecuted were *so remotely* connected (but nevertheless connected) with the matters involved in his compulsory testimony that a fifth amendment refusal would not have been upheld even without an immunity statute: "We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned."\(^{52}\) Specifically following this theory was *Shapiro v. United States*,\(^{53}\) which denied immunity to a witness who, pursuant to subpoena and in reliance on the immunity provision, produced documents found by the Court to be non-privileged. Since the witness could not have lawfully avoided production of the papers on self-incrimination grounds, he received no statutory immunity by complying with the subpoena.

The second theory, frequently called the "gratuitous" principle, simply follows the plain wording of the immunity statute and therefore concludes that a witness testifying or producing documents in a proceeding defined by the act receives immunity as to *all* transactions concerned in his testimony or documents, regardless of whether a self-incrimination privilege would be applicable absent the statute. The rationale of this theory, as expressed by Justice Frankfurter dissenting in the *Shapiro* case,\(^{54}\) is based not only upon the unequivocal language of the statute, but also upon the observation that Congress intended through the immunity statute to eliminate all constitutional questions in certain investigative proceedings and, therefore, purposely conferred an immunity which was *not* dependent upon the availability or interpretation of the fifth amendment privilege. Specifically illustrating this "gratuitous" theory are *Adams v. Maryland*\(^{55}\) wherein an immunity provision was held to prevent state prosecutions of a witness (an immunity certainly far beyond the recognized limit of the fifth amendment, which protects only as to federal incrimination), and *United States v. Monia*\(^{56}\) wherein it was held that the immunity attaches automatically, without any pre-

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\(^{51}\) 227 U.S. 131 (1913).  
\(^{52}\) Id. at 142.  
\(^{53}\) 335 U.S. 1 (1948).  
\(^{54}\) Id. at 36.  
\(^{56}\) 317 U.S. 424 (1943).
requisite that the witness first claim his privilege against self-incrimination (again an immunity which exceeds the scope of the self-incrimination privilege, since the latter is waived if not asserted at the first opportunity). Hence, under this theory the statute actually confers the "gratuity to crime" which was so offensive to Mr. Justice Holmes. Yet any other conclusion, including the "exchange" theory, necessarily involves reading language into the statute which Congress did not see fit to include—a process hardly justifiable in light of the fact that Congress has enacted immunity statutes for over sixty years, copying without alteration the language of the original act.\textsuperscript{57}

Even more perplexing than the mere existence of these two opposite theories is the historical fact that they seem to be applied alternately by the Supreme Court. In 1913 the "exchange" theory was invoked in Heike v. United States; then in 1943, the "gratuitous" theory was applied in United States v. Monia, a decision which impliedly limited the Heike holding to its facts and in which dissents were voiced based on Heike.\textsuperscript{58} Later in 1947, the Shapiro case was decided specifically on the "exchange" theory and in great reliance on Heike, but with four bitter dissenters clinging to the Monia decision and its philosophy. Finally, in 1954 (Adams v. Maryland\textsuperscript{59}) and in 1956 (Ullmann v. United States\textsuperscript{60}), the Court again reverted to the "gratuitous" theory by holding that state prosecutions were subject to the immunity. To add to the confusion, Mr. Justice Frankfurter authored the emphatic dissent in the Monia case and advocated the "exchange" theory,\textsuperscript{61} but four years later completely reversed himself in Shapiro, giving specific approval to the "gratuitous" theory and the Monia decision which he had previously rejected.

The two theories interpreting the typical immunity statute are mutually repugnant: the "exchange" doctrine would bestow immunity only where the self-incrimination privilege would apply; the "gratuitous" theory enforces the clear language of the statute and simply grants immunity as to every "transaction, matter, or thing" concerning which the witness testifies or produces evidence, even where the self-incrimination privilege would not apply to excuse the witness. Which theory will next be "in season" remains to be seen, although for reasons which

\textsuperscript{58}317 U.S. at 431.
\textsuperscript{59}347 U.S. 179 (1954).
\textsuperscript{60}350 U.S. 422 (1956).
\textsuperscript{61}317 U.S. at 431.
will hereinafter be discussed, the “exchange” theory may already have been abandoned.

1. Oral Testimony

The creation of immunity when giving oral testimony before the Secretary of Labor is assured by the statute. The applicable provisions of section 9,\(^6\) being virtually identical with those of the Immunity Act,\(^7\) are clearly governed by the various decisions under the latter. Basically, this means that the self-incrimination privilege may not be asserted regardless of the nature of the questions asked, but that the witness receives complete immunity as to any transaction or matter concerning which he may testify.\(^8\)

From a procedural standpoint, it is equally clear that the witness need do nothing in order to invoke this immunity other than simply to answer the questions asked. It is not necessary, in regard to oral testimony, that he assert his privilege, for the immunity is automatically conferred when the testimony is given.\(^9\) However, the statute does specifically set forth two absolute conditions which must be satisfied before immunity is conferred: (1) The testimony must be before the “commission” (or in this case the Secretary of Labor or some officer designated by him); (2) The testimony must be given in obedience to a subpoena issued by the “commission” (Secretary).

If either of these elements is lacking, Sherwin \textit{v. United States},\(^6\) which was specifically followed in Goodman \textit{v. United States},\(^7\) indicates that the immunity provision will not apply. In each of these cases, special examiners for the Federal Trade Commission, without subpoena, had obtained various oral answers and documents from the defendants. In \textit{Sherwin} the defendants had specifically refused to cooperate but were threatened and verbally coerced by the agent. Nevertheless, the immunity provision was held inapplicable because of the clear statutory requirement

\(^{65}\) Adams \textit{v. Maryland}, 347 U.S. 179 (1954); \textit{United States v. Monia}, 317 U.S. 424 (1943). The more recent immunity statutes, however, do contain a provision limiting the application of the immunity only to those witnesses who specifically claim the privilege. \textit{E.g.}, \textit{Emergency Price Control Act of 1942}, \$ 202(g), 56 Stat. 30, 50 U.S.C. App. \$ 922 (Supp. V, 1951). This innovation, not included by amendment in any of the older immunity acts, was apparently designed to circumvent the \textit{Monia} holding and thereby give the Government a chance to refuse to take certain testimony if immunity would be conferred.
\(^{66}\) 268 U.S. 369 (1925).
\(^{67}\) 273 F.2d 853 (8th Cir. 1960).
that the testimony be given "before the commission in obedience to a
subpoena issued by it."

A third procedural prerequisite to successful invocation of immunity is
strongly suggested by the Sherwin decision. To understand this, reference
must be made to the original Immunity Act found in 49 U.S.C. § 46
(1958). Section 48, immediately following that immunity provision,
specifies certain exceptions among which is the provision that the
immunity granted in section 46 extends only to a natural person who
"gives testimony under oath or produces evidence, documentary or other-
wise, under oath." All other qualifications appearing in sections 46 and
48 are contained verbatim in section 9 of the Federal Trade Com-
mission Act, but the "under oath" stipulation is missing. Perhaps it was
through mere inadvertence that the "under oath" provision was dropped,
or possibly Congress felt that the term "testify" adequately implied an
oath; on the other hand, the omission may have been intentional in
anticipation of field investigations by the Commission where oaths are
not usually administered. Nevertheless, the omission was made. How-
ever, in denying immunity in the Sherwin case, the Supreme Court
specifically emphasized that "no one [of defendants] made any answer
under oath either orally or in writing." In view of this clear implication,
it is suggested that a third requirement, administration of an oath, might
well be considered a condition precedent to creation of immunity.

Therefore, as a practical matter, a witness who has a bona fide fear of
self-incrimination in an investigation under the new Labor-Management
Act has only three points to observe:

(1) He must insist on a subpoena to himself issued by the Secretary
of Labor or his lawfully designated officer;

(2) He must be certain that his testimony is given before the
Secretary or his lawfully designated officer;

(3) He should insist that his testimony is under oath.

If either condition (1) or (2) is not satisfied, such witness is free to
assert his self-incrimination privilege. Likewise, if he is not under oath
as suggested in (3) above, and if the examining officer refuses to
administer such an oath, the privilege should be asserted as a precau-
tionary measure against possible incrimination. But once these three
conditions are affirmed, all self-incrimination privileges are totally
eliminated.

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68 27 Stat. 443 (1893).
69 268 U.S. at 372.
2. Production of Documents

The act likewise eliminates fifth amendment privileges as to production of documents and physical evidence, but provides immunity as to matters relative thereto for any natural person producing the items. Again it should be emphasized that as in the case of oral testimony, the production of such documents or evidence must be (1) pursuant to a subpoena issued by the Secretary or his officers, and (2) before the Secretary or his lawfully designated officer. In addition, the serious question of whether the production must be under oath is involved. Failure of any of these conditions may well prevent the attachment of immunity to the subject matter of the produced documents.

Prior to any discussion of the operation of the immunity section as to documents, it is helpful first to consider in a general way the self-incrimination privilege in this field. Concerning the books, records and documents of any union (or corporation or other organization, for that matter) which an individual holds merely in a custodial capacity, United States v. White\(^70\) settled beyond dispute that the self-incrimination privilege is not available to resist production. Therefore, even without an immunity statute displacing the fifth amendment, the union officer or record custodian cannot refuse to produce the organizational records in his possession if sought pursuant to a lawful subpoena or administrative order. Conversely, as the White decision recognized, the records of an individual which are his personal matters, held by him in an individual rather than a representative capacity, are fully protected by the constitutional guarantee. Obviously, under normal circumstances a valid claim of the self-incrimination privilege would excuse the individual from producing such private papers pursuant to subpoena.

However, Shapiro v. United States\(^71\) propounded a significant exception to the privileged character of such personal records, an exception which will prove most germane to many problems arising under the Landrum-Griffin Act. The Shapiro decision holds, among other things, that even the personal documents of an individual are non-privileged if they are records required to be kept by law, under the theory that thereby they actually become public records excluded from the constitutional privilege. Obviously, section 206\(^72\) of Landrum-Griffin makes stringent provision for the maintenance and retention of records by those individuals who

\(^70\) 322 U.S. 694 (1944).
\(^71\) 335 U.S. 1 (1948).
are obligated to file reports—records which would clearly fall within the exclusionary doctrine of Shapiro.

That the Shapiro decision is still the recognized authority on this issue cannot be denied, so that one must assume under the present state of the law that all records or documents, both organizational and individual, which Landrum-Griffin requires to be maintained are not within the scope of the self-incrimination privilege. However, it is suggested that Shapiro is quite vulnerable to attack and is not to be regarded as such compelling authority as to render futile all future attempts to exclude the Landrum-Griffin type of record from the holding of that case. The basic weaknesses of the case may be outlined as follows:

(1) The decision was a narrow five-to-four majority by a 1947 Supreme Court of substantially different personnel than the present tribunal.

(2) The decision was undoubtedly influenced by the wartime emergency nature of the law involved (price administration and controls) which the Court was determined to enforce even at the expense of civil rights. Quite probably this accounts for the concurrence of the usually liberal Justices Black and Douglas with the majority.

(3) The doctrine expounded in the case with respect to individual records cannot possibly be extended without doing great violence to the Constitution. Thus, as the dissent of Mr. Justice Jackson noted, the Government might conceivably solve all of its law-enforcement problems by merely inaugurating a statute requiring all citizens to keep diaries of their personal activities. Under the Shapiro majority holding, such diaries, being records required by law, would be non-privileged and available to government agents and grand juries for any investigation of the individual's conduct. This absurd application of the doctrine merely illustrates that which common sense dictates—the Shapiro decision is unlikely to exist for any length of time as vital precedent. While it may never be expressly overruled, it is reasonable to expect that the case will be narrowly limited to its facts, distinguished or simply not followed—eventually to earn its just repose as a legal anomaly.

That the Shapiro decision is ripe for careful re-examination by the Supreme Court is a foregone conclusion. The Solicitor General has already conceded this, for in his brief opposing certiorari in Beard v. United States,\(^7\) he noted: "We agree with petitioner that the question whether the rule of the Shapiro case extends to personal books and rec-

\(^7\) 222 F.2d 84 (4th Cir.), cert. denied, 350 U.S. 846 (1955).
ords of taxpayers required to be kept under the internal-revenue laws is both serious and important."74 And in at least one instance, *United States v. Clancy*,75 certiorari has been granted76 to consider, among other things, whether the "public records" doctrine of the *Shapiro* case can justify a seizure under warrant of the ledgers and records of a professional gambler and bookmaker which are required to be kept by law. The thought is comforting, at the very least, that *Shapiro* may not be the final word on the problem of personal records.

Turning to the more specific problem of whether or not immunity is conferred under Landrum-Griffin by the production of records and documents, one is again confronted with *Shapiro v. United States*. A second major holding of that decision, interpreting federal immunity legislation, specifically applies the "exchange" theory and categorically denies immunity in any instance in which the self-incrimination privilege may not be claimed. The application of this rule would virtually eliminate all prospects of immunity in regard to the production of documents under a section 601(b) investigation. The union records (non-privileged under *United States v. White*77) and the individual's records which the act in section 206 requires that he maintain (non-privileged under *Shapiro*) would seem to constitute practically all of the pertinent documents, and these the Secretary of Labor now seems able to procure without problems arising under the Constitution or from statutory immunity.

The only solution to this seemingly hopeless situation is, again, a direct attack on the *Shapiro* decision. Obviously if the "gratuitous" theory were to prevail and thus eliminate the "exchange" doctrine, complete immunity would be obtained from the production of subpoenaed documents. This, of course, is exactly what the statute prescribes when it incorporates by reference78 section 9 of the Federal Trade Commission Act: "[N]o natural person shall be prosecuted . . . for or on account of any transaction, matter, or thing concerning which he may . . . produce evidence, documentary or otherwise, before the commission [Secretary] . . . ."79 What *Shapiro* and the "exchange" theory have done is merely to

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74 Brief for Appellee, p. 9. However, certiorari was resisted solely because the appellant had never claimed the privilege. If he had, the government contended it would not have opposed the writ. See id. at 10. It should be noted that a brief in support of the granting of certiorari was filed by the American Bar Association as *amicus curiae*.
75 276 F.2d 617 (7th Cir. 1960).
76 363 U.S. 836 (1960).
77 322 U.S. 694 (1944).
engraft limitations on the statute by the process best described as judicial legislation.

The question, then, is how to obviate the Shapiro decision and its "exchange" philosophy and restore the law in this field to a state of consistency wherein immunity statutes are held to mean what they say. It is submitted that this has probably been accomplished already and that the Shapiro decision, insofar as it advocates adherence to the "exchange" doctrine, will no longer be followed today. Numerous factors support this conclusion.

First, the historical background reveals that prior to the Shapiro decision the last "exchange" theory case was the 1913 holding in Heike v. United States. If, for the moment, we overlook Shapiro (and there is indeed cogent reason hereinafter discussed for eliminating this decision from the over-all scheme), every pertinent Supreme Court decision since the Heike case manifests an affinity for the "gratuitous" doctrine: United States v. Monia specifically distinguished Heike and limited it to its facts; Adams v. Maryland and Ullmann v. United States both affirmed the extension of immunity to state prosecutions—a direct rejection of the "exchange" idea; and, most of all, Smith v. United States specifically repudiated the Government's contention that the "exchange" theory be followed and held that the witness received immunity under the statute for all matters concerning which he testified, even if such testimony was wholly exculpatory and not subject to the self-incrimination privilege.

Secondly, the Shapiro case should not be considered a true "exchange" holding, despite the specific language of the opinion, because the immunity statute therein interpreted was expressly limited. The section of the Emergency Price Control Act under discussion in that case provides:

> No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 . . . shall apply with respect to any individual who specifically claims such privilege.

Immediately it is apparent that this particular statute actually provides for an "exchange" immunity; the fifth amendment privilege must first be asserted in order for the witness to obtain immunity, the latter then

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80 227 U.S. 131 (1913).
81 317 U.S. 424 (1943).
83 350 U.S. 422 (1956).
84 337 U.S. 137 (1949).
being offered in exchange for the privilege. No such limitation is involved in the Landrum-Griffin and Federal Trade Commission Act immunity provisions. If the Supreme Court would have simply based its decision in Shapiro on this additional statutory requirement and had not generalized about legislative intent in all immunity statutes, the holding would in no way conflict with the "gratuitous" doctrine of the other cases. Nevertheless, it is submitted that this statutory distinction provides the real explanation of the Shapiro case and a most compelling reason why that holding is in all probability not applicable in situations arising under the unlimited type of immunity found in Landrum-Griffin.

This distinction was carefully underscored in Smith when the Court traced the history of immunity statutes and particularly the newest version which was involved in Shapiro:

By the date of the Monia decision, Congress had, foresightedly, added to the standard immunity clause, drawn from the Interstate Commerce Act, the provision that the witness must claim his privilege. By this addition the statute on compulsory testimony as to this requirement was put on a parity with the constitutional privilege against self-incrimination.86

The clear implication is that, before the addition of this provision requiring a witness to claim the privilege, the immunity act was not on a parity with the self-incrimination privilege, but indeed provided far greater protection. Significantly, the Smith opinion was but two years after Shapiro and thus confirms the suspicion that the real basis of the Shapiro holding was this additional statutory provision limiting immunity to specific claimants of the privilege. This conclusion is buttressed by the fact that the Solicitor General in opposing certiorari in Beard v. United States87 gave as the reason for his opposition the petitioner's failure to claim his fifth amendment privilege.88

To summarize, the foregoing discussion purports merely to point out that the "exchange" theory, in all probability, has long ago been abandoned by the Supreme Court. With Shapiro distinguished away, only the 1913 Heike decision remains to oppose the "gratuitous" philosophy, an opposition which cannot be too serious in view of the many later cases applying the more liberal interpretation. But above all—and this point cannot be overemphasized—the clear and unequivocal language of the

86 337 U.S. at 147-48. (Emphasis added.)
88 Brief for Appellee, p. 10. Also the following language is significant: "We do not agree, however, that that question, which petitioner seeks to raise here, is presented by the facts of this case." Id. at 9.
statute itself militates against this “exchange” theory in regard to immunity under a Landrum-Griffin investigation.

If this analysis be correct, the “gratuitous” theory will be applied in interpreting rights of immunity under the present act, which means nothing more than that the literal meaning of the statute will be enforced. Thus any person producing documents or records pursuant to a subpoena, even if they are non-privileged union records under United States v. White or personal records non-privileged under the “public records” doctrine of Shapiro v. United States, might well receive immunity as to all matters concerning such records.

One final principle is worthy of note in this regard. Even though the Supreme Court may hold, contrary to foregoing considerations, that the immunity will not apply to the production of non-privileged documents, nevertheless immunity may be successfully invoked if testimony is elicited from the witness concerning the documents. As Curcio v. United States89 pointed out, the non-privileged character of certain records does not apply to the custodian’s oral testimony in regard to those records; he might even, on grounds of self-incrimination, refuse to identify the documents he has produced pursuant to subpoena. Hence, since the privilege is available for his testimony, as contrasted with its unavailability for his production of custodial records, the immunity under the present statute would consequently be “exchanged” for his testimony when given.

The basic concepts, then, to bear in mind concerning documentary production and immunity are:

(1) The procedural requirements of a subpoena, production before the Secretary (or designated officer), and possibly the oath are applicable in determining immunity just as they are in the case of oral testimony.
(2) Records of the union are non-privileged.
(3) Personal records, required to be maintained by law, are non-privileged if the Shapiro “public records” doctrine is held applicable to the Landrum-Griffin Act.
(4) Immunity for the production of non-privileged records will not be conferred under the Shapiro “exchange” doctrine.
(5) Immunity for the production of all documents, non-privileged and otherwise and including union records, will be conferred if the “gratuitous” theory (and the literal meaning of the statute) is followed.
(6) Regardless of which theory is used, oral testimony concerning non-privileged records will nevertheless create immunity for the witness.

89 354 U.S. 118 (1957).
3. **Scope of Immunity**

Under the statute, absolute immunity from prosecution is conferred as to any "transaction, matter, or thing" concerning which testimony is given or records are produced. This provision appears to create the broadest possible scope of immunity. However, in *Heike v. United States*\(^90\) the immunity was held inapplicable because the relationship between the testimony given and the facts involved in the subsequent prosecution was too remote, even though some matters in the prosecution were in fact elicited in the testimony. It is submitted that this decision, rendered long before recent Supreme Court extensions of the self-incrimination privilege and the "link-in-the-chain of evidence" rule,\(^91\) will no longer be followed since the scope of the immunity must be at least as broad as that of the fifth amendment which it displaces,\(^92\) a doctrine approved by virtually every Supreme Court decision on immunity herein cited.

The best illustration of the enlarged scope of immunity is *Smith v. United States*,\(^88\) reversing a conviction for violation of the Emergency Price Control Act. Here the Court found that immunity had been conferred on defendant by his prior testimony, despite government contentions that such testimony was exculpatory and non-incriminating. It was simply noted that the testimony given, being *substantially connected* with the subject matter of the prosecution, was ample enough to allow invocation of the immunity provision of the statute.

While the *Smith* and *Heike* cases probably can be reconciled on their facts,\(^94\) they are certainly inconsistent insofar as the *Heike* decision refuses to expand the immunity provision to the full breadth which the statute specifies. The more recent *Smith* decision, because it seems to establish a requirement of "substantial connection" between the testimony and the immunized crime, is more consistent with the statute itself and probably suggests the best guide to follow at present.

\(^90\) 227 U.S. 131 (1913).
\(^92\) Counselman v. Hitchcock, 142 U.S. 547 (1892).
\(^93\) 337 U.S. 137 (1949).
\(^94\) The immunity sought in the *Heike* case involved a prosecution much more remote from the compulsory testimony sought in the *Smith* case. In *Heike* the antitrust investigation included incidental mentioning of defendant's scales, and his later (non-immunized) prosecution was based on the use of fraudulent scale weights. In *Smith* the price-control inquiry included transactions which Smith testified were conducted by some third party, and the subsequent immunized prosecution was for these transactions, naming Smith as conspirator.
IV
PROCEDURAL RIGHTS AND RELATED PROBLEMS

1. Right to a Designated Place of Hearing

In the first paragraph of section 9 of the Federal Trade Commission Act (incorporated by reference into section 601 of the Landrum-Griffin Act) the Commission is given the power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence. Members and examiners of the Commission are permitted to examine witnesses and receive evidence. The first sentence of the next paragraph, reading "such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing," makes it clear that the power given in the first paragraph is only to summon witnesses and evidence to "any designated place of hearing." The use of the word "such" can refer only to the same power given in the first paragraph so that the Commission's (or the Secretary's) power of subpoena carries with it these two limitations: (1) there must be a hearing; and (2) the place of hearing must be designated in advance in the subpoena.

The nature of the hearing will be discussed later, but for present purposes the express wording of the statute should make it plain that the administrative subpoena does not permit the Secretary's representative to appear on the scene with a subpoena and demand immediate access to records or to witnesses on the premises. A representative of the Secretary operating under a notice of inspection as against a "corporation being investigated" would have the right to inspect documents on the premises and without the requirement of a hearing as set forth in section 9. However, since labor unions and individuals hardly qualify under the statutory definition of corporations found in section 4, this right should not be available against them in any case. Where a subpoena demands from a labor union the production of its books and records on its premises, as was the case of a section 601 subpoena issued against Teamster Local 405 of St. Louis, it would appear to violate the requirement that there be a "place of hearing," unless one can conclude that the Secretary has the right to designate the labor union's premises.

96 Subpoena issued by the Secretary of Labor against Teamster Local 405, July 12, 1960. Copy on file at the Georgetown Law Journal office.
as a place of hearing without its consent. It would appear patent that no governmental agency can arbitrarily move in and appropriate the premises of a person or group of persons for a hearing and still remain within constitutional limits. Also, in the subpoena issued against Local 405, the time for the required production of records was inserted in ink by the Secretary's representative to coincide with the time of the service of the subpoena. This can hardly meet the statutory requirement that the place of hearing be "designated"; the word must carry with it some connotation that the designation be in advance of the duty imposed and must carry with it a reasonable time for compliance.\(^97\) Cognate cases so construing the subpoena power in instances other than administrative subpoenas are too numerous for citation here.\(^98\)

However, there have been cases in which courts appear to approve a subpoena which demands books and records to be produced on the premises; the circumstances are unusual where a witness would complain that he is being forced to produce the books and records where his business can be orderly pursued and would insist that he produce them at some governmental agency. These cases fall into two patterns: either (a) the statute involved did not require a "designated place of hearing" and the subpoena was directed to a person against which the agency had a correlative right of access and inspection so that the subpoena could be construed as a notice of inspection;\(^99\) or (b) the statute did require a "designated place of hearing," but the court without objection from the witness and as a convenience to him amended the subpoena or suggested that the records be produced at the witness' place of business to lessen his inconvenience.\(^100\)

No case has been found where a witness has insisted that the literal language of section 9 of the Federal Trade Commission Act be followed, but it would seem that on proper objection a witness may insist that he produce his books and records only at a hearing and that the hearing be held somewhere other than his own place of business—the former as a matter of simple statutory construction, the latter as a constitutional

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\(^97\) By calling attention to these defects, the authors do not mean to imply that the subpoena is perfect in all other respects. For instance, the subpoena failed to designate the witness by name (Officer in Charge of Records) and, therefore, raises serious immunity considerations.

\(^98\) See generally Annot. 8 A.L.R.2d 1134 (1949).

\(^99\) Westside Ford, Inc. v. United States, 206 F.2d 627 (9th Cir. 1953); Porter v. Gantner & Mattern Co., 156 F.2d 886 (9th Cir. 1946).

\(^100\) Durkin v. Fisher, 204 F.2d 930 (7th Cir.), cert. denied, 346 U.S. 897 (1953); Walling v. American Rolbal Corp., 135 F.2d 1003 (2d Cir. 1943).
prohibition against unlawful seizure and deprivation of property without due process of law.

2. Right of Appraisal, Confrontation and Cross-Examination

Before determining whether there is a right of appraisal, confrontation and cross-examination under the Landrum-Griffin Act, one must determine the nature of the hearing to which the witness is being summoned. If the hearing is an adjudicative one where orders are issued, legal sanctions imposed or individuals' legal rights affected, then section 606 makes applicable the provisions of the Administrative Procedure Act. Section 606 also makes the Administrative Procedure Act applicable to rule-making hearings. Specifically, section 7 of the Administrative Procedure Act then comes into play to regulate the conduct of adjudicative and rule-making hearings and leaves no question that under subparagraph (c) of section 7, appraisal, confrontation and cross-examination are the rights of every party whose rights or property will be directly affected by the agency's ultimate determination.

On the other hand, if the hearing is an investigational one whose only purpose is to determine and find facts which may subsequently be used as a basis for further action either by the agency, the legislature, or some law-enforcement arm, section 606 of the 1959 Labor Act and section 7 of the Administrative Procedure Act do not apply, and one must turn elsewhere to determine the procedural safeguards available, if any, in the investigational hearing authorized and made effective by the subpoena power granted in section 601(b). As a matter of due process, one can now be categorical that appraisal, confrontation and cross-examination are not required in investigational hearings.

Because the procedures of section 7 of the Administrative Procedure Act are limited only to hearings under section 5 (adjudications) and section 4 (rule making) in harmony with section 601 of Landrum-Griffin, this does not mean that other provisions of the Administrative Procedure Act will not apply to the conduct of investigational hearings.

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101 Sec. 606. The provisions of the Administrative Procedure Act shall be applicable to the issuance, amendment, or rescission of any rules or regulations, or any adjudication, authorized or required pursuant to the provisions of this Act.


Section 6, unlike section 7, is not limited to the kind and nature of
the hearing; its application is to "any person compelled to appear in
person before any agency or representative thereof." Section 6 sets out
certain statutory procedural requirements which appear to be as fully
applicable to investigational hearings under Landrum-Griffin as to
similar hearings conducted by other administrative bodies. The Federal
Trade Commission, for instance, has incorporated within its Rules of
Practice procedural rules for investigational hearings which appear to
be nothing more than a restatement of the statutory requirements of
section 6 of the Administrative Procedure Act and section 9 of the
Federal Trade Commission Act. Even without adoption at this time
of any Rules of Practice by the Secretary for Landrum-Griffin investi-
gational hearings, the statutory requirements of section 6 of the Adminis-
trative Procedure Act and section 601(b) of Landrum-Griffin (incorpo-
rating section 9 of the Federal Trade Commission Act) would seem to
leave little or no room for a variance in procedural requirements under
the 1959 Labor Act. Analysis of section 6 of the Administrative Proce-
dure Act shows this section to contain several important safeguards for
the witness subpoenaed under Landrum-Griffin, but among them is not
the right of appraisal, confrontation or cross-examination. Hence one is
forced to conclude that neither as a matter of constitutional due process
or statutory enactment is a witness entitled to such a right in a Landrum-
Griffin investigational hearing.

3. Right to Counsel

Section 6(a) of the Administrative Procedure Act gives to any person
compelled to appear before any agency or representative thereof the
right to be accompanied, represented and advised by counsel. In Hannah
v. Larche the Supreme Court spoke with approval of the Federal

107 SEC. 6. Except as otherwise provided in this Act—

(a) Appearance.—Any person compelled to appear in person before any agency or
represented thereof shall be accorded the right to be accompanied, represented, and
advised by counsel or, if permitted by the agency, by other qualified representative.
Every party shall be accorded the right to appear in person or by or with counsel
or other duly qualified representative in any agency proceeding. So far as the orderly
conduct of public business permits, any interested person may appear before any agency
or in part of any written application, petition, or other request of any interested person
made in connection with any agency proceeding. Except in affirming a prior denial or
where the denial is self-explanatory, such notice shall be accompanied by a simple
statement of procedural or other grounds.


110 363 U.S. 420, 446 (1960).
Trade Commission's rule limiting counsel's participation to the giving of advice.\textsuperscript{111} Obviously, the Court did not see any conflict between this rule and the statutory right of representation given in section 6(a) which might arguably include active participation by counsel at the hearing. One might question the agency's authority to limit the statutory "right. . . to be represented" to advice-giving only, but the Supreme Court, if aware of the problem, found it unworthy of mention. Also, the right to counsel implies that the witness shall have reasonable time to retain counsel—another factor which should effectively prevent the simultaneous serving of a subpoena by the Secretary's representative and his insistence on immediate commencement of the investigation.

4. Right to Transcript of the Investigational Record

Section 6(b) provides that every person compelled to submit data or evidence shall be entitled to retain or pay for a copy of a transcript thereof. This limits one's right to a transcript of his testimony alone. It seems clear that this section assumes that the investigational hearing will be stenographically reported at the agency's expense.\textsuperscript{112} However, section 6(b) also provides that where the investigatory proceeding is nonpublic, the witness may for good cause be limited to inspection of the official transcript of his testimony. This exception answers at least one question and raises several others which apparently have not yet arisen in any decided cases:

(1) It makes clear that no person has the right to insist on a public investigational hearing. The statute assumes that such a proceeding may be nonpublic, and section 1.41 of the Federal Trade Commission Rules provides that all investigatory proceedings shall be nonpublic, unless otherwise ordered by the Commission.\textsuperscript{113}

(2) It limits the witness' right to a transcript of his own testimony even in nonpublic proceedings upon a showing of good cause. By whom must the good cause be shown; presumably, by the administrative agency? If so, to whom must it show the good cause—to itself? Must the good cause be spelled out for the witness and can he object to the sufficiency of the showing? If so, to whom can he object? Must it be the Commission and, if so, can he appeal from the Commission's ruling? If he can appeal, to whom? Assuming that he is unsuccessful in upsetting the sufficiency of the good cause and must content himself with

\textsuperscript{111} 16 C.F.R. § 1.40 (1960).

\textsuperscript{112} See 16 C.F.R. § 1.34(b) (1960).

\textsuperscript{113} 16 C.F.R. § 1.41 (1960).
an inspection of the official transcript of his testimony, must he commit it to memory or can he copy and take notes? If he can take notes or copy, must the witness do it himself or will a representative, such as his own shorthand reporter, be permitted to do so?

In particular cases under Landrum-Griffin, the witness’ access to an official transcript of his testimony in an investigational hearing may be the most important right accorded him. Where sufficiently unpopular witnesses are involved, the opportunity to set a trap for perjury indictments is often moralized as a means justified by the end. Perhaps even more important is that without an official transcript of a witness’ testimony, the extent and scope of his immunity becomes a matter of proof. In the absence of an official transcript one can visualize subsequent hearings and possibly adverse rulings by the courts concerning the exact content of the questions put to a witness by the Secretary’s representative. This danger can be eliminated simply by insistence on a transcript so that a later claim of immunity is not reduced to subjective judgments by a court as to credibility.

5. Right to an Independent Hearing Examiner

Although section 9 of the Federal Trade Commission Act provides that members and examiners of the Commission may examine witnesses and receive evidence, the contention has been made in a few cases\(^{114}\) that a subpoena is invalid unless it orders the evidence returnable before an independent hearing examiner as defined in section 5(c) of the Administrative Procedure Act.\(^{115}\) These cases sought to invalidate subpoenas

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\(^{115}\) SEC. 5. (c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

returnable before the Commission's representative conducting the investigation. Such a contention has been uniformly found to be without merit because the word "examiner" in section 9 does not differentiate between investigative and adjudicative examiners. It is the application of section 5(c) to adjudications that requires section 9 of the Federal Trade Commission Act to permit only independent hearing examiners in adjudicative hearings. In investigational hearings any representative who examines meets the statutory requirement of section 9 that he be an "examiner." 116

6. Objection or Resistance to Subpoenas

A perplexing problem, and one to which the present law offers no solution, is the manner in which a subpoena or some investigative procedure of the Secretary may be resisted without subjecting the objecting party to criminal penalties. The question is certainly a practical one, for even under the broad investigative powers of section 9 of the Federal Trade Commission Act it is possible for the Secretary to transgress the limitations of reasonableness. Suppose, for example, the Secretary were to issue a subpoena duces tecum for all records, of whatever form and nature, of a 10,000 member union for a five-year period. So sweeping a demand might be successfully challenged in court, but counsel for the union is faced with the problem of raising this challenge without risking criminal prosecution of his clients.

In this regard, the pertinent statutes have established two avenues of enforcement available to the Secretary to enforce his demands. Under section 9 the district court may be petitioned for an order to compel obedience to the subpoena, a violation of which would constitute contempt. This method of enforcement poses no problem since the district court would conduct a formal hearing prior to issuance of its order, at which time the objections to the subpoena might be adequately interposed. Furthermore, such enforcement order is appealable so that eventually a final judgment would be obtained either upholding or condemning the particular investigation sought—all without danger of penalty or prosecution to the objector.

On the other hand, section 10 providing a second means of enforcement summarily constitutes it a criminal offense (with substantial maximum penalties of one year imprisonment and/or $5,000 fine) for any person to refuse to obey a subpoena or lawful order of the Secretary. Even the word "willful" is omitted from this statutory crime, thus mak-

116 Cases cited note 114 supra.
ing it doubtful at best that any defense based on lack of criminal intent would lie. It is this second means of enforcement, of course, which one would prefer to avoid, because regardless of the good faith and legal adequacy of objections to the subpoena, few attorneys would ordinarily care to have them adjudicated with a criminal conviction as the price of an unsuccessful challenge.

Significantly, not a single reported case to date reflects a criminal prosecution under section 10 by way of enforcing investigative procedures; the Federal Trade Commission has always elected to seek enforcement under the noncriminal provision of section 9. However, some doubt exists that the Secretary of Labor, in a similar position by virtue of Landrum-Griffin, would tend to be as charitable in dealing with certain labor unions, particularly Teamsters. The threat of criminal prosecutions under section 10 must therefore be considered both real and substantial, and it is this threat which creates the instant problem of imposing objections to subpoenas (or other investigative procedures).

In this regard, it will probably be easiest first to consider what cannot be done in the way of a challenge. First, a motion to quash the subpoena, although an available procedure, is likely to be futile. Since the motion must be addressed to the administrative body itself (here the Secretary of Labor) for a ruling, the principal object of procuring a judicial, noncriminal and appealable decision on the matter is not attained. And the likelihood of the Secretary (or his designated officer) quashing one of his own subpoenas is too remote to justify use of this procedure.117 Secondly, an injunction in the district court to prevent enforcement of the subpoena is not available. Numerous decisions, headed by FTC v. Claire Furnace Co.,118 hold that the federal courts have no jurisdiction to enjoin the Commission from pursuing its investigative procedures under section 9.119 With such procedures eliminated, the only possible recourse would seem to be that which is usually employed—a simple refusal to comply with the subpoena or order, which will eventually cause the matter to be heard and adjudicated in the district court. At present, there is no known action or precaution which might be taken

117 Nevertheless, such a motion to quash might be a valuable procedure to demonstrate an attempt to exhaust the administrative remedies. This could be an important factor in defeating a prosecution, as hereinafter discussed, laying the groundwork for constitutional objections on due process grounds in the event of indictment.

118 274 U.S. 160 (1927).

to ensure that an enforcement order under section 9, rather than a criminal prosecution under section 10, would be used to enforce the subpoena. The choice apparently lies in the discretion of the Secretary of Labor and the Attorney General.

However, a ray of hope may be gleaned from Supreme Court decisions in other fields of administrative law—decisions which indicate that a criminal prosecution in this instance may well violate due process requirements where the defendant merely urges a bona fide objection to an administrative order. Leading the way in this field is Yakus v. United States,\(^{120}\) which thoroughly discusses the requirements of due process in this type of case. While approving the specific procedure there involved, the opinion strongly implies that generally there must be some opportunity for judicial review of an administrative order before the violation of such an order can be criminally punished. Specifically approved in that decision was Wadley So. Ry. v. Georgia,\(^{121}\) which upheld penalties assessed by a state railroad commission for violation of its orders. While finding that Georgia had provided adequately for judicial review, the Court set forth a general rule for administrative orders:

But in whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.\(^{122}\)

And later in the same case: "A statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the commission) would be void if access to the courts to test the constitutional validity of the requirement was denied . . . ."\(^{123}\) It should be noted that the penalty in the Wadley case was upheld only because the Georgia statutes permitted an injunction suit to test the commission's orders—a procedure specifically forbidden under the instant law.\(^{124}\)

A re-examination of sections 9 and 10 in the light of the foregoing opinions reveals interesting possibilities of unconstitutionality. For example, the Claire Furnace case specifically denied injunctive relief to a

\(^{120}\) 321 U.S. 414 (1944) (upholding criminal conviction where administrative remedy to challenge the regulation was available).

\(^{121}\) 235 U.S. 651 (1915).

\(^{122}\) Id. at 661. (Emphasis added.)

\(^{123}\) Id. at 666. (Emphasis added.)

The procedural problems involved in raising objections to investigative subpoenas may be summarized as follows:

(1) A refusal to comply may cause either a noncriminal enforcement action under section 9 or a prosecution under section 10.

(2) The Secretary of Labor apparently has a choice of using the criminal or noncriminal enforcement procedure; hence, any refusal to obey a subpoena, even though in good faith and on reasonable grounds, runs the definite risk of criminal prosecution.

(3) Federal district courts have no jurisdiction to entertain injunction proceedings against the Secretary’s investigative procedures or subpoenas.

125 Although the rationale of the Claire Furnace case is broad enough to cover criminal proceedings under section 10, query, whether or not this case (where the penalty was the forfeiture of one hundred dollars per day by the corporation) would apply to the conviction and possible imprisonment of a natural person?

126 No attempt shall be made here to exhaust the problem of “safe review,” other than to call attention to the existence of the doctrine and its possible application to the Landrum-Griffin penalty sections. Actually, it is doubtful that a ruling on a motion to quash is an immediately appealable order under section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958). However, this and other possible methods of safe judicial review should be considered in advance by counsel if an attempt to resist a subpoena is contemplated.
(4) If administrative procedures, statutes and decisions provide no way to challenge a subpoena and thus obtain a judicial review thereof in advance of indictment or information, an attempted criminal prosecution for refusing to comply with the subpoena may be defended as a violation of due process. It is conceivable that such a case may cause the criminal provisions of section 10 to be declared unconstitutional—to date they have never been tested.

(5) It is not possible, under the present law, to avoid the risk of criminal prosecution if a subpoena or investigative procedure is to be challenged. While such prosecution was seldom, if ever, used in the past, and while it may be unconstitutional as suggested in (4) above, the risk is nevertheless present.

CONCLUSION

It is apparent that the investigatory provisions of the Landrum-Griffin Act contain the vagaries and ambiguities which one might expect to find in an enactment conceived in haste and in hurried response to political and editorial pressures. Failure to employ the ordinary processes of careful, deliberate legislative study and research is clearly reflected in this act. Now that the political turmoil has subsided, Congress would do well to re-examine its handiwork in an atmosphere of legislative calm and to clarify the intent and meaning of the act's provisions authorizing investigations by the Secretary of Labor.
THE INSANITY DEFENSE IN THE DISTRICT OF COLUMBIA—A LEGAL LORELEI

CHARLES W. HALLECK*

Tracing from its inception the development of the insanity defense in the District of Columbia, the author carefully discovers the meaning of an acquittal under the Durham rule in the light of current post-trial commitment procedures. Mr. Halleck suggests the unconstitutionality of mandatory confinement following acquittal and proposes, as a safeguard to the rights of acquitted defendants, the legislative adoption of a civil trial on the issue of insanity prior to commitment.

Not infrequently an attorney who defends a person accused of crime in the District of Columbia may be faced with the difficult and unusual task of preventing the prosecution and the court from learning that his client has a valid defense. This anomalous situation arises by virtue of a series of recent judicial interpretations of the mandatory confinement provision of the District of Columbia Code1 which provides that all defendants acquitted of crime by reason of insanity shall automatically be confined to a hospital for the mentally ill.2 Because this provision may now so operate as to impose upon acquitted defendants sanctions far more severe than those attached to conviction, the defense attorney may believe that in spite of the admonition of Canon 5,3 he will better serve the interests of his client by avoiding the insanity defense entirely. It is the purpose of this article to suggest that the election by the attorney and his client not to raise the defense of insanity, even where it might succeed, is morally and professionally justified in light of the post-trial commitment procedures now in effect in the District of Columbia. In order to understand this proposition, it

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The helpful comments of E. Barrett Prettyman, Jr., are gratefully acknowledged by the author.

2 All such persons are committed to St. Elizabeths Hospital in the District of Columbia.
3 Canons of Professional Ethics (1957). Canon 5 provides in part: "[T]he lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."
is necessary first to review briefly the development of the law of insanity as a defense to crime in the District.

Insanity initially reared its head as a defense to crime in England in the fourteenth century. It was left to Lord Hale in the seventeenth century, however, to formulate one of the first tests to be applied by the courts. This test, known as the "child of fourteen years test," was premised upon the belief that "such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." Under Hale’s test total insanity which rendered the accused of less understanding than a fourteen-year-old child negatived all possibility of criminal intent and excused the act alleged to be criminal. Late in the eighteenth century, Hawkins presaged the now widely accepted right and wrong test by what may be called the good and evil test: "[T]hose who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots and lunaticks, are not punishable by any criminal prosecution whatsoever."

But perhaps the most important early case establishing the concept of insanity as a defense to crime was M’Naghten’s Case decided in England in 1843. There the defendant, while laboring under the delusion that one Drummond, private secretary to Sir Robert Peel, was Sir Robert, shot and killed Drummond. The defense was insanity and the jury acquitted on that ground. The House of Lords subsequently debated the case, and accordingly the opinions of the fifteen judges of England were obtained on the matter. From the opinions of the judges came the M’Naghten rule, or the right and wrong test, under which an accused could establish a defense of insanity only by showing that he was so mentally deranged that he did not know the nature and quality of his act, or that if he did know it, he was unable to tell that what he was doing was wrong. This test is presently in use in a majority of American jurisdictions.

In 1882 the right and wrong test of M’Naghten’s Case was approved

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4 Glueck, Mental Disorder and the Criminal Law 125 (1925).
5 1 Hale, Pleas of the Crown 15 (1847).
6 Id. at 30.
7 Hawkins, Pleas of the Crown 1-2 (7th ed. 1795). (Footnotes omitted.)
9 Id. at 202-14, 8 Eng. Rep. at 719-24.
10 Perkins, Criminal Law 751 (1957).
for the District of Columbia in the case of Charles Guiteau who had assassinated President Garfield.\textsuperscript{11} Unfortunately for Guiteau, however, his defense failed and he was executed. Later, in 1895, the Court of Appeals of the District of Columbia in \textit{Taylor v. United States}\textsuperscript{12} rejected an attempt to add the so-called irresistible impulse test, and it was not until 1929 that the court, finally recognizing that the great advances made in medical science cast new light on the subject, enunciated a broadened rule for the District:

The accepted rule in this day and age . . . is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.\textsuperscript{13}

There the law stood until July 1, 1954, when the United States Court of Appeals for the District of Columbia Circuit handed down \textit{Durham v. United States}.\textsuperscript{14} It is doubtful whether any single case in the criminal law has stirred more comment and controversy than \textit{Durham}, for it virtually scrapped the right-wrong, irresistible impulse tests of criminal insanity and adopted a new and far-reaching test for the District of Columbia.\textsuperscript{15} In the six years since it was first announced in the District, the \textit{Durham} rule has been rejected in every state except New Hampshire, whence it came,\textsuperscript{16} and in every other federal jurisdiction in which it has been urged, save perhaps the Virgin Islands.\textsuperscript{17} The most recent rejection was on September 26, 1960, by the Supreme Court of Pennsylvania in \textit{Commonwealth v. Woodhouse}.\textsuperscript{18} There, the court asked: "Should the M'Naghten Rule be abolished in Pennsylvania? Our answer is 'no' for very compelling reasons."\textsuperscript{19} The court went on to point out that "the Durham Rule has been consistently rejected

\textsuperscript{11} United States v. Guiteau, 12 D.C. (1 Mackey) 498 (1882).
\textsuperscript{12} 7 App. D.C. 27, 43 (1895).
\textsuperscript{14} 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).
\textsuperscript{15} See Weihofen, The "Test" of Criminal Insanity: Recent Developments, 172 International Record of Medicine 638 (1959).
\textsuperscript{16} State v. Pike, 49 N.H. 399 (1869).
\textsuperscript{17} V.I. Code tit. 14, § 14 (1957).
\textsuperscript{18} 164 A.2d 98 (Pa. 1960).
\textsuperscript{19} Id. at 104.
in most state jurisdictions since it was first adopted in the State of New Hampshire in 1869.20

In essence, the Durham rule is "simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."21 "Disease" was defined by the court as "a condition which is considered capable of either improving or deteriorating," and "defect" was defined as "a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."22

However, the history of these changes in the applicable test and the simplified statement of the present rule in Durham are meaningless, as a practical matter, until it is seen how the rule is applied. Therefore, one of the most important questions, both theoretical and practical, is: Given the rule, who has the burden of proving what?

There is a well-established presumption in the law that all men are sane.23 At the outset of a criminal trial, the prosecution has the benefit of this presumption, but being rebuttable it may be dispelled by evidence introduced by either the defendant or the prosecution. Once the question of the defendant's sanity is put in issue, the rule in federal jurisdictions, including the District of Columbia, is that the prosecution must then assume the burden of proving beyond reasonable doubt that the defendant had the mental capacity to form the criminal intent necessary to commit the alleged crime.24 Coupled with the Durham rule, this rule casts upon the prosecution the burden of showing that the accused did not suffer from mental disease or defect at the time of the crime, or that if he was mentally disordered, it did not cause him to commit the crime. In effect, to obtain a conviction the Government must carry the burden of proving a negative proposition. The Government is called upon to go forward with this proof, however, only after "some evidence" has been introduced from either side which puts the sanity of the accused in issue.

How much evidence must be introduced in order to overcome the pre-
sumption of sanity and require the prosecution to go forward with its burden of proof was at least partially determined in 1945 in Holloway v. United States.25 In that case the court stated: "[T]he burden is on the accused to overcome the presumption of sanity by evidence sufficient to create a reasonable doubt as to his mental capacity to commit the offense."26 It should be remembered that at the time of Holloway the right and wrong test, supplemented by the irresistible impulse test, was the rule in the District.

Then in 1951 the court of appeals decided Tatum v. United States.27 Ernest Tatum had been convicted by jury trial of raping a nine-year-old girl, and pursuant to statutory authority28 the jury added to its verdict the words "with the death penalty." At trial, Tatum had sought to establish the defense of insanity, which in essence "rested upon [Tatum's] ... insistence that he remembered nothing of what happened at the time the offense was committed."29 The trial judge did not instruct the jury on the issue of sanity, no doubt because Tatum's trial counsel did not request it. The point was not urged on appeal, but the court of appeals, taking up the question under Rule 52(b) of the Federal Rules of Criminal Procedure,30 overruled Holloway and established instead what has been called the "some evidence" rule.

"[I]n criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own."31 Thus the function of the trial judge is simply to determine whether the issue of sanity "is brought into the case by evidence." If it is, the issue of the defendant's sanity must be presented to the jury, and if the jury has a reasonable doubt of his sanity, it must acquit.

The quantum of evidence that will constitute "evidence" or "some evidence" has never been clearly defined, but there have been five cases other than Tatum decided by the court of appeals since Durham.

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26 Id. at 4, 148 F.2d at 666. (Footnote omitted.)
29 88 U.S. App. D.C. at 388, 190 F.2d at 614.
30 "(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."
which bracket the line of demarcation. In 1955, the court of appeals decided the case of Lolita Lebron and three of her Puerto Rican countrymen\textsuperscript{32} who had been convicted of assault with intent to kill or assault with a dangerous weapon. The offense charged grew out of a shooting spree on March 1, 1954, in the Congress of the United States. Five Congressmen had been shot by these defendants from a vantage point high in the House gallery. The defendants had flatly refused to rely on insanity as a defense at trial and then urged on appeal that the trial court erred in failing to present the issue to the jury. They contended that the very act of "shooting up" the Congress, coupled with the abnormal calm of three of the defendants and the hysterical behavior of Miss Lebron, plus the alleged irrational act of belonging to an organized minority group in Puerto Rico, constituted "some evidence" of insanity. The court of appeals found no error in the ruling of the trial judge that the evidence did not fairly raise the issue of the defendants' sanity.

On the other hand, in Clark v. United States\textsuperscript{33} the court of appeals found that the naked and self-serving speculations of the defendant from the witness stand that "'I did this crime unbeknowing to what I was doing in a crazy and insanity manner,' and 'I must have been insane,' and 'I believe I was insane, out of my head,'"\textsuperscript{34} were sufficient to justify the trial court's instructions to the jury on the issue of the defendant's sanity. Explanation for the decision perhaps may be found in the fact that the trial court was reversed because Clark's attorney, apparently without his prior approval, did not argue the insanity defense, even though the jury was given instructions on that issue. Instead his attorney had argued to the jury that Clark was guilty of manslaughter rather than first degree murder. The jury convicted of murder in the first degree. Since Clark faced mandatory execution for the shotgun slaying of a man with whom he had argued earlier and whom he had shot in the back through a gasoline station window, the court of appeals, had it affirmed the conviction, would have sent Clark to his death.\textsuperscript{35}


\textsuperscript{34} Id. at 29, 259 F.2d at 186.

\textsuperscript{35} The reluctance of courts and juries in the District of Columbia to approve first degree murder convictions with the resulting mandatory death penalty is graphically
It is interesting that Circuit Judge Warren E. Burger, dissenting in *Clark*, noted that "a defense lawyer who would try to make out an insanity defense on the 'evidence' of insanity in this record might well be charged with incompetence for taking the risk of alienating the jury's sympathies."  

Then on July 2, 1959, the court of appeals decided the appeal of Claude C. Goforth, convicted of taking indecent liberties with a female child under the age of sixteen years. Goforth had not submitted to the trial court a written instruction on the issue of insanity, although his counsel several times had made verbal requests for such an instruction. The attorney did not object to its omission from the court's charge to the jury, but the court of appeals considered the question under Rule 52(b). Noting that there was "significant evidence that he [Goforth] might have been of unsound mind at the time of the alleged crime . . . including evidence of delusions and the hearing of voices," the court reversed the case because the trial judge had not instructed the jury on the issue of Goforth's sanity. Circuit Judge Walter Bastian dissenting, pointed out:

The entire evidence was to the effect that Goforth was a drunkard . . . . There was not one word of testimony from any source to indicate that appellant was suffering from any mental disease or defect. At the most there was only his own testimony, totally uncorroborated, as to imaginings of his intoxicated-befuddled mind—a not unusual phenomenon of continued and continuous drinking, and a far cry from mental disease or defect.

Two months later, the court of appeals heard oral argument in the case of Walter U. Smith, who had been charged with a felony (assault with a dangerous weapon) and convicted of a misdemeanor (simple assault). The case grew out of an attack by Smith upon his estranged wife, an attack which resulted in wounds requiring fifty-five stitches. Smith had demonstrated by the fact that of over 125 first degree murder indictments handed down since 1953, only one man, Robert E. Carter, has been executed. He died on April 26, 1957, for the killing of a policeman.

39 Note 30 supra.
41 Id. at 113, 269 F.2d at 780.
sought an instruction on the issue of sanity from the trial judge, relying upon the evidence elicited from prosecution witnesses during the Government's case in chief. The trial judge denied the requested instructions. The court of appeals recognized that the issue of sanity could be raised by the prosecution as well as by defense witnesses, but, said the court, evidence that the accused had a history of deterioration of family relationships and work habits, of violent outbursts of uncontrollable temper, and of mistaken beliefs about his wife, coupled with a lack of coherence in speech when arrested at the scene of the crime, did not constitute sufficient evidence to raise the issue. Circuit Judge David L. Bazelon vigorously dissented, arguing that on the basis of Tatum v. United States there was, in the totality of the evidence heard by the jury, "some proof" of insanity requiring submission of the issue to the jury. It is difficult to reconcile the reasoning in Smith with that in Goforth. Some explanation perhaps may be found by comparing the panels of the court, rather than the facts, in each of these five cases.

One other case on this point deserves mention. In Moore v. United States five judges ruled that testimony that Moore had an intelligence test score of 69 did not constitute evidence tending to show that he had either a mental disease or a mental defect "as this court has defined those terms." The four dissenters argued that this evidence might very well constitute the "some evidence" required by Tatum. They also pointed out, as the court had previously held, that mental illness is not limited to psychosis.

If any one rule can be gleaned from these cases, it must be that it takes little evidence indeed to put in issue the sanity of the defendant and to cast upon the prosecution the burden of proving beyond a reasonable doubt that the defendant was free of causative mental disease or defect at the time of the alleged commission of the crime. In a close case the issue may be governed, in the final analysis, by which one of the fifteen district judges presides at trial, and by which three of the nine judges of the United States Court of Appeals for the District of Columbia Circuit make up the panel on appeal. Whatever the necessary quantum of evidence, it is admittedly slight. Whether much more than a scintilla of evidence is required is doubtful since it is no longer necessary that

44 Tatum, Lebron, Clark, Goforth and Smith.
46 Chief Judge Prettyman and Circuit Judges Miller, Danaher, Bastian and Burger.
the evidence create a reasonable doubt of the defendant’s sanity. The answer to the question of what is “some evidence” lies in a factual no-man’s land, somewhere between “reasonable doubt” and a “mere scintilla.”

Once the “some evidence” test has been met, the prosecution is faced with the task of proving beyond a reasonable doubt the defendant’s freedom from mental disease or defect at the time of the crime. This is a particularly heavy burden when the issue is raised at trial without forewarning to the prosecution. Testimony directed to the mental condition of the defendant at the time of trial is immaterial and inadmissible.48 The distinction is important and adds to the Government’s burden.

The problem faced by the Government in a recent criminal case in the District of Columbia illustrates the point. Charles L. Cross was indicted in a nine count indictment growing out of an attempted kidnapping and robbery on December 12, 1958.49 On January 30, 1959, Cross entered a plea of not guilty, and on February 27 moved through his counsel for a mental examination. The prosecution opposed the motion, and on March 9, the district court denied it, whereupon Cross withdrew his plea of not guilty and pleaded guilty to three counts of the indictment. A subsequent motion by Cross to withdraw his guilty plea was denied by the district court on June 26, and Cross was sentenced to a total of 9 to 30 years’ imprisonment. Thereafter, Cross appealed the ruling of the district court denying him leave to withdraw his plea. He alleged that he had not been mentally competent to plead guilty. On October 30, 1959, the court of appeals reversed and remanded the case to the district court with directions to allow Cross to withdraw his guilty plea.50 On December 11, Cross was arraigned again and his motion for a mental examination was granted, almost one year after the crime. Thereafter, one psychiatrist at the District of Columbia General Hospital reported that Cross was competent to stand trial, but that he had suffered from a personality disturbance at the time of the alleged crime.51 The prosecution sought to obtain a mental examination

51 The doctor’s report stated: “He suffers from a life long personality disturbance characterized by megalomania which so destroys his judgment, he may be considered to suffer a mental disease. In this case, the crime with which he is charged is the product of this illness.” Ibid.
by a psychiatrist from St. Elizabeths. On March 11, 1960, the district
court ordered Cross to St. Elizabeths for an examination, but Cross
refused to speak to or cooperate with the St. Elizabeths' psychiatrists,
and they were unable to determine from mere observation his mental
condition as of fourteen months earlier. On April 5, 1960, Cross came
to trial and the psychiatrist from the General Hospital testified in his
behalf. At that point, on April 7, the district court ordered Cross back
to St. Elizabeths for an examination. When St. Elizabeths reported
Cross still refused to talk to them, basing his refusal on his right not
to incriminate himself,\(^5^2\) the district court directed a verdict of not
guilty by reason of insanity. Cross was committed to St. Elizabeths
Hospital pursuant to section 24-301(d), and he remains there to the
present day.

That the prosecution has a heavy burden to carry is therefore
readily apparent.\(^5^3\) The difficulties confronting the prosecutor vary
in direct proportion to the lapse of time between offense and trial and are
heightened by an understandable unwillingness on the part of the de-
fendant to help the Government convict him.\(^5^4\)

Most critical to the instant discussion, however, is that time at trial
when the judge must charge the jury. When the defendant's insanity
is at issue, the court must instruct the jury that the burden clearly rests
with the Government to establish beyond a reasonable doubt that the
accused was not suffering from a mental disease or defect at the time
of the crime or that the crime was not the product of a mental disease.
Any instruction to the effect that in order to render a verdict of not
guilty by reason of insanity the jury must find affirmatively that the
accused suffered from a mental disorder is erroneous and warrants
reversal.\(^5^5\)

\(^5^2\) See Flint v. District Court, Misc. No.1388, D.C. Cir., Dec. 3, 1959 (petition for
writ of mandamus denied).
\(^5^3\) See Davis v. United States, 160 U.S. 469 (1895); Carter v. United States, 102
232, 239 F.2d 52 (1956).
Constitutional problems involving the question of the defendant's being forced to give
evidence against himself when he is sent to a government hospital, or of his right to a
jury trial which may be denied by a directed verdict of not guilty by reason of insanity,
which includes a finding of guilt under Rucker v. United States, 280 F.2d 623 (D.C. Cir.
1960), are not within the scope of this article.
\(^5^5\) Isaac v. United States, No. 15081, D.C. Cir., Jan. 21, 1960; Carter v. United States,
To realize the full import of the form of the instructions, assume
the following hypothetical case of an imaginary defendant named Bates.
A fugitive suspect in a crime, Bates is finally arrested and brought to
trial. The trial takes place five years after the alleged crime. At trial,
the only evidence tending to show that Bates had a mental disease five
years earlier is a recitation of some odd behavior observed by a lay
witness, coupled with the conclusion, stated by that witness, that "Bates
must have been insane." Believing that this testimony meets the "some
evidence" test, the prosecution then attempts to prove that Bates was
sane, or free from mental disease or defect, at the time of the crime.
The trial court, also concluding that the issue of sanity has been raised
by "some evidence," properly instructs the jury and the jury retires
to consider the case. If the jurors find that the prosecution's proof on
the issue of sanity failed completely, they may find Bates "not guilty
by reason of insanity," although the only affirmative evidence of his
insanity is a layman's speculation which need not create even a rea-
sonable doubt that Bates might have been insane. Furthermore, if the
jurors find that the prosecution proved Bates sane by a preponderance
of the evidence but not beyond a reasonable doubt, they must likewise
find Bates not guilty by reason of insanity. The jurors are not to decide
whether Bates is insane. Rather, they are to decide whether the
prosecution has proved beyond a reasonable doubt that Bates was not
insane at a point of time in the past. If the prosecution has failed
in this proof in the face of the minimal "some evidence" required by
Tatum, Clark and Goforth, the jury must find the defendant "not
guilty by reason of insanity." Bates' present sanity or insanity never
enters the picture.

The result, then, is that the verdict of "not guilty by reason of in-
sanity" is not, and cannot be, a finding by the jury that the defendant
is now or ever was insane. In fact, the jurors are not to be instructed
by the trial court that they are to make that finding,\(^{56}\) for neither
side has the burden of proving that the defendant was actually insane.
The only proof going to the question of insanity is proof which does
not raise even a reasonable doubt\(^{57}\) but is simply the scintilla of
evidence needed to satisfy the "some evidence" rule—evidence which
need not tend to show that the defendant is "insane" but only that he
may have had a mental disease or defect.

\(^{56}\) Ibid.

It was not until October 9, 1959, that anyone in the District of Columbia seriously argued that a verdict of "not guilty by reason of insanity" is not a finding that the defendant is insane. When Donald Ragsdale urged it in a hearing on his petition for a writ of habeas corpus seeking release from St. Elizabeths Hospital,58 the district court ignored the point and denied the petition. Ragsdale then appealed to the United States Court of Appeals for the District of Columbia.

While Ragsdale's appeal was pending, a petition to appoint a committee for the person and estate of Donald C. Houser was filed.59 Houser had strangled his wife and had been found not guilty by reason of insanity. Thereafter, pursuant to the District of Columbia mandatory commitment law, he was committed to St. Elizabeths Hospital by the district court. However, the petition to appoint a committee was denied by the district court for the reason that the Code provides for the appointment of a committee only in the case of a person who has first been adjudged non compos mentis.60 The district court, in a memorandum opinion filed April 7, 1960, said in regard to the verdict in Houser's criminal trial: "A jury, hearing a criminal charge against him, found the patient not guilty by reason of insanity. Such a verdict is not an adjudication establishing the insanity of the defendant."61

Then on June 23, 1960, the court of appeals decided Ragsdale v. Overholser.62 Although not plainly stated in the majority's opinion, the court seems clearly to admit that the jury's verdict of not guilty by reason of insanity means, at most, only that there is reasonable doubt about the defendant's sanity; the verdict does not represent an affirmative finding of insanity.63 The concurring opinion of Circuit Judge Charles Fahy was even more explicit. He described the jury's verdict as follows: "[T]here is no finding of insanity, but only a doubt with respect to sanity, when section 24-301 comes into operation."64 Clearly, then, Ragsdale and Houser have at least enunciated what a verdict of "not guilty by reason of insanity" is not. It is not a finding that the acquitted defendant was insane. And it is also clear that the verdict

61 In re Houser, Mental Health No. 110-60, D.D.C., 1-2, April 7, 1960.
62 281 F.2d 943 (D.C. Cir. 1960).
63 Id. at 947.
64 Id. at 950.
represents no finding of any sort on the defendant’s present mental condition since evidence going to that fact is not material at trial.

In the light of the foregoing principles of law, an examination of post-trial commitment procedures in the District of Columbia takes on new significance. At the time the Durham case was decided in 1954, it was a matter of discretion with the trial judge whether or not to certify acquitted defendants to the Secretary of Health, Education and Welfare, who in turn might exercise his discretion in ordering such persons confined in a hospital for the insane. Immediately after Durham a storm of protest arose in the District of Columbia, which led to the appointment on October 25, 1954, of the Committee on Mental Disorder as a Criminal Defense. The Committee summed up the fears of those critics of Durham who felt that this new rule would result in the unjustified acquittal of countless criminals who might or might not be insane, and who might thereafter be released to prey on an innocent and unsuspecting populace.

However, the public has a very great interest in assuring, and in being assured . . . that dangerous mental cases are not prematurely released to prey upon the citizenry. The newspapers of the nation, in recent times, have contained many accounts of persons relieved of criminal responsibility by reason of insanity and who have been prematurely released from mental hospitals only to commit some further serious crime, many of them involving rape and/or murder.

The entire report when subsequently presented to Congress in support of proposed amendments to the District of Columbia Code was thereafter included in the printed reports of both the House and the Senate. This proposed new legislation urged, among other things, that section 24-301 be amended to provide for the mandatory confinement in an insane asylum of every defendant found “not guilty by reason of insanity.” At public hearings on this legislation, Congressman James C. Davis of Georgia, Committee Chairman, frankly stated: “[T]he task which faces us is to work out the best remedial legislation which can be devised to get us out of what you might call the hole in which we find ourselves by reason of these recent decisions.” Obviously, Congress-

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man Davis did not approve of Durham. Out of this Committee came an amendment to section 24-301, which then became law, providing that any person acquitted of crime “solely on the ground that he was insane at the time of its commission” shall be “confined in a hospital for the mentally ill.”

The difficulty is that the Committee on Mental Disorder as a Criminal Defense, its Chairman, and the members of the House and Senate Committees on the District of Columbia, were all laboring under what now can be shown to be two clearly erroneous presumptions. In the first place, they all believed that a verdict of “not guilty by reason of insanity” in the District of Columbia in 1955 represented an affirmative finding by the jury that the defendant was in fact insane. This conclusion, for example, clearly appears in the testimony given before the House Committee on the District of Columbia by George L. Hart, Jr., Chairman of the Committee on Mental Disorder as a Criminal Defense, the group which drafted the new section 24-301.

The Report of the Committee on Mental Disorder as a Criminal Defense, reprinted in both House and Senate Reports, was in a similar vein:

The Committee believes that a mandatory commitment statute would add much to the public’s peace of mind, and to the public safety, without impairing the rights of the accused. Where accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee’s opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered.


If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

71 “In other words, there are two matters of discretion on a person who has been found insane, who has been exculpated from liability for a crime by reason of insanity.” Hearings on H.R. 6585, supra note 69, at 21-22. (Emphasis added.) “But our committee felt most strongly that just as the presumption of sanity should continue until overcome, once a person is found insane that presumption of insanity should continue until it is found that the person has recovered.” Id. at 22. (Emphasis added.) “Now, it is our very strong feeling that no person who has been committed to a mental hospital because insane at the time he committed the crime should be released purely on the ‘say-so’ of the superintendent.” Id. at 23. (Emphasis added.)

And the Senate Committee on the District of Columbia stated in its report that one of the purposes of the mandatory confinement amendment was:

To provide that in every case where an accused is found not guilty of a crime solely by reason of insanity he shall be confined in a hospital for the mentally ill. This is designed to protect the public against the immediate unconditional release of accused persons who have been found not responsible for a crime solely by reason of insanity.73

In view of this legislative history and in view of the language of the new section 24-301(d), it may logically and forcefully be argued that Congress set up a condition precedent to mandatory confinement which, simply stated, is that before a person can be confined under section 24-301(d), he first must have been acquitted by a jury which affirmatively found him insane.74

This argument was presented to the court of appeals in Ragsdale v. Overholser.75 The appellant, who had been found "not guilty by reason of insanity,"76 advanced the theory that he was being confined at St. Elizabeths in violation of section 24-301(d)77 because the condition precedent in that section had never been met, i.e., no jury had affirmatively found him insane. He logically argued that since Congress considered an acquittal on the ground of insanity a finding by the jury that the defendant was insane, Congress in amending the Code meant to provide for automatic confinement after acquittal only if the defendant "is acquitted solely on the ground that he was insane . . . ."78 The court of appeals rejected this argument, however, on the theory that the earlier decision of Orencia v. Overholser79 was controlling on the issue. There is serious question, however, as to the soundness of the court's reliance on Orencia.

74 Similar statutes providing for mandatory confinement after a jury affirmatively finds a criminal defendant insane and acquits him on that ground have been held not to violate due process of law. E.g., In re Clark, 86 Kan. 539, 121 Pac. 492 (1912); In re Brown, 39 Wash. 160, 81 Pac. 552 (1905).
75 281 F.2d 943 (D.C. Cir. 1960).
79 82 U.S. App. D.C. 285, 163 F.2d 763 (1947). The court also cited with approval People v. Dubina, 304 Mich. 363, 375, 8 N.W.2d 99, 103, cert. denied, 319 U.S. 766 (1943). In that case the trial judge specifically asked the jury if "by your verdict you find that he was insane?" to which the jury replied "'Yes, sir'.
Mrs. Mary Orencia killed her three-year-old daughter on February 12, 1944. At her trial in November 1944 for second degree murder, the jury found her "not guilty by reason of insanity," and she was subsequently committed to St. Elizabeths Hospital under the discretionary procedures then in effect. In seeking release by habeas corpus, she alleged that prior to confinement in an insane asylum, she was entitled to a jury determination, after acquittal, on the issue of her sanity. Since her murder trial had taken place prior to Tatum, the rule announced in Holloway had been applicable; i.e., she had been required to introduce enough evidence to create a reasonable doubt of her sanity at the time she killed her daughter. The court in Orencia stated that it could "perceive no reason for a second trial by a jury as to her mental condition, when the murder jury had duly tried the same issue tendered by her." The court also said: "[T]hat the appellant was insane at the time she killed her child is not and cannot be questioned, since it was so determined by the jury in the murder case." The court then ruled that her insanity would be presumed to continue and that her confinement was proper. It was further held that Mrs. Orencia could obtain release by habeas corpus only upon a showing that she was so completely restored to sanity that she could be released without danger to herself or others.

It is difficult to reconcile the statement of the court in Orencia that a jury determination of "insanity" cannot be questioned with the finding in Ragsdale and Houser that a jury does not determine "insanity" when it finds a defendant "not guilty by reason of insanity." The theory of a presumption of continuing insanity set out in Orencia is bottomed on the proposition that the jury found the defendant insane. This insanity, once established, is then presumed to continue. Ragsdale adopts and applies this presumption, but with the necessary implication that "only a doubt with respect to sanity" is presumed to continue. Thus the rule announced by the Ragsdale court is one of a presumption of continuing doubt about sanity, rather than a presumption of continuing insanity.

At the time the mandatory confinement amendment to the District of Columbia Code was passed, it was the rule in only ten states and in England that the court is required forthwith to commit to a mental hospital any person found not guilty of crime by reason of insanity. In England, under the Trial of Lunatics Act of 1883, the jury returns a verdict of

81 82 U.S. App. D.C. at 286, 163 F.2d at 764.
82 Id. at 287, 163 F.2d at 765.
83 46 & 47 Vict., c. 38.
"guilty but insane" if it acquits a defendant on that ground. Such a verdict represents an affirmative finding by the jury of the insanity of the accused. In four of the ten states with mandatory commitment laws, the accused must prove his insanity as an affirmative defense. In three of the ten states, the accused has the burden of introducing enough evidence to raise a reasonable doubt of his sanity; merely introducing some evidence of insanity will not suffice. While the remaining three states resemble the District of Columbia in that the introduction of evidence, although not necessarily enough to create a reasonable doubt, nevertheless shakes the presumption of sanity, they differ from the District in that they follow the right and wrong test. In none of them will merely some evidence of a mental disease or defect such as the naked, self-serving speculation of the defendant suffice to raise the issue. Of these last three states, only Massachusetts adds the irresistible impulse test to the right and wrong test. It is interesting to note that in New Hampshire, the only state which has a test for criminal insanity like the District of Columbia's Durham rule, there is no mandatory confinement after an acquittal on the ground of insanity. Commitment is discretionary with the court. Therefore, the District of Columbia stands alone as the only American jurisdiction which mandatorily confines a defendant when the prosecution is unable to carry the burden of proving him free of causative mental disease or defect in the face of merely "some evidence" of his insanity.

Since 1885, it has been established in the District of Columbia that confinement in an insane asylum is a deprivation of personal liberty and may not be ordered unless there has been a prior judicial determination that the person is actually insane. Due process of law requires that the opportunity for a hearing be afforded to a person before he may be deprived of his personal liberty through confinement in a mental institu-

85 Michigan: People v. Finley, 38 Mich. 482 (1878); Oklahoma: Gallagher v. State, 81 Okla. Crim. 15, 159 P.2d 562 (1945); Maas v. Territory, 10 Okla. 714, 63 Pac. 960 (1901); Wisconsin: Duthey v. State, 131 Wis. 178, 111 N.W. 222 (1907).
88 In re Bryant, 14 D.C. (3 Mackey) 489 (1885).
In Ragsdale, the court of appeals recognized that when persons found not guilty by reason of insanity are immediately confined to an insane asylum without an affirmative finding of insanity, there is posed a serious constitutional problem. The court answered the problem by pointing out that the writ of habeas corpus is always available to test the legality of the acquitted defendant's confinement. The court characterized this habeas corpus hearing as a "de novo proceeding to examine into petitioner's then existing mental condition; at such hearing he is free to put in evidence, both lay and expert, to demonstrate that he has recovered to the point where he will not be dangerous to himself or others." But the person seeking release must also carry the "burden of showing that the refusal of the superintendent [of the mental hospital] to issue the statutory certificate [of eligibility for release] was arbitrary or capricious." Presumably, then, the person seeking release carries the burden of establishing that the superintendent has been arbitrary and capricious in failing to certify that the petitioner has recovered from an abnormal mental condition and will not be dangerous to himself or the community. The initial presence of the abnormal mental condition is assumed although its presence exists only by virtue of the presumption of continuing doubt.

The court in Overholser v. Leach faced the problem of what to do with a defendant who seeks release after having been found not guilty by reason of insanity and who was not insane within commonly accepted meanings of the word. The defendant Leach, a sociopath, had been acquitted on the ground of insanity. He then sought his release from St. Elizabeths Hospital by habeas corpus, insisting that he was not insane and, therefore, entitled to release. Prior to November 1957, St. Elizabeths' psychiatrists consistently testified in court that a sociopath did not suffer from a mental disorder. But in November 1957 at a staff meeting, these psychiatrists changed their official opinion in what is referred to among hospital personnel as "The Big Switch." Thereafter, the official staff view was that "people suffering from sociopathic personality

94 This change of mind actually took place in the middle of Leach's criminal trial.
disturbance should be 'labelled' as diseased, as mentally ill . . . ."[95] Jack Leach was a sociopath. So was Donald Ragsdale. And as Dr. William G. Cushard, a psychiatrist attached to the St. Elizabeths' staff, testified in response to a question about the type of treatment available to sociopaths: "About the only kind of treatment I know for any type of personality is to try to change his personality, and that's a very difficult thing to do, to change a person's basic personality."[96] Leach had argued that he was "sane" in the commonly accepted sense of the word, and that since the statute[97] set out as a prerequisite for release the requirement "that such person has recovered his sanity," he was entitled to be set free. The court of appeals rejected his argument and ruled that it is not sufficient for a defendant merely to prove that he is sane as would be the case of an ordinary person confined through civil commitment procedures, but that to warrant unconditional release,[98] defendant must prove a "freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future.[99] Such defendants were considered "an exceptional class of people" for although they committed a criminal act,[100] they were nevertheless "not guilty by reason of insanity."[101]

Four days short of one year after Leach was decided, the court of appeals further clarified the release procedure. In Hough v. United States[102] conditional release was said to require a finding that "the in-

[98] A defendant committed to St. Elizabeths under section 24-301(e) may seek either a "conditional" or "unconditional" release. If the defendant seeks an unconditional release, the courts must determine whether the superintendent of the hospital has certified "(1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release . . . ." If the superintendent believes that the defendant does not warrant an unconditional release, a conditional release may be granted under such conditions as the court may direct.
[99] 103 U.S. App. D.C. at 292, 257 F.2d at 670. (Footnotes omitted.) In its original opinion, the court used the words "freedom from such mental disease or defect," but later amended the opinion to require "freedom from such abnormal mental condition.
[100] "The general verdict of not guilty by reason of insanity carried with it a finding that, except for the question as to his sanity, defendant was guilty as charged." Rucker v. United States, 280 F.2d 623, 625 (D.C. Cir. 1960). (Footnote omitted.)
individual had recovered sufficiently so that under the proposed conditions . . . 'such person will not in the reasonable future be dangerous to himself or others'.'

The extent of the burden of proof cast upon the defendant seeking either type of release, conditional or unconditional, and the exact meaning of "dangerous" were not settled until June 23, 1960. On that day, the court of appeals decided two cases103 which virtually "nailed the lid" on St. Elizabeths.

In Ragsdale the court spelled out the standard of proof which had been only partially defined in Leach: proof by a preponderance of the evidence that the defendant is free from abnormal mental condition will not satisfy the purpose of Congress. If any reasonable doubts—either medical or judicial—exist as to whether an abnormal mental condition renders the petitioner seeking release potentially dangerous, those doubts must be resolved against the petitioner.104

In Overholser v. Russell105 the court defined what was meant by the phrase "dangerous to himself or others" found in section 24-301(e) of the Code. Psychiatrists had testified that Russell might write a worthless check if released. In answering the question "whether Russell is 'dangerous' if he may commit a non-violent crime, or only if he may commit an act of violence,"106 the court held that "the danger to the public need not be possible physical violence or a crime of violence. It is enough if there is competent evidence that he may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial and conviction."107

Clearly, then, a person seeking release from commitment under section 24-301(d) has an almost insurmountable burden of proof. It is conceivable that within the framework of this rule, eligibility for release could not be established if the staff of St. Elizabeths believed that a person seeking release may commit the "criminal act" of using the character "Smokey Bear" without consulting the Secretary of Agriculture and the Association of State Foresters.108

These recent developments in the law of insanity in the District of Columbia have created thorny problems for the attorney called upon to defend a person accused of crime, when that attorney discovers some

104 281 F.2d at 947.
105 283 F.2d 195 (D.C. Cir. 1960).
106 Id. at 198.
107 Id. (Emphasis added.)
108 See 18 U.S.C. § 711 (1958) ($250 fine and/or 6 months in jail).
evidence of possible mental disorder in his client. It is clear that not only will it take very little evidence to raise the issue of sanity, but also the prosecution will very likely have a difficult time in carrying its burden of proving the negative proposition—that the defendant did not suffer from causative mental disease or defect at the time of the crime. For these reasons, the insanity defense may appear extremely tempting. But like the Lorelei of the River Rhine, the temptation may lead to a rock of despair. If the defense of insanity is successfully urged, the defendant, although not affirmatively found insane, will be automatically committed to a mental institution from which he will be released only when he “recovers” to the point that there can be no reasonable doubt of his freedom from abnormal mental condition. Additionally, he will have to prove beyond a reasonable doubt that he will not in the foreseeable future commit a criminal act, violent or nonviolent. Since these requirements for release, if stringently applied, might thwart nearly every attempt at release, and since there is no statutory limit on the length of time a defendant may be held in a mental institution, an acquittal may often result in far more severe penalties for the defendant than conviction. A sociopath with a clean record, but charged with a minor offense, conviction for which would probably lead to probation or a very short sentence, would be foolish indeed to interpose a successful insanity defense. If he is found not guilty by reason of insanity, he faces the prospect of confinement in a mental hospital until his personality is changed—a difficult and time-consuming task even under the most ideal conditions. He might remain in a mental hospital for “two, five, or ten years—or even beyond that.”

An examination of statistics demonstrates the unlikelihood of early release. Since the adoption of the Durham rule, and through April 30, 1960, 160 persons acquitted by reason of insanity have been automatically committed to St. Elizabeths. Sixty-five of these acquittals occurred prior to December 12, 1958. In that period, 20 of those 65 patients were discharged. But by April 30, 1960, of the 160 persons committed after acquittal, a total of only 24 had been granted unconditional

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110 Commitment and release statistics are not generally available to the public, since no running tally is maintained at St. Elizabeths. However, figures were compiled for an address given by Dr. Overholser in August 1960 before the Conference of Chief Justices which the author obtained from staff psychiatrists.
111 This date is approximately three months after the denial of a rehearing in Overholser v. Leach, 103 U.S. App. D.C. 289, 257 F.2d 667 (1958).
leases.\textsuperscript{112} From these figures it is plain that while the number of acquittals on the ground of insanity has greatly increased over the last several years, the impact of the \textit{Leach} case has been noticeably apparent in the reduced number of unconditional releases. Therefore, in discussing the possibility of an insanity defense with his client, the defense attorney must point out that such an acquittal may result in a far greater deprivation of the defendant’s liberty than a conviction which would carry with it the practical possibility of probation or a light sentence. Unless conviction calls for the death penalty or a long term of imprisonment, a defendant might very likely be released from jail sooner than from an insane asylum.\textsuperscript{113}

The question whether it would not be better for the defendant to receive treatment in a hospital than to go to jail presupposes that he needs and can benefit from treatment. The purpose of the \textit{Durham} rule is to provide treatment instead of punishment for those who should not be held responsible for their acts.\textsuperscript{114} But the penitentiary at Lorton, Virginia, has facilities for psychotherapy which provide treatment for many prisoners who need that type of help,\textsuperscript{115} whereas St. Elizabeths, despite

\textsuperscript{112}A review of the docket of the United States District Court for the District of Columbia reveals the following cases in which defendants were found not guilty by reason of insanity between June 1, 1958, and July 1, 1960, and have since been released:

\begin{table}
\begin{tabular}{llll}
\hline
\textbf{Criminal No.} & \textbf{Name} & \textbf{Date of Acquittal} & \textbf{Type and Date of Release} \\
\hline
842-58 & Gerald Levy & 11-3-58 & uncond. 1-7-59 \\
1142-58 & Leonard Brandenburg & 4-28-59 & uncond. 12-10-59 \\
410-58 & George W. Foster & 10-9-58 & uncond. 7-14-59 \\
75-58 & Donald W. Satterwhite & 6-25-59 & uncond. 3-28-60 \\
283-56 & Egbert Gunter & 6-24-58 & conditional, for purpose of deportation to British West Indies, 12-11-58 \\
566-57 & Edith Hough & 7-10-58 & conditional 5-3-60 \\
983-58 & Clarence Arnold & 1-15-59 & conditional 3-25-60 \\
\hline
\end{tabular}
\end{table}

In addition, an unknown number have “elooped,” or escaped from the hospital, including Donald Ragsdale.

\textsuperscript{113}It is no secret that the insanity defense is seldom raised by defendants in municipal court, even in cases where it could be. The prospect of a relatively light sentence upon conviction of a misdemeanor—the only type of crime tried in municipal court—is much less foreboding than the possibility of indefinite confinement in a mental hospital.

\textsuperscript{114}Bazelon, \textit{The Awesome Decision}, Saturday Evening Post, January 23, 1960, p. 32.

\textsuperscript{115}The \textit{Washington Post}, July 12, 1959, \textsection B, p. 7, col. 3. It is at Lorton that most District of Columbia prisoners serve their sentences.
the new John Howard Pavilion, still houses some of its patients in buildings which are 100 years old, and in some units of the hospital 1000 patients are cared for by only two psychiatrists. St. Elizabeths also has a shortage in the basic supply of professional personnel.\textsuperscript{116} Whether the treatment in lieu of punishment which the proponents of the Durham rule advocate is, as a practical matter, actually being rendered at St. Elizabeths is the subject of much debate.\textsuperscript{117} The possibility that the expected treatment of the absolved defendant may not be available at St. Elizabeths is a matter which bears heavily upon the probable length of the period of confinement in St. Elizabeths. This fact must be carefully considered in reaching a decision as to whether or not the defense of insanity should be urged.

Recently, however, another development in the law of insanity has appeared, making the decision of the defense attorney and his client even more difficult. If the prosecution discovers evidence of mental disorder sufficient to raise the question of defendant’s sanity, it may introduce that evidence as part of the Government’s case. A most striking example was the case of William C. Kloman.\textsuperscript{118} Kloman had been charged with assaulting a policeman, and after a mental examination was found incompetent to stand trial on June 5, 1958. Then, on February 1, 1960, the district court held a hearing and found that he was competent to stand trial, after which he was arraigned and entered a plea of not guilty. At the trial on February 15, 1960, Kloman specifically instructed his attorneys not to raise the defense of insanity. For his defense, he chose to rely instead on justification. Over strong defense objection, the prosecution called psychiatrists to the witness stand who presented “some evidence” that Kloman’s acts were the product of a mental disorder. Then followed a curious spectacle: both the prosecution and the defense asked the jury to acquit Kloman, the defense urging “not guilty,” and the prosecution “not guilty by reason of insanity” because “some evidence” of insanity had been introduced, and the prosecution frankly admitted that it had not even attempted to carry its resulting burden of proof. The jury not surprisingly found Kloman not guilty by reason of insanity, and he was committed to St. Elizabeths where he is today.

In another case, presently pending before the court of appeals,\textsuperscript{119} a

\textsuperscript{116} The Evening Star, September 21, 1960, § A, p. 15, col. 5.


defendant had not been permitted to plead guilty to a misdemeanor for which he was tried in the Municipal Court of the District of Columbia. Instead, the latter court, after hearing the testimony of a psychiatrist over the defendant's objection, found the defendant not guilty by reason of insanity and committed him to St. Elizabeths under the mandatory confinement provision of the Code. From these cases it becomes clear that if a defendant does not wish to rely on the insanity defense, he may have to prevent the prosecution or the court from discovering in the first instance that he may have a mental disorder, however slight.

If a defendant is competent to stand trial, he should be competent to decide whether he wants to rely on the defense of insanity. The defense attorney has the obligation of explaining to his client all of the ramifications of a successful defense of insanity; then, fully advised, the defendant should be permitted to make his own choice. This presupposes that the defendant is mentally competent to participate in his own defense. If he is not competent, then his decisions are, of course, invalid. No real problem occurs at this point in the case of a defendant with ample funds. He can, through his attorney, hire an outside psychiatrist, unbeknownst to the court or the prosecution, to make an examination and render an opinion both on the issue of competence and of past mental condition. But in the case of the vast majority—the indigent prisoners—the only course open to the defense attorney who wishes to determine the competency of his jailed and indigent client is to request through the court a mental examination of the defendant by government psychiatrists. The difficulty with this procedure is that it then provides the prosecution and the court with evidence of the defendant's mental condition. It is possible that even though the defendant may be competent to go to trial and to participate in his defense, he may still have a mental disorder. Therefore, in determining whether the defendant is competent, the defendant and his lawyer may provide the prosecution and the court with evidence which could then be used to foist the defense of insanity upon the defendant, even though he has elected not to use it. If the attorney is to protect his client from having an unwanted defense thrust upon him—a defense which, if successful, may carry far worse penalties than conviction—he must avoid supplying information about that defense to the Government. But if the attorney is to protect himself, he must be certain that the defendant is competent to make these decisions, and in so doing, he may let the cat out of the bag. Once out, it is impossible to get it back in.

It is all very well for the court of appeals to say, as it did in Clark, that an attorney cannot, on his own, forego a defense of insanity once the issue is injected into the trial. But it should be noted that Clark was decided before it became apparent that the defense of insanity is a two-edged sword. No one foresaw at that time that it might be the prosecution, rather than the defense, which would deliberately inject the issue of insanity into a case. No one foresaw that an attorney, as a matter of cold logic and in the interests of his client, might decide that the client would be best served by risking a light sentence or probation following conviction, rather than indefinite commitment to an insane asylum. For the lawyer who must give frank counsel to a criminal defendant evidencing signs of a mental disease or defect, there seems to be no easy answer to the problem.

This writer suggests, however, a requirement that the authorities come into court within a reasonably brief period of time after a defendant has been acquitted on grounds of insanity and prove that he is, in fact, dangerously insane. This procedure would not only alleviate the difficulties and inequities of the present situation, but would also obviate the possibility that acquittal could result in a longer period of confinement than conviction. Confinement in a mental hospital would not be based on an acquittal, which does not find the defendant insane at any time, but rather it would hinge upon the result of a prompt judicial determination of the present sanity of the defendant. This procedure would require the authorities to prove—for the first time—that the defendant is dangerously insane and, therefore, deserving of confinement. Furthermore by making provision for a judicial determination that the person is actually insane before depriving him of his liberty, it would seem to comport with the due process requirement of the Constitution. Not only would the attorney's problems be lessened, but the public as well would be protected—without impairment of the individual rights of the acquitted defendant.

Such a procedure is not only possible but practical. In recent months, the prosecuting authorities in the District of Columbia have begun a program of obtaining a civil commitment of persons who have been long confined in St. Elizabeths Hospital because they are mentally incompetent to stand trial on criminal charges. If at any time during a criminal proceeding it appears to the court from the court's own observation or from prima facie evidence submitted to the court that the accused is of

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121 The Office of the United States Attorney.
unsound mind or is mentally incompetent, the court may order the accused committed to a mental hospital for examination. The psychiatric staff of the mental hospital will then, by examination and observation of the accused, determine whether he is able to understand the nature of the charge and the proceedings, and whether he is able to assist his attorney in his own defense. If the hospital reports that the accused is mentally incompetent to stand trial, and the court agrees, the accused is confined in a mental institution until he is restored to mental competency.

In several cases, where the accused has been confined for a long period of time as incompetent to stand trial, and where the criminal charge has been a minor one, the Government has instituted civil commitment proceedings and has thereafter dismissed the criminal charges. The most recent example of this procedure involved the case of James H. Robinson, who had been charged in municipal court on April 28, 1953, with the crime of unlawful entry. Unlawful entry, a form of trespass, is a misdemeanor in the District of Columbia. A civil commitment proceeding in Robinson's case was instituted by the Government, and thereafter the criminal charge was dismissed. Under section 21-312 of the District Code, Robinson had the right to demand a jury trial on the issue of his sanity in the mental health proceeding. He demanded and received a jury trial, and on October 19, 1960, the jury found Robinson of unsound mind. He was then committed to St. Elizabeths by order of the district court.

If the Durham rule works as well as its supporters claim it does, then only those persons who suffer from a mental disease or defect and who, because of that fact, commit crimes will be absolved of criminal responsibility. It should not be difficult, then, to commit such persons to mental

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123 It may be seriously questioned whether a psychiatrist is competent to decide what an accused must be able to do to assist his attorney. It would seem that this issue is peculiarly one for an attorney to decide.


125 These proceedings are instituted pursuant to D.C. Code Ann. § 21-326 (1951).


hospitals under the civil commitment procedures which would provide
the constitutional safeguards to which Judge Fahy referred in his con-
curring opinion in Ragsdale.129 If the defendant is really mentally ill,
needs treatment and is potentially dangerous because of his proclivity
for criminal activity, he will certainly be subject to civil commitment.130
At the same time the civil commitment procedures are completely ade-
quate to protect the public safety. Therefore, except for the easily dis-
carded argument that a civil commitment procedure is too time-consum-
ing, it appears that the only real objection to such a procedure is that it
will permit persons who are not insane or of unsound mind, but who have
obtained acquittal under the extremely liberal Durham rule, to go scot-
free.131 No doubt such critics of the Durham rule as Congressman Davis
intended that the mandatory confinement law should plug such a loop-
hole. But if such a loophole exists in Durham, then extreme and string-
ent requirements for release from a mental hospital bottomed on a
mandatory confinement statute are not the way to remedy that defect.
Congress may well have thought that a mandatory confinement statute
would not impair the rights of the accused because it would apply only
in cases where the "accused has pleaded insanity as a defense to crime"
and would occur only after the jury had "found that the defendant was,
in fact, insane."132 Neither premise has proven to be true. The prosecu-
tion may plead the defense, and the jury's finding does not indicate that
the defendant is insane. But the statute remains in the Code, while doubt
as to the constitutionality of its application grows and argument quick-
en. In the meantime the defense attorney would appear to be completely
justified in not presenting the defense of insanity to the court and jury,
for the defense in some cases has become a snare and a delusion to trap
the unwary. It is indeed a legal Lorelei.

130 As Judge Bazelon pointed out in Williams v. United States, 102 U.S. App. D.C.
51, 58, 250 F.2d 19, 26 (1957), in reversing a criminal conviction of the "Badman of
Swampoodle," Dallas O. Williams, and remanding for dismissal of the indictment:
It is open to the Government, however, to proceed for a civil commitment under D.C.
Code, § 21-326, if it considers that, with Williams at large in his present state, "the
rights of persons and of property will be jeopardized or the preservation of public
peace imperiled and the commission of crime rendered probable."
131 Defendants with personality disorders, low intelligence levels, or some other slight
mental abnormality may be acquitted under Durham. To that extent, Durham affords an
escape route to an otherwise guilty criminal who deserves punishment, for such persons
probably are not subject to civil commitment.
While all agencies connected with the detention and treatment of juveniles in the District of Columbia issue annual reports which are available to the public, indications are that a widespread unawareness exists in both bar and judiciary as to the nature, purpose and effectiveness of the socio-legal system governing the disposition of the District’s juvenile offenders. Since a concern for this system is a logical incident of any sensitivity toward the future order and tranquillity of society, the purpose of this note is essentially informational, to familiarize lawyers with the procedures and practices employed by the District of Columbia and United States Governments from the time a youth is apprehended by police until he is either returned on probation to his home or committed to a juvenile training school, in either contingency by the Juvenile Court of the District of Columbia acting pursuant to the provisions of the Juvenile Court Act.¹

The thread of analysis follows only those police and Juvenile Court operations having to do with juvenile deliction, by which is meant actual violation of the law by a youth below the age of eighteen. In its broadest application in this jurisdiction, the term “juvenile delinquency” includes truancy, conduct habitually beyond the control of parents, association with vagrant, vicious, or immoral persons, or deportment such “as to injure or endanger the health and safety of others”;² but as these conditions do not partake of the classically criminal characteristics of delinquency, they will not be discussed. Neither is the court’s additional jurisdiction over dependency, paternity, and adult criminal cases treated.³ Similarly

omitted is any description of the institutions and methods of treatment involved once a case has been passed upon by the Juvenile Court judge, with the single significant exception of the post-disposition power of the Attorney General of the United States to transfer inmates of the National Training School for Boys to federal prisons for adult criminals. A resume of the limited case law which has reviewed District juvenile proceedings is integrated with the general discussion.

A brief insight into the rationale supporting the juvenile system will be of assistance at the outset. The philosophy underlying the procedure in cases involving a juvenile accused of committing an act, which if committed by an adult would amount to a crime, is that the delinquent child is to be "considered and treated not as a criminal, but as a person requiring care, education and protection." Since rehabilitation rather than punishment is the end to be obtained, the proceedings by which the child is found to be in need of and subjected to such "care, education and protection" are characterized as civil in nature. And since the proceedings are civil in nature it follows that the constitutional safeguards for those accused of crime and the rules of procedure and evidence employed in criminal trials are not applicable. The extent to which the authorities are able to implement this informal design is implicitly incorporated in the descriptive study that follows.

I

THE POLICE AND JUVENILES

The formal processing of a delinquent which may eventually receive courtroom review usually begins in an arrest or, as it is carefully termed, "apprehension" by a police officer somewhere in the District of Columbia. The juvenile is taken to a precinct headquarters where, once his age is determined to be below eighteen, a call is placed for the Youth Aid Division of the Metropolitan Police Department. Youth Aid dispatches a Juvenile Squad car to the precinct, and with the meeting of juvenile and Juvenile Squad officers, a theoretical separation from conventional adult criminal procedures occurs.

The Youth Aid Division was formed in 1955 as a special police arm designed to cope with the unique status of juvenile offenders and the special problems posed in their handling under District of Columbia law. Members of the Division are normally not selected for juvenile duty

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5 Gen. Order No. 1, D.C. Metropolitan Police Dep't (Jan. 1, 1956).
unless they possess five years of police experience. The approximately 85 staff members, including 30 women, are given a 48-hour course in juvenile procedures upon entering the Division. The Division’s purpose, briefly stated, is to prevent and combat juvenile delinquency from a central organization by methods divorced from ordinary police techniques and oriented generally to the principle of juvenile rehabilitation which presumably motivates the actions of all agencies and government officials concerned with youthful offenders in the District of Columbia. In order to expedite the contact between Youth Aid and wayward juveniles apprehended for delinquency, the Division maintains patrol cars on the city streets 24 hours a day. Thus it is that within a brief space of time following apprehension the boy or girl is in the hands of special officers.

Their first step is to notify parents or relatives. Police experience has been that in more cases than not, parents do not bother to appear at the station house. The officers commence investigation by interrogation, the thrust of all preliminary efforts being primarily to avoid any booking. Under the statute, juveniles cannot be considered criminals; it follows that all records of a criminal nature, including names in a precinct’s arrest records, are undesirable, and Division operations attempt to bypass that eventuality by weighing the evidence before entering a charge.

The investigators use the precinct as field headquarters, however, and the delinquent will be kept there during the inquiry. Precinct detention is frequently extended for a matter of hours while police search for other juveniles implicated by the youth arrested. Such implication is commonplace since juveniles have a proclivity for finding trouble collectively. But while the first youth apprehended may be forced to wait, he waits in an open reception area of the precinct or in a side office, and absent a violent attitude, is not locked behind bars in violation of the statute.7

When sufficient evidence appears to make detention of the boy necessary, i.e., when the Youth Aid officers determine probable cause, he is booked8 and committed to the Receiving Home for Children at 1000

8 The practice of placing juvenile arrests on the Records-of-Arrest book in the precincts was discontinued in 1956, in keeping with the concept that juveniles shall have no criminal record. However, Police Form 255 (Record of Arrest) is made out in quadruplicate, three
Mt. Olivet Road, N.E. Alternatively, in cases of minor offenses of a nonviolent nature, the boy may be released in the custody of his parents unless such a course is, in the words of the statute, "impracticable." This latter determination is left to the discretion of the police, who use the nature of the offense as a principal criterion. Release involves a signed statement by the parent that he or she agrees to produce the juvenile in court. Frequently parental indifference compels the police to transport the youth home from the station house.

Rare cases occur when a complaint filed by a citizen together with the existence of evidence tending to show guilt will require that police arrest a juvenile sometime after an offense has been committed. No warrant is needed for Youth Aid officers to make such an arrest since, as noted, no juvenile is charged with a crime. Arrest itself is a concept technically alien to juvenile processing. Instead, juveniles are "apprehended"; but while there is this studied distinction made, a difference is hard to perceive. The police do, however, obtain warrants of search when the investigation requires intrusion into a private home, obviously because adult rights then hang in the balance and the license of informality in the handling of juveniles no longer obtains.

The large majority of cases, however, involve apprehension at or near the scene of the offense, and the juvenile is removed to the Receiving Home when a release to parents is not arranged. Commitment to the Home is attended by none of the formal rites usually found in criminal arrests and detention. No notice of right to counsel is made; there is no available procedure for preliminary hearing before a committing magistrate; no bail is set. These omissions may be ascribed to the fact that

copies of which form a permanent part of precinct and Youth Aid Division records. No person outside of the police may have access to these records. Gen. Order No. 1, D.C. Metropolitan Police Dep't, p. 6 (Jan. 1, 1956).

9 The police order governing commitment to the Receiving Home by Juvenile Squad officers reads in part: "Juveniles shall not be sent to the Receiving Home except as follows: (1) When they are charged with offenses which require a period of investigation; ..." Gen. Order No. 1, Metropolitan Police Dep't, p. 6 (Jan. 1, 1956).


constitutional guarantees have not unequivocally been assumed to apply to juveniles, and particularly not criminal constitutional guarantees. But compensations of a minimal nature appear to offset reduced protections for juveniles in the District of Columbia. Pursuing a discretionary policy, Youth Aid transports juveniles in unmarked squad cars, driven by plainclothes policemen, thereby avoiding the stigma of the "paddy wagon"; in general they do not fingerprint or photograph, except where the nature of the offense is such as to indicate the probable future appearance of the offender in police hallways, in which case such records would prove helpful to law enforcement. Aside from these measures, and an admitted air of stern affability marking members of the Juvenile Squad, the juvenile finds himself deposited with no uncertainty in the Receiving Home, a detention facility which will be discussed subsequently.

The period between apprehension and commitment is ordinarily of short duration, usually not exceeding two or three hours. In instances where a search for other juveniles implicated by the one picked up causes delay, the pre-commitment detention may extend to five or six hours, but Youth Aid Division officials express a desire to avoid these cases even though the Mallory rule, 14 which precludes the admission of evidence obtained during periods of illegal detention, is inapplicable in subsequent Juvenile Court proceedings. 15 Abuses laid to police freedom from the Federal Rules of Criminal Procedure in the handling of juveniles 16 are not readily apparent and have obtained almost no appellate review, but conversational contacts with non-police sources disclose some skepticism as to whether certain policemen comprehend the special status of juveniles and the ostensibly rehabilitative system to which they are absorbed upon apprehension. Such doubts may or may not be justified, but in the absence of any more definitive demonstration that abuses do exist, the Youth Aid operation must generally be admired as a realistic and helpful police approach to the growing problem of juvenile delinquency. The understanding and readiness to assist existing in higher police echelons, which the Division's organization and attempted operation reflect, are most creditable and should enlist the community's attention and applause.

A police complaint and notice of commitment are filed at the Juvenile Court soon after placement of the child in the Receiving Home. If the commitment occurs during the night, filing and notice are made when the

16 Id. at 50, 274 F.2d at 559.
court opens the following morning. With the filing, police control over the juvenile ends, and further police participation in the case will be restricted to informal consultation with court officials as to the feasibility of waiving jurisdiction to an adult court\(^\text{17}\) or to testifying in Juvenile Court if the case is retained.\(^\text{18}\)

However, in cases where the police apprehend a juvenile and release him to his parents, participation in the case may be only beginning. It is only at this juncture of police juvenile processing that serious question can be raised as to the legal propriety of a standard police practice—the retention of jurisdiction over minor offenses, such as initial misdemeanors, which are then disposed of by a police hearing. The Juvenile Court never obtains notice or jurisdiction in such cases and is not empowered to review the police decision since no police hearing was ever contemplated under the statute. With regard to police involvement in juvenile proceedings, the statute provides in part: "In every such case [where police apprehend a juvenile] the officer taking the child into custody shall immediately report the fact to the court and the case shall then be proceeded with as provided in this Act."\(^\text{19}\) Elsewhere in the act, original and exclusive jurisdiction in all proceedings concerning children who have violated the law is lodged in the Juvenile Court.\(^\text{20}\) Nevertheless, police screening procedures via closed hearings abound, and days after a juvenile has been arrested or ticketed and released he may be asked to return to the Youth Aid Division to explain his difficulty.\(^\text{21}\)

The notice sent to the juvenile's parents announcing these hearings is carefully worded: "You are hereby requested to be present . . . "; implicit in this language is Youth Aid's awareness that a parent or child cannot legally be compelled to attend. Non-attendance elicits second and third notices from the division and occasionally a phone call. The effectiveness of these methods is demonstrated by the fact that police officers interviewed could not remember a single case in the last five


\(^{18}\) Additionally, police officers occasionally visit the Receiving Home to question an inmate in connection with an investigation of the alleged offense.


\(^{21}\) It is to be observed that on the national scale, police hearings of this nature enjoy the recommendation of both the United States Children's Bureau and the National Council of Juvenile Court Judges.
years in which parent and child did not eventually appear at headquarters.

Last year 5239 hearings were held, resulting in 1295 dismissals and 221 references to Juvenile Court. Approximately 1100 of the cases screened involved traffic violations which are considered delinquent acts in this jurisdiction. The remainder usually fall within the non-serious, non-violent misdemeanor category.

Despite their lack of statutory authority, if one observes a few of these hearings and attempts to evaluate them in light of the Juvenile Court’s huge backlog of cases, their merit, not merely to the court but also to the child, becomes strikingly apparent. The hearings commenced in 1955 in response to a staggering workload then borne by the court and were expressly permitted by incumbent Judge Edith Cockrill. Her single stipulation was that no child screened should be placed under police probation; cases meriting such supervision were to be disposed of exclusively by the Juvenile Court. With a few exceptions, the police appear to have strictly observed this caveat, and those exceptions are cases in which the hearing officer acting completely unofficially has the juvenile return once or twice to report on progress. This practice is rare and always either ratified or requested by the parent, who is informed of the tenuous legal nature of the arrangement.

The hearing itself is informal and carried on in a small office off the main room of Youth Aid headquarters in the Municipal Center. The complaint filed by the arresting officer is read to the boy and his parents, and he is asked whether he committed the offense. If he denies and expresses a willingness to try the case, it is immediately referred to the court and the hearing ends. If he admits, as is the usual case, and his record is fair or excellent, he is given an old-fashioned horse-sense lecture by the officer on (1) the penalty theoretically assessable for the particular act committed; (2) the utter stupidity of a young man embroiling himself in the particular form of trouble; (3) the jeopardy in which the boy places himself by his act with regard to college entrance, employment opportunities, and a bright future generally; and (4) the enormous recidivistic rate among adults with juvenile records. The hearing officers are characterized by what may be best described as a verbal surefootedness and a hard-hitting if understanding style of presentation; a boy teetering on the brink of a delinquent attitude could

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22 1959-60 Annual Report, Youth Aid Division, D.C. Metropolitan Police Dep't (1960).
23 Unofficial police sources estimate this rate as high as 75%.
24 Currently there are four hearing officers, all of Detective rank.
hardly fail to be healthily intimidated and impressed. Best evidence of this result emerges from the statistics; a cumulative study of the last five years indicates that more than half of the juveniles dismissed after one of these hearings never reappear before Youth Aid Division officers.²⁵ If a juvenile with a prior record reflects an uncooperative attitude at the hearing, the hearing officer will send the case to Juvenile Court.

Traffic violations provide the only instance in which formal restrictions on a juvenile will issue from these hearings. In such cases the police may compel attendance at Traffic School. Since the Juvenile Court also sends offenders to the Traffic School, question may be raised as to whether the concept which justifies the police hearings—that they circumvent unnecessary adjudications—is not undermined by the fact that in these cases the police are duplicating a judicial disposition. A second less questionable consequence of these hearings is reference of the child to the city-wide Commissioner’s Youth Council program, where his participation is on a voluntary basis.

In summary, five characteristics mark these hearings: (1) except for the question posed by the traffic school referrals, these hearings never result in any form of punishment or treatment by the police, penal or rehabilitative dispositions being left exclusively with Juvenile Court; (2) they nearly halve the number of cases which would otherwise burden the court, and thus permit more time for the cases the court already has, while preventing delay and the involuntary injustice of summary treatment in the handling of those cases now kept out of the court; (3) they are preventively effective, by statistical showing; (4) but, they are of questionable legality; and (5) they are without the benefit of a social evaluation such as is introduced before the disposition of every case heard by the Juvenile Court. Inasmuch as these hearings are without statutory authorization, it may be contended that they should be eliminated. Yet their practicable elimination can only be effected if Juvenile Court judicial and administrative personnel are increased by the Congress. Since continued congressional intransigence is to be anticipated, the alleviation of the present court’s burden cannot be counted upon in the foreseeable future. To observe the strict letter of the Juvenile Court Act, then, by closing off the police hearings and referring every single case to the court without benefit of the screening technique, would appear to be folly of the highest order. A doctrinaire approach to the problem of a swamped juvenile system clearly will not

²⁵ 1959-60 Annual Report, note 22 supra.
do. Until Congress sees fit to authorize additional manpower for the court, the solution to the legal problem posed by police hearings lies alternatively with either continuing publicly to ignore their implications, which most officials do, or with legislatively ratifying them and putting a power of review in the Juvenile Court to insure against the growth of abusive practices in the exercise of police discretion.

II

THE SOCIAL SERVICE DIVISION OF THE JUVENILE COURT

Usually within a day after police commitment to the Receiving Home and court receipt of notice of the placement through the police complaint, the court’s social intake procedures begin. A social worker in the Juvenile Intake Section of the court’s nonjudicial Social Service Division is assigned to the boy and visits him as swiftly as possible at the Home. The time lag between commitment and this visit may be limited to scant hours, but under current workloads a social worker may not see the child until after he has conferred with the parents who are called to the Juvenile Intake Section of the court the day after commitment. This conference is designed to acquaint the social worker with the family and with background information concerning the child. The parents are in turn fully informed of the alleged offense. In rare cases, the social worker may decide on the basis of this conference that the juvenile should be released to his home, and this request is channeled to the Director of Social Service for approval; but in most instances the narrow result of the meeting is to schedule further contacts with the parents and to provide the social worker with factual guideposts from which he can undertake a brief study of the youth.

The material accumulated in this study together with information gleaned from a maximum of three visits with the boy at the Receiving Home is reported to the Director of Social Service of the court in order to assist that official at the time he holds a preliminary hearing or, as it is called, “the Director’s Conference.” This hearing, at which the youth, his parents, his attorney, the social worker, and the Social Director can all theoretically be present, 26 is under current court policy to be held within five days of the court’s receipt of the complaint or “as soon thereafter as scheduling permits.” 27 At the present time, inmates of the Receiving Home are brought in within the stated period, but juveniles released to

27 Ibid.
their parents upon arrest often must wait longer for the hearing, the delay finding justification under the quoted escape clause.

When held, it is only rarely that an attorney is present. The small number of attorneys who appear—in approximately one out of every ten cases—is unsurprising since notice of the right to have counsel present at the hearing is not given beforehand, and the realization of the right is therefore left solely to the imagination and initiative of the parent. Given the indifferent attitude of many parents, the absence of counsel at the preliminary hearing is in consequence a normal occurrence. Such absence is not flatly condemnatory of the system, since the preliminary hearing is held only to determine whether a petition, analogous to an information in the criminal law, will be filed. Juvenile Court jurisdiction does not officially attach until the petition is filed and, upon filing, it binds the youth over for an appearance before the Juvenile Court bench. In no strict sense can the hearing be regarded as an adjudication of delinquent status. The Director is not a judicial officer, the hearing is not judicial in nature, nor will information offered by either probation officer, parent or juvenile be later admitted in Juvenile Court in the event the adolescent denies involvement in the act and is held over for trial. Nevertheless, presence of counsel would appear to be a desirable aspect of the proceedings; the Director can and frequently does determine not to file a petition,28 and the presence of a persuasive advocate on behalf of a boy could well turn the hearing officer in favor of a deserved dismissal. Since internment at the Receiving Home for at least a month or more may result if a petition is filed, unless the Director is persuaded to release him in the interim to his parents, the youth should at the preliminary hearing have the benefit of all available assistance in resisting this potential deprivation of liberty. It follows that notice should be given to all parties that counsel may attend the hearing, and furthermore, in case of financial hardship, the court should appoint an attorney to serve the juvenile’s cause during these pre-adjudicatory proceedings. The Director himself has classified the now sporadic appearance of counsel “constructive,” with exception reserved toward those who enter the conference imagining it to be a preliminary hearing before a United States Commissioner.

At the present time, twelve conferences are held each morning at the Juvenile Court building. The purpose of the hearings as propounded

28 The Annual Statistical Report for the Juvenile Court for fiscal 1960 indicates that 828 delinquency cases were disposed of during the year by the Director of Social Service without judicial action.
in a Juvenile Court policy memorandum\textsuperscript{29} is to determine whether the interests of the public or of the child require that judicial action be taken in relation to children referred to the court. Under current workloads, this complex determination is given an average 15 to 20 minutes per case hearing. The following order of business, occasionally varied, normally characterizes each conference: parents, juvenile, the occasional attorney and the caseworker enter the conference room off the Juvenile Courtroom and sit opposite the Director. The complaining witness or witnesses are not present. Introductions ensue and the Director reads the complaint filed by the police against the youth. Upon completion of this reading, he informs the parties that he will decide at the conclusion of the conference whether a petition will be filed and the case thereby held over for judicial disposition. If the juvenile has been transported from the Receiving Home for the conference, the Director adds that he will reach the further determination as to whether the boy will be returned to the home or released to his parents pending the trial.\textsuperscript{30} The youth is then asked whether he did the acts charged. If he admits, he is briskly asked why. If he denies, he is asked to explain why he thinks he was charged. Denial draws the Director's advice as to right of counsel and the availability of court-appointed attorneys if required. Any explanation to be made regarding the offense then follows, during the course of which the Director scans the juvenile's record for signs of previous difficulty with the law. When the boy finishes, usually quickly and inarticulately, the Director asks for the social worker's report from which he derives essential assistance in reaching a decision. The worker relates his knowledge of the offense, of the boy's background, habits and schooling, or as much of these as he has been able to learn from the study permitted by the limited space of time between arrest and conference. Any recommendations the social worker has are heard. The parents are then asked if they have any statement to make. Similarly, the attorney is asked to contribute as he or she wishes. Following all the statements, the Director returns his attention to the juvenile and, in the case of a confession, asks him if he understands the wrongfulness of his act, if he has learned anything from his experience since the offense, and if he thinks this sort of act might occur again. The answers elicited are obvious and vary little from case to case. By this point, the Director has reached a decision as to both petition and release, the

\textsuperscript{29} Policy Memorandum No. 2, supra note 26, at 1.

\textsuperscript{30} In rare instances, the decision has been made to confine a juvenile in the Receiving Home who had been in parental custody between arrest and Director's conference.
latter heavily conditioned by the nature of the offense and the juvenile's recidivistic tendencies, if any, as indicated by the record. The parties are dismissed after the Director announces his determinations.

These determinations under official court policy are alternatively to dismiss or to petition, and if to petition, then to release or to continue confinement. In practice, however, fifteen per cent of the cases encounter a third type of disposition which falls somewhere between petition and dismissal. This is the decision to defer the petition for further study.31

Essentially, deferment entails a stern warning to the juvenile that he must maintain good behavior throughout an informal probation period, during which he will be kept under social supervision and may be required to report to the Social Service at regular intervals. In the meantime, the petition will be held in abeyance. Failure to meet the unofficial probationary conditions will presumably result in filing, since in theory no petition is deferred unless the child has admitted the offense, thus providing sufficient legal ground to support judicial action. However, the official court memorandum32 supporting deferment sets forth no minimal legal criteria which must be satisfied before resort to deferment procedure is permissible.

Deferment is a unilateral Social Service measure and is not reviewed by the Assistant Corporation Counsel or the judicial division of the court. The only disturbing legal aspect of this practice is that nothing but the Director's discretion currently prevents the deferment from being utilized in cases where probable cause to believe the child is guilty does not appear but where surveillance of the child is nevertheless deemed wise for various indefinable social reasons. The fact that great discretionary power is exercised with benevolence in the present does not justify that power for all future time, and it may therefore be suggested that some minimal check be installed with regard to deferment to insure that no child is ever restricted without sufficient cause.

Assuming a decision to file a petition at the close of the conference, a date is set for court appearance and the petition is drawn up and forwarded to the Assistant Corporation Counsel's office for the Juvenile Court. This office performs dual functions resembling those of an appellate court with respect to the Director's decision to file or dismiss.

31 See Policy Memorandum No. 2, supra note 26, at 2.
32 Ibid. The Probation officer must have a report and recommendation ready within 90 days after conference if the child is at liberty, within 30 days if he is in the Receiving Home.
A decision either way is presumably reviewed in each case by an assistant corporation counsel. If the Director’s decision to dismiss is not agreeable, the Corporation Counsel’s office can file its own petition and thereby insure that the case will come before the court for judicial disposition. Conversely, the corporation counsel may veto the Director’s decision to file by failing to approve the petition for legal sufficiency. The Director is without recourse in that event, and the case is dismissed. In practice, however, Assistant Corporation Counsel rarely fails to rubber-stamp the Director’s decisions, which thus roll across the government desk in an unimpeded pro forma parade.

It may be valuable to observe at this point the considerable police unrest at the fact that the power over preliminary release of a committed juvenile resides in a Social Service officer and not a lawyer.33 A common complaint is that some “fairly tough boys,” guilty of fairly violent offenses, are all too often dismissed to their parents because the individual determining such release is not trained to comprehend the legal gravity of the juvenile’s act. Rather in making his decision, the Director relies on such criteria as the juvenile’s past record, the impression he and his parents create at the conference, and the social worker’s report on the home and school situations. The alternative to the present method would be to put the power of decision in Assistant Corporation Counsel or some judicial officer, such as a master, with the Social Service officers acting objectively in advisory capacities. At the very least, Assistant Corporation Counsel should give greater attention than has been given to the results of these Director conferences, in terms of both the petition’s legal sufficiency and the danger to the community if an adolescent is released pending trial.

A final question exists in some quarters as to whether there is statutory authority to justify the action taken at the Director’s conference of confining or reconfining the child in the Receiving Home. The Juvenile Court Act provides that no child “shall be held in such place of detention for any period longer than five days, excluding Sundays and holidays, unless the judge shall order such child detained for a further period.”34 Since the Director in effect now makes this order, the question becomes whether the power is properly delegated to him. As the Di-

33 The criticism is inapplicable to the present incumbent of the Directorship, who has a law degree in addition to sociological training. But no rule or policy currently prevailing insures that a lawyer will always hold the position.

rector sits in a theoretically civil capacity, under the administrative direction of the judge, and is authorized to have charge of all social work of the court, the decision to confine seems properly left in his hands, for it is reached largely on the grounds of the welfare of the child or of the community, both of which evaluations may be considered "social" in nature without snapping the thread of definition.

At the close of the hearing, the juvenile is returned to the Receiving Home where he may wait as long as two months for his appearance before the bench in Juvenile Court. The delay is occasioned by the huge backlog of cases presently burdening the court, the alleviation of which unquestionably lies in congressionally authorized additions to the court's judicial and administrative personnel. Since the Receiving Home must serve as a place of lengthy confinement for juveniles, where they are separated, for better or for worse, from freedom and conventional surroundings, that institution's operation will bear brief review below.

To be noted also is the post-conference assignment to the juvenile of a probation officer (a social worker) who in the period between the Director's conference and the court appearance will attempt to gather sufficient information concerning the child in order to present a useful recommendation to the judge once that official has determined the juvenile's status upon the arraignment or the trial.

There are presently fourteen social workers in the court's Probation Section, which is distinct from the Juvenile Intake Section although under the same general direction of the head of the Social Service Division. A reorganization plan currently underway contemplates the addition of one more probation officer to the staff. Each officer has approximately 90 juveniles, almost evenly divided between pre-adjudication and post-adjudication probation cases, for which he or she is responsible. One official noted that ideally this load would be closer to 50 cases. But analysis of the simple factor of time available suggests that even 50 cases are too many. The social worker is presumed to see as much of probationers as of juveniles undergoing the social study before adjudication; he is expected to evaluate the home, the financial, educational and cultural circumstances of family life, the schooling, habits and outside interests of the juvenile, the interaction characterizing the parent-child relationship, and a myriad of other factors entering a proper social

36 Ibid.
37 Compilation for the third quarter of 1960 indicated a backlog of approximately 1900 cases, including both adults and juveniles.
study; to these ends, he is expected to meet regularly with the child, ideally once a week, and even more frequently with the parents, and to have contact with school or employers. After the average eight-week period between petition and disposition—often less in cases where the juvenile is in the Receiving Home, more when the child is in parental custody—has passed, he is expected to present a carefully conceived evaluation and recommendation on the case by way of assisting the Juvenile Court judge in the latter's attempt to dispose equitably of the juvenile before him. The absurdity of this expectation emerges upon brief reflection; assuming a five-day, forty-hour week for the probation officer, and further assuming the two-month prolongation between petition and courtroom proceeding, the officer with not 90, but only 80 cases can devote precisely 30 minutes a week to each, or 4 irregular hours over the entire pre-adjudicatory period. Assuming the theoretically ideal burden of 50 cases per probation officer, approximately 48 minutes a week or 6½ hours over the period is available for each case. These figures discount, of course, time spent composing written reports, attending staff meetings, appearing in courtroom proceedings, and traveling to and from the necessary sources of social information. The consequences are obvious: the officer rarely has a satisfactory contact with the child or the parents, discharges many of his duties by telephone, suffers the frustration of watching his training spread thinly and uselessly over a tragically wide problem area, and ends up penning an admittedly superficial evaluation on which the judge then relies in determining the future course for the juvenile. Both the Commissioners for the District of Columbia and Congress' self-appointed authorities on juvenile treatment, who presently stall the authorization of additional court personnel, might well take notice of the waste.

III

The Receiving Home for Children

The present Home was opened as a detention center in 1949 with a capacity for 40 inmates. Rampant overcrowding over the following eight-year period precipitated an expansion of facilities to accommodate 90 in 1957. In only two years in its entire eleven-year history has the Home housed on an average less than or exactly at capacity. One consequence has been that, during peak periods, the beds run out and inmates sleep on mattresses on the floor. One official of the Home has noted, in regard to overcrowding, that while occasionally bedding and clothing supplies are depleted, there remains the assurance that sufficient
food will always be available. The Home is not governed by the Juvenile Court, but by the Department of Public Welfare, and the wide discretionary policies of Home treatment and care permitted the Department are not reviewable by the court. While not obviously unfortunate, this split of command over persons theoretically subject to the same rehabilitative system does not lend itself to the unity of treatment or control which should be ideally sought in working with children over a period of sensitive months or years. Whatever danger inheres in this split is exacerbated by the additional fragmenting which characterizes later handling of a juvenile in the case where he is committed to the National Training School for Boys, which is directed by the Federal Bureau of Prisons, and where he is technically in the custody of the Attorney General of the United States. That officer, as will be discussed, possesses statutory power to commit the boy to a federal prison for adult criminals.

When a juvenile suspected of delinquency is committed to the Home, usually by Youth Aid Division police officers, a brief history is taken, he is immediately showered, dressed in khaki and sweat shirt, and undergoes a medical examination before being placed in one of the Home living units. The units or groups of inmates into which newcomers are placed are determined roughly by age. Temperament is advertised as a second determining factor, but the brief amount of time spent analyzing the child before he is integrated into a group belies the idea.

Department of Public Welfare personnel handle these groups individually in various work, physical training, schooling, and counseling activities. Although the Receiving Home is a detention center and not a corrective agency or training school, Home officials term these programs rehabilitative and all inmates participate in them. Strictly speaking, the operations of the Home in this respect involve a presumption of guilt; inmates undergo a rehabilitation process before any showing that rehabilitation is required; a juvenile is cured before proof is entered that he is wayward.

Doubtless the operation of a detention center on a rehabilitative principle could be justified by a showing that these operations entailed only healthy, time-consuming work, obviously good for any child, and did not in the least partake of the punitive or criminal aura. That such a refreshing state of affairs exists is not at all clear. Perhaps most damaging to the image of cheering rehabilitative work at the Home is the questionable practice of punishing uncooperative or otherwise difficult detainees by ushering them into solitary confinement for periods ranging from twenty-four hours upward. A visit to the Home disclosed
that solitary cells are without bedding; a blanket suffices as both mattress and cover for the inmate sleeping on a concrete floor. Inmates report minimal internments in solitary as of four- and five-day duration, which is sharply at odds with the statements of Home officials. Although much of what an inmate of any institution reports as abuse may be discounted as an unjustified expression of aggravated concern for personal plight, the idea of even a 48-hour bedless confinement in solitary at a pre-adjudicatory detention and "rehabilitation" center may well deserve review. It is to be observed that solitary confinement, although frequently invoked by Home personnel for punitive purposes, finds no mention in the Annual Report of that institution's operations. Undoubtedly, separating particularly obstructive or anti-social individuals from the group for the benefit of the cooperative majority is a sound and meritorious measure; but at a detention center holding unjudged juvenile suspects and professing an orientation towards a rehabilitative end, it should not be a punitive measure.

The Home is heavily secured, and occasional runaways have compelled the innovation of prison locks on main doors, collared locks on inner passageways. The constant necessity for a counselor with a key, if one is to travel any distance, may contribute to the feeling among some of the more sophisticated juveniles, as one Home official stated, that they are undergoing a criminal process. Of the few inmates recently interviewed, including females, most considered their detention punishment and were free with their use of the word "jail," an institution expressly precluded from use for the detention of juveniles\(^\text{38}\) in the District of Columbia. If it is fair to say that the nature of a system is partly determined by the psychological reaction of the individuals subjected to it, the Home may therefore be more a jail than a juvenile detention center. But reality commands the quickly added remark that, given the escape wish in juveniles as well as in adults, perhaps a jail it must be.

**The Trimble\(^\text{39}\) Decision.** Until recently, there appeared to be no method of being released from the Receiving Home without the approval of the Juvenile Court. But in September 1960, Judge Holtzoff of the United States District Court for the District of Columbia in a habeas corpus proceeding admitted to bail a fifteen-year old inmate of the Receiving Home who had been incarcerated there pending a trial in the


Juvenile Court for assault.\textsuperscript{40} The decision was the first in this jurisdiction to recognize the eighth-amendment right to bail as obtaining for a juvenile.\textsuperscript{41} In casting aside considerations of the civil nature of juvenile proceedings and the Juvenile Court Act's silence as to bail, the court determined that the only test as to the applicability of constitutional guarantees was one of physical freedom: "If as a result of an infraction of law, the proceedings may result in depriving a person of liberty, the protection of the Bill of Rights is applicable."\textsuperscript{42} Since the petitioner faced detention of up to several months in the Receiving Home pending trial,\textsuperscript{43} and the risk thereafter of an indeterminate commitment to the National Training School for Boys or a federal reformatory,\textsuperscript{44} the court found that the right to bail applied.

The decision evokes not only the familiar discussion as to the status of juveniles vis-à-vis Bill of Rights guarantees,\textsuperscript{45} but expressly notes the important argument against the unrestricted application of those rights.

The Court recognizes that it may be desirable in the interest of the public, or even in the interest of the individual, in some instances to confine the accused while awaiting final disposition of his case, instead of permitting him to be liberated on bail. . . . [But] it is far more important to preserve the basic safeguards of the Bill of Rights, which were developed as a result of centuries of experience, than it is to sacrifice any one of them in order to achieve a desirable result in an individual case, no matter how beneficial it may seem to be for the moment.\textsuperscript{46}

The persuasion in this sweeping constitutional argument must be accepted as irresistible, but it does not solve all the problems which are posed by the uniquely incapable status of minors. If all children today in the Receiving Home have a constitutional right to bail, many may be sent home to the most sordid and dangerous situations the community has to offer. By this is not meant merely colder meals, less care and more dirt in the home, as one concerned Juvenile Court official pointed out, but in numerous known cases, to incestuous relations, extreme alcoholism, and other equally primitive conditions. Unlike the adult

\textsuperscript{40} Ibid.
\textsuperscript{41} Former Judge Cockrill regularly set bail, but Judge Ketcham terminated this practice.
\textsuperscript{42} 187 F. Supp. at 486.
\textsuperscript{43} Id. at 484.
\textsuperscript{44} 18 U.S.C. § 4082 (1958).
\textsuperscript{46} 187 F. Supp. at 488.
freed on bail, where the risk lies wholly on society, a child liberated poses the greater risk to his own welfare; only secondarily is the risk to the community of significance. The child is, in the realistic view of the law, frequently incapable of adequately protecting himself. It follows, therefore, that while under a constitutional system every individual charged with an offense must have a right to bail, to leave the matter there in the case of a juvenile is not enough. The additional power must be put in the Juvenile Court to assume jurisdiction to commit the child, on the basis of dependency, not delinquency, if it appears upon sufficient investigation that exposure to his home life will be debilitating. One may term this dependency jurisdiction a device subject to abuse, but clearly the constitutional assurance of liberty may be justifiably diminished when liberty itself is a greater evil than confinement.

Two practical problems immediately mark the innovation of juvenile bail and a dependency jurisdiction alternative to the jurisdiction over delinquency. As to bail, no machinery currently exists for the swift presentation of a juvenile before a United States Commissioner where bail could be set. But correctional legislation may supply the answer to this difficulty. An appearance before a United States Commissioner need not lead to incarceration in the D.C. Jail; the Receiving Home, where at the very least the juvenile is kept separate from adult criminals, would remain the designated place of commitment, the difference after legislation being that the power to commit is in a judicial officer, not a policeman. It is difficult to discern the greater rehabilitive good accruing to a juvenile when the policeman has that power, as he now does. Once the commitment is accomplished and the complaint is received by the Juvenile Court, the social worker assigned by the court could commence the standard investigation, adding a special inquiry as to home conditions in view of the possibility that the court may have to assume dependency jurisdiction if bail is forthcoming. This possibility introduces the second problem. Clearly the idea of a dependency jurisdiction to counter bail involves enormously increased paperwork and responsibility for the court's social and administrative personnel, and will require that the judge spend additional time—a precious commodity in this system—on cases which under present arrangements do not require that attention. But this argument ultimately leads the listener back to Capitol Hill, for it is there, in the District Committee possessing the power to recommend legislation which would authorize the additional staff so critically needed by the court, that the solution to most juvenile-system problems resides.
IV

WAIVER OF JURISDICTION

Under the Juvenile Court Act, the judge of the Juvenile Court may waive jurisdiction to the United States district court in cases where a juvenile between the ages of 16 and 18 has committed an act which would have been a felony if perpetrated by an adult, or where a juvenile of any age has committed an act which if committed by an adult would be punishable by death or life imprisonment. While the decision to waive is embodied in an order which can be signed only by the Juvenile Court judge, numerous opinions are voiced one way or the other during Social Intake proceedings, and the judge heavily relies on these in reaching his determination. Normally in the case of a crime falling within the statutory categories, the Youth Aid Division will attach to its complaint filed at the court a recommendation that jurisdiction be waived to the District Court for the District of Columbia. The Chief of the Intake Section, acting in conjunction with the probation or social worker assigned to the juvenile, similarly forms an opinion as to waiver which is forwarded with the police recommendation to the Director of Social Service. Conferences between the Director, other Social Service officials, and the police may follow. In instances where doubt exists as to the legal sufficiency of the complaint, insofar as it must be passed on by a grand jury in the district court, Juvenile Court legal assistants will consult with the United States Attorney. The Director of Social Service for the Juvenile Court may or may not determine the utility of waiver before a conference with the suspect. Conferences are usually not held. But it is reasonable to observe that in instances where a conference is held with waiver in issue, the presence of an attorney could be potentially of great service to the juvenile, considering the gravity of the consequences which may attend a waiver and subsequent trial in an adult court. Such instances would therefore seem to strengthen the argument favoring notice to the juvenile of right to counsel immediately after his apprehension, instead of a continuation of the current practice of notice only when the juvenile denies involvement at the Director's conference.

Both Director's and judge's final opinion as to waiver are conditioned

47 Nothing in the act militates against waiver to the Municipal Court for the District of Columbia, but the district court is always selected.

by criteria set forth in a Juvenile Court policy memorandum. These include considerations such as the nature of the crime, the manner in which it was committed, its prosecutive merit before a grand jury, the maturity of the suspect and the age of his companions in the offense, his record, and his susceptibility to rehabilitation. Once the judge signs the waiver order, Youth Aid police officers proceed to the Receiving Home where the child is collected and taken forthwith to a magistrate for a preliminary hearing. The juvenile, suddenly an adult confronted by the criminal law, is then committed to the D.C. Jail pending arraignment and trial. All guarantees and protections of the Constitution and the Federal Rules of Criminal Procedure immediately and unequivocally obtain.

Presentment before a grand jury is the first government step to follow the preliminary hearing before a United States Commissioner. At this point, a curious situation has occasionally occurred in the past. If the grand jury fails to return an indictment for a felony, the case may be sent to the Municipal Court for trial as a misdemeanor. But since the Municipal Court has persistently denied its jurisdiction to try a juvenile for an offense of less stature than a felony, the suspect is therefore set free. No formal opinions appear in explanation of the Municipal Court's refusal to try, but several explanations may be hazarded. First, the Juvenile Court Act grants original and exclusive jurisdiction over pre-18-year-old juvenile offenses to the Juvenile Court. Other District courts, including the Municipal Court, can receive juvenile cases only in the event of a felony or capital crime since these provide the only instances when the Juvenile Court may waive. If the district court grand jury in effect reduces the charge to a misdemeanor by failing to bring in a felony indictment, the calibre of the crime topples into the category of offenses which are delivered exclusively into the jurisdiction of the Juvenile Court by the statute, and as to which that court has no discretion to waive. The Municipal Court may therefore logically believe it is precluded from assuming jurisdiction. On the other hand, the argument may be advanced that since the Juvenile Court has waived jurisdiction, the child has assumed an adult criminal status and may

51 Id. at 50-51, 274 F.2d at 559-60. In fiscal 1959-1960, 77 indictments were returned in the 89 cases waived by the Juvenile Court. 1959-60 Annual Report, note 22 supra.
thereafter be tried for any degree of criminality provable from the particular transaction out of which the case originally arose. Although the idea has never been formally stated, the district court appears to believe it could try a juvenile for a misdemeanor if it so chose, but does not do so only because of a policy against trying any misdemeanors whatever, regardless of the defendant’s age. In a distinguishable situation, the district court has never had difficulty accepting a guilty plea for a lesser included offense from a juvenile over whom jurisdiction was waived and against whom the grand jury had returned a felony indictment.

When the Municipal Court refuses to hear a misdemeanor charge, a hiatus results because the Juvenile Court in such cases is not recorded as ever having resumed the jurisdiction it had earlier waived, and consequently the suspect returns unblemished to the community. Doubt exists in the present Juvenile Court as to whether such a resumption of jurisdiction would be legal. Under the former direction of Judge Edith Cockrill, jurisdiction was never assumed anew, even for offenses committed by juveniles subsequent to the offense waived. However, the current judicial incumbent in Juvenile Court explicitly waives only as to the single felony or capital crime and believes the court maintains jurisdiction for offenses subsequent to that one precipitating the waiver.

Once an indictment is obtained by the United States Attorney, the juvenile defendant is arraigned and tried. Discretion exists in the district court, however, to try the defendant as a juvenile. But to do so would seemingly require a dismissal of the indictment, the filing of a petition duplicating that which would be used in a normal Juvenile Court adjudication, and the withdrawal of the prosecuting services of the United States Attorney in favor of a substitution of the Corporation Counsel for the District of Columbia. Confronted by this procedural maze, the district court has refused in all but one case to sit in a juvenile capacity since early 1960. A further factor militating against district court utilization of the juvenile proceeding may be the unfortunate effect it would have of reversing the Juvenile Court decision to waive.

The Juvenile Court Act provides that a child’s social and delinquency record is available to any court before which the child may appear.

55 Ibid.
57 66 Stat. 134 (1952), D.C. Code Ann. § 11-929(b) (Supp. VIII, 1960), amending 52 Stat. 603 (1938). Although the “shall make available” language of this provision appears...
which of course includes the District Court of the District of Columbia in waiver cases. But the Juvenile Court judge's discretion to deny access to such records to "other interested persons, institutions and agencies" has seemingly been limited by a recent district court order which called for such records to be made available to defense attorneys appointed in a case waived to district court, in order to assist those officers in preparing for the adult trial.\(^{59}\) Whether the district court can or will use the subpoena power to make these confidential records further available to other parties whose interests are not clearly accommodated by the Juvenile Court Act remains an open question.\(^{60}\)

The ordinary criminal trial of the juvenile, then, normally ensues and is characterized by all the conventional criminal protections accorded an accused adult.\(^{61}\) The Federal Rules of Criminal Procedure doubtless apply,\(^{62}\) as does the \textit{Mallory} rule\(^ {63}\) which precludes the admission at trial of statements received by police during a period of illegal pre-trial detention. Exactly what period of detention will be examined to determine the applicability of \textit{Mallory} has yet to be determined, but presumably it will be that time between the juvenile's original apprehension and the filing of a complaint by the police with the Juvenile Court. Conceivably the commitment to the Receiving Home, which is frequently previous to filing the complaint, as in cases of a midnight apprehension, will mark the terminal point of the examinable period. Yet a third possibility exists with the period from apprehension until post-waiver presentation before a United States Commissioner, since it is a common police practice to


\footnotesize{\textsuperscript{60} Judge Orman W. Ketcham doubts the legal support obtaining for such district court orders and has expressed a desire for appellate court review. Washington Post, Nov. 29, 1960, § B, p. 1, col. 6.}


\footnotesize{\textsuperscript{62} Ibid.}

\footnotesize{\textsuperscript{63} Id. at 52, 274 F.2d at 561.}
visit the Receiving Home for additional investigation following commitment. These visits presently occur at a rate of two to three a week for all cases combined. Since these few visits cannot be in connection with all the cases pending, the period between apprehension and post-waiver presentation before the Commissioner may be used for purposes of the Mallory rule only as to those cases where post-commitment visits have been made. In this respect, the rule, as in adult cases, will have flexible application, unrestricted to a definite time period.

If a conviction is obtained upon the trial, the sentence will involve a typical adult criminal penalty, and the juvenile can be committed to an adult federal prison or reformatory. He irrevocably obtains a criminal record, and it is doubtful whether he will ever return to the quasi-benevolent fold of the juvenile system.

V

The Juvenile in Court

No physical difference between the Juvenile Court and an adult civil or criminal court is perceptible when one enters a delinquency proceeding; bailiffs, U.S. marshals, clerks, court stenographers, and a judge on an elevated dais are all present. There is the difference, however, that when the juvenile appears before the bench, he or she is accompanied by parent or guardian, the assigned social worker, and in those cases where a trial is to ensue, by a representative of Assistant Corporation Counsel, who in effect assumes the role of prosecutor.

The great distinction appearing between juvenile and adult criminal proceedings lies in the area of constitutional guarantees. Since the juvenile proceeding is characterized as civil, Bill of Rights guarantees which belong to one accused of crime are inapplicable in Juvenile Court adjudications. More specifically, the following rights are not constitutionally guaranteed in these proceedings: (1) the right to counsel; (2) the right to public trial; (3) the right to trial by jury; (4) the

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necessity for grand jury indictment where the juvenile is held for a capital or otherwise infamous crime;\(^68\) (5) the right to a speedy trial;\(^69\) (6) the protection from being compelled to give self-incriminating evidence;\(^70\) (7) the protection against being placed in jeopardy twice for the same offense;\(^71\) (8) the right to bail;\(^72\) and (9) the right to be confronted by one’s accusers.\(^73\)

In practice, rights essentially analogous to a few of the above are made applicable by the statute or by judicial interpretation of due process. Thus where legislative fiat has included such guarantees in the statute or where they fall within the meaning of due process,\(^74\) the juvenile will be assured at least of the most basic of these rights; but even here assurance lasts only as long as the legislative will remains unchanged or the judiciary continues to recognize a right as essential to a concept of fair play.

Although the act nowhere expressly provides for the right to counsel, \textit{Shioutakon v. United States}\(^75\) held that the Juvenile Court judge must advise the child of that right and, in the case of an indigent respondent, must appoint counsel if demand is made. However, \textit{Shioutakon} rejected the contention that the right to counsel was basically a constitutional one, predicating this determination on the rationale that the right is only applicable in a criminal case which a juvenile proceeding is not. Recognizing the necessity for counsel but classifying juvenile cases as civil rather


than criminal forced the court to interpret the statute broadly. Since the statute grants the juvenile offender other rights which he could not intelligently exercise without the effective aid of counsel, it was reasoned that Congress must have intended that the juvenile offender should have the right to counsel as well. Furthermore, since any waiver of this right must be an intelligent one, it would seem that merely showing the defendant was informed of and understood that he had the right to counsel is not sufficient.

Since the Shioutakon case established only a statutory right to counsel, it followed that the right’s retroactive application would not be granted. Swann v. District of Columbia illustrated this problem in a habeas corpus proceeding. Petitioner, a fifteen-year-old boy at the time of his trial, was accused and convicted of “mugging” and committed to the National Training School for Boys. Swann contended that as he had not been advised of his right to counsel and did not have counsel during the proceedings, due process had been denied. The court reaffirmed the Shioutakon position that juveniles in delinquency proceedings are not entitled to counsel as a matter of constitutional right, not even as a matter of due process. Swann had been tried before the court of appeals in the Shioutakon case found the right to counsel within the statute, and retroactive application of the statute was therefore denied.

The conceptual basis of these decisions—that juvenile proceedings are civil in nature—is still subject to the valid criticism leveled by a pre-Shioutakon case in the district court. In In re Poff, where the right to counsel in juvenile proceedings was founded on due process, the court stated:

By some sort of rationalization, under the guise of protective measures, we have reached a point where rights once held by a juvenile are no longer his. Have we now progressed to a point where a child may be incarcerated and deprived of his liberty during his minority by calling that which is a crime by some other name? If so, at what age is the Congress limited to legislate on behalf of the juvenile? May a child be deprived of his liberty and incarcerated in an institution until he reaches the age of twenty-one years merely by changing the name of the offense from unauthorized use of a motor vehicle to juvenile de-

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76 Id. at 374, 236 F.2d at 669. However, the right to counsel does not apply in parental-neglect proceedings. See In re Custody of Minor, 102 U.S. App. D.C. 94, 250 F.2d 419 (1957).
77 Williams v. Huff, 79 U.S. App. D.C. 31, 142 F.2d 91 (1944). (The district court proceeding was against a juvenile for assault with a dangerous weapon.)
linquency? In other words, has the Congress wiped out the constitutional prote-
ction by changing a name, the substance remaining the same? This court stands
steadfast in the belief that the Federal Constitution, insofar as it is applicable,
"cannot be nullified by a mere nomenclature, the evil of the thing remaining the
same."80

Nevertheless, the law today in the District of Columbia is that a
juvenile is entitled to effective counsel by the statute but not by virtue
of the sixth amendment or the fifth-amendment due process clause. Conse-
sequently if Congress chooses, it may expressly abrogate the juvenile's
right.

To anyone familiar with the Juvenile Court Act, a courtroom barren
of the public will come as no surprise. The act provides: "In the hearing
of any case, the general public shall be excluded and only such persons
as have a direct interest in the case and their representatives . . .
admitted."81 In practice, however, the present judge of the Juvenile
Court conducts both hearings and trials in substantial conformity with
the right of a public trial. Persons having a legitimate interest in the case
are admitted, curiosity seekers excluded. Attorneys, law students, persons
engaged in juvenile work, the press, and others who fall into similar
categories are welcomed to the court, if they agree to keep juvenile identi-
ties secret. However, in the absence of any constitutional right and in
the presence of a narrow statutory right to a semipublic trial, the pos-
sibility still exists that the legitimately interested public might just
as freely be excluded. In view of the latent dangers of secret trials,82 it
is submitted that the right to a public trial should be acknowledged as
constitutionally guaranteed, yet in a manner that need not impair the
protective philosophy of the act. Since the right belongs to the person
being tried, it could be recognized, with provision made for waiver in
the absence of a timely demand. Such recognition would yield protection
to a basic right of the child while giving effect to at least one obvious
purpose of the act—the safeguarding of juveniles from the notoriety at-
tending public trial and commitment.

The jury box is normally vacant, in this instance owing again to the
clear language of the act: "The court shall hear and determine all cases of
children without a jury unless a jury be demanded by the child, his

80 Id. at 226.
599 (1938).
82 See generally Heller, The Sixth Amendment to the Constitution of the United States
61-63 (1951).
parent, or guardian or the court.® 8 Several reasons may be attributed to the large number of cases (82.7% in fiscal 1959)® 8 in which a jury is waived. First, waiver results if a demand is not made within five days after the initial hearing or arraignment before the judge.® 8 If the parents and child waive the right to counsel, they generally remain unapprised of the right to a jury, since they are usually not informed of it by the court. Even where the parties know a jury may be obtained, the right would be little enjoyed without counsel since a juvenile cannot be expected to pursue his case before a jury without legal assistance. Even with counsel, discretion would still appear to dictate waiver, for with the relaxed rules of evidence employed in juvenile trials, the harm to be feared from a jury’s inability to sift reliable from unreliable evidence would probably surpass the risks involved when the judge alone acts as the finder of fact. A third factor which can influence the decision to waive is the prolongation of detention in the Receiving Home, since jury trials are held but once a month for juveniles. Thus the statutory “grant” of a right to jury trial appears to be somewhat shallow. Two curative methods may be suggested: first, inform the parties at the Director’s conference, or sooner, of the availability of a jury; secondly, require express waiver rather than the waiver by inaction currently prevailing.® 8

In lieu of any necessity for a grand jury indictment, a delinquency proceeding is held on the previously mentioned petition.® 8 The petition is drafted in the office of the Director of Social Service and almost automatically found legally sufficient by an assistant corporation counsel.® 8 Thus, sufficient cause for formal judicial proceedings against the child is found by an administrative officer, not by presentment before a grand jury. The civil character of the proceedings again justifies this

86 See generally Heller, op. cit. supra note 82, at 1-34.
absence of a normal criminal procedure. But the confusion of what should be done after the child is adjudged delinquent with how he is to be so judged seems questionable. Fairness does not require the insertion of grand jury proceedings into the Juvenile Court system, but in view of the long periods of detention, together with the absence of conventional procedures for the determination of sufficient cause, additional procedural safeguards may be reasonably suggested.

The atmosphere at trial is one of dignified informality, as provided for by the statute. But it is here that the increase of juvenile delinquency with its resulting burden upon the court and its agencies becomes tragically apparent. Because of the long delay before the juvenile is tried, Corporation Counsel representatives, who originally had little time to familiarize themselves with the case, are even less familiar with it by the time it is presented for trial. If the witnesses can be found and are still living in the District, they tend to forget events with the passage of time. Perhaps even more important from the psychological viewpoint, the child is often forgetful of the events which have led him to court, thereby severely hampering any curative effect a court appearance or commitment may have upon him. The clog of cases in Juvenile Court continues to accumulate, aggravating an already difficult situation. As of June 30, 1959, there was a backlog of 235 juvenile cases requiring judicial action and 511 cases involving adults. The backlog as of June 30, 1960, stood at 502 juvenile cases and 1,165 adult. An unofficial source estimates that as of December 1, 1960, the total backlog is "about 2,000." These figures go far in explaining the overcrowding and length of stay at the Receiving Home, the brevity of court hearings, the disappearance of witnesses, the forgetfulness of witnesses who do appear, the dismissal of cases for lack of evidence, the necessity for extra-judicial and extra-legal police and administrative measures to mitigate the onslaught, and the frustration of the individualized form of attention sought under the act. Undue delay, in itself, may cultivate a delinquent disposition in that it breeds disrespect for the law, if not outright antipathy toward it.

89 E.g., Ex parte Januszewski, 196 Fed. 123 (S.D. Ohio 1911).
92 Ibid.
93 See Receiving Home Population as of October 7, 8 and 9, 1960 (daily statistical report sent to Juvenile Court by Home officials). A sampling of the more aggravated cases reveals incarcerations of 87, 68, 56, 50, 40 and 37 days.
The speed with which the one judge in Juvenile Court must handle each case, together with the duty of supervising the administrative facilities of the entire court, leads to further informality in the courtroom. While the petition is being read by the clerk, the judge is often compelled by his limited time to consult with another official of the court in order to dispose of paper work or orders relating to other cases. Corporation counsel presents his evidence, usually having the witnesses state what happened in narrative form. Opposing counsel has the right to cross-examine, but more often than not it is the judge who asks the pointed questions, seeking to uncover essential facts buried by the lapse of time between offense and trial. On the rare occasions when a police officer appears on the stand, it is normally not the arresting officer but a member of the Juvenile Squad, who relates what the arresting officer told him, together with other relevant information he may have seen or heard.

The juvenile frequently takes the stand although it does not appear that he could be required to testify if it were not his wish. While numerous foreign jurisdictions have denied juveniles the fifth amendment protection against self-incrimination, no decision has yet issued on the point in the District of Columbia. As noted earlier, the Mallory rule, forbidding the use of statements made during an illegal detention, is not applicable in Juvenile Court. Hearsev evidence is admissible, but the social worker is not permitted to read the report containing privileged material either before or during the determination of the juvenile's delinquent status. In practice, the rules of evidence seem to be solely within the discretion of the judge. Perhaps the best description of the evidentiary

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94 An average of eight to twelve minutes only can be devoted to each case or hearing. This figure is drawn from time spent on all the diverse proceedings before the court, and is low partially because of the large number of guilty pleas entered. Hearings on S. 1456 Before the House Committee on the District of Columbia, 86th Cong., 1st Sess. 14 (1959) (Statement of Judge Orman Ketcham, Judge of the Juvenile Court for the District of Columbia). See also Hearings on S. 1456, at 85. Testimony of Mrs. Quenstedt, Assistant Corporation Counsel for the District of Columbia, in reference to Judge Ketcham's predecessor: "I have seen 86 new cases involving children go through in one day, and I know it has been a terrific grind for one judge to handle the large number of cases in that court."


rules used in Juvenile Court is that they "follow the rules of evidence which apply in administrative law cases to a greater extent than in criminal cases." As might be expected, current practice in the Juvenile Court is to adhere less strictly to the rules of evidence where trial is had without jury. Moreover, the court will carefully examine self-incriminating statements made by the child for assurance that they are voluntary, although no constitutional or statutory provision compels such inquiry.

After the evidence is in and final argument or statement made, the judge instructs the jury and a verdict will be returned; in the absence of a jury, the judge will make his own decision. In the latter case, no specific findings of fact are made—either the child committed the offense or he did not. In most cases, this decision is reached by the judge without leaving the bench and within a few moments. If a determination of delinquency is reached, the social worker, with his report and opinion, comes before the court.

The social worker's report normally includes the background of the child, e.g., family, surroundings, previous difficulties, the progress of the child over the period of consultation, and a recommendation as to his future treatment. On the basis of this report and recommendation, the offense involved, previous record, and any other relevant material before the court, the judge determines what disposition is to be made. Except in the most unusual type of case, the decision is reached within a few moments. Although the decision is often difficult and clearly of great importance to the child's future, the throng of people in the hall outside the courtroom waiting their turn before the court does not permit the judge the luxury of prolonged meditation.

Many avenues are opened to the judge in making this disposition. The child may be placed on probation, committed to the Department of Public Welfare, or returned to the custody of his parents, relatives or other fit person. If the child appears to need mental or physical care, the judge may have him committed to the D.C. General Hospital for treatment or a determination that the child should be committed to a mental


100 The elimination of the fifth amendment right from juvenile proceedings and the Juvenile Court's refusal to give it even token application in other jurisdictions has elicited dissents of great eloquence. People v. Lewis, 260 N.Y. 171, 179, 183 N.E. 353, 356, 260 N.Y. Supp. 171, 179 (app.) (1932) (Crane, J., dissenting); In re Holmes, 379 Pa. 599, 610, 109 A.2d 523, 528 (1954) (Musmanno, J., dissenting).
institution. The latter determination may indirectly result in confinement in such an institution for an indefinite period of time. If neither hospital nor mental institution appear desirable or necessary, the child may be placed in a qualified private agency or institution at no public expense, sent to the Children's Center in Laurel, Maryland, or to the National Training School for Boys. The Juvenile Court judge also has the power to send the child temporarily to the D.C. Jail\textsuperscript{101} where rehabilitative prospects seem, at the very least, doubtful. Finally, the judge may make "such further disposition of the child as may be provided by law and as the court may deem to be best for the best interests of the child."\textsuperscript{102} This provision of the Juvenile Court Act was probably intended to embrace those \textit{ad hoc} situations requiring a remedy tailor-made to the child's difficulty.

In general then, the juvenile in court faces a paternalistic type trial. However, the introduction of sociological concepts into courtroom procedure has created a danger that invites the imposition of legal safeguards. The presence of such concepts should not replace the rules of procedure and evidence which have been established to insure accuracy and fairness in the courtroom, but rather should complement them. Here, more than anywhere else in the processing of juveniles, a need appears for the practical integration of essential safeguards to insure an accurate finding that the accused juvenile has committed the offense. The urgency of this need becomes more apparent in view of the following section of this note.

VI

The Transfer Cases

As indicated, this note does not purport to review juvenile procedure and treatment beyond the dispositive stage at which the judge determines a course of probation or commitment for a child offender. But one aspect of the post-disposition procedure merits attention since it threatens to destroy the very fabric of, and justification for, an informal juvenile system.

In 1941 the Court of Appeals for the District of Columbia held that the Attorney General's statutory power to transfer prisoners from one federal prison to another did not extend to the transfer to such prisons of juveniles committed to the National Training School for Boys, since exclusive jurisdiction and control over such juveniles was legislatively


vested in the Juvenile Court. Chronically bad conduct on the part of the juvenile petitioner in the case, while he was an inmate at the National Training School, had triggered his transfer to the Lorton Reformatory. His writ of habeas corpus was sustained in the district court and affirmed on appeal. Shortly thereafter, Congress responded to the decision by amending the statutory grant of power to the Attorney General to include specifically within it the power to transfer inmates of the National Training School, and this amendment continues on the books. An estimated 100 inmates of the School have been transferred to adult federal reformatories at Chillicothe, Petersburg, Danbury and similar institutions since the amendment reversed the determination of the court of appeals.

Few decisions have appeared over this period to review the propriety of these transfers. Shortly after the amendment, it was held that the additional grant of power by Congress had inferentially repealed the section of the District of Columbia Code which subjects a juvenile committed to the National Training School to the exclusive jurisdiction of the Juvenile Court. Then, in 1954, the District Court for the District of Columbia interpreted the amendment as having granted to the Attorney General power to designate places of confinement "limited to those where special facilities are provided for training and care, somewhat comparable to those provided by the National Training School for Boys, but with closer supervision where necessary for those that may prove to be otherwise intractable." Assuming that the juvenile in the case, who was then temporarily lodged in the D.C. Jail, would be speedily sent to such a suitable place of detention other than the National Training School, the court discharged the juvenile's writ of habeas corpus without prejudice to renewal. The writ was renewed when the boy was transferred by the Attorney General to the Federal Correctional Institution at Ashland, Kentucky, and the same court this time sustained the writ, on the ground that the Kentucky institution was "designed for the

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104 Id. at 21, 121 F.2d at 892.
110 Id. at 651.
custody of persons convicted of crime” and would therefore involve a prohibited commingling of juveniles with criminals.\textsuperscript{111}

Despite the interpretation placed on the Attorney General’s power by these decisions, a different judge sitting five years later held that the Director of Prisons of the United States is authorized by law\textsuperscript{112} to transfer inmates of the National Training School to any federal institution, whether a place of incarceration for adult criminals or not.\textsuperscript{113} The institution involved in this instance was the Federal Reformatory of Chillicothe, Ohio. But another 1959 decision of the district court disagreed with this result, holding that the federal statute relating to the powers of the Attorney General does not apply to juveniles committed under the District of Columbia Code provision since “no adjudication upon the status of any child shall be deemed conviction of a crime.”\textsuperscript{114}

Then in April of 1960, on the ground that jail was an improper place for a child, district court Judge Youngdahl sustained a writ of habeas corpus filed by a juvenile petitioner who was in the D.C. Jail, under the Attorney General’s power, pending a determination of whether his National Training School parole should be revoked.\textsuperscript{115} In agreement with the earlier district court decision of 1954,\textsuperscript{116} Judge Youngdahl construed the amendment as not authorizing the detention of a National Training School parolee at any institution, but only at the National Training School or another institution with substantially similar facilities. The decision noted that a “grave constitutional question” would attend a literal application of the amendment,\textsuperscript{117} and pointed out that the relaxation of constitutional safeguards in juvenile proceedings can only be justified if the proceedings are absolutely noncriminal.

The keynote is struck by this observation. Clearly an informal “civil,” “rehabilitative” process of arrest, trial and confinement totally breaks down under the weight of its own hypocrisy if its end result is the incarceration of a youth in an adult criminal reformatory. This conclusion is unavoidable, barring a redefinition of benevolence and “guardianship imposed by the state as parents patriae.”\textsuperscript{118} Perhaps the most

\begin{itemize}
  \item \textsuperscript{111} White v. Reid, 126 F. Supp. 867, 871 (D.D.C. 1954).
  \item \textsuperscript{112} 18 U.S.C. § 4082 (1958).
  \item \textsuperscript{114} Cogdell v. Reid, 183 F. Supp. 102 (D.D.C. 1959).
  \item \textsuperscript{115} Kautter v. Reid, 183 F. Supp. 352 (D.D.C. 1960).
  \item \textsuperscript{116} White v. Reid, 126 F. Supp. 867 (D.D.C. 1954).
  \item \textsuperscript{117} 183 F. Supp. at 354.
  \item \textsuperscript{118} White v. Reid, 125 F. Supp. 647, 649 (D.D.C. 1954).
\end{itemize}
penetrating legal statement yet made in this regard was uttered by the late Judge Bolitha Laws:

To send a juvenile to the usual penitentiary where hardened criminals are kept in close confinement and under special types of strict discipline, where the juvenile would inevitably come into contact with them and suffer the same type of treatment as they do, would in effect stamp the case of the juvenile as a criminal case except insofar as his records would be protected from public disclosure. *In such criminal prosecutions*, constitutional safeguards must be vouchsafed the accused.119

This view is unofficially favored among Juvenile Court personnel. In an informal effort to circumvent further transfers from the National Training School to adult prisons, Juvenile Court Judge Orman Ketcham early in 1960 reached an agreement with the Bureau of Prisons whereby his sentences to the School were not to exceed 18 months or to extend through the juvenile’s 18th birthday, whichever involved the longer time.120 The purpose of such limitation was to attenuate the overcrowded conditions that plagued Bureau officials in their management of the school. In return, the Bureau, an agency subordinate to the Attorney General, gave assurance that the transfer of inmates to adult reformatories would not take place without the consent of Judge Ketcham. But no legal force attaches to the agreement; thus while the sentences have been limited to the stipulated periods, the Bureau has continued the practice of transfer with only minimal consultation with the judge.

Appellate confirmation of the recent district court views limiting the Attorney General’s power of transfer is thus to be strongly desired. Or, in the alternative, a system already suspiciously close to a criminal process should be openly declared as such and the presently omitted constitutional protections should be afforded those subjected to its grip. As matters stand, the ends, transfers to federal prisons, and the means, the relaxed and unguarded treatment of juveniles, are in theory mutually exclusive, but in practice glaringly coexistent.

CONCLUSION

The single most striking factor one encounters in this hope-generated juvenile system is the dissatisfaction with it expressed by every person officially involved. This reaction on the one hand proves that the system does not function successfully, yet on the other it reveals that the men and women involved dearly wish the situation were different. The lack of indifference is dissatisfaction’s healthy aspect. But the cold facts are

119 Id. at 650-51. (Emphasis added.)
120 See Statement of Procedures Regarding Commitments by the Juvenile Court of the District of Columbia to the National Training School for Boys, June 10, 1960.
that the police feel hampered, and are aware of the questionable propriety of some of their procedures, despite the undeniable concern they bring to the job; that the judicial personnel is not able to work the fifteen-hour day requisite to any truly adequate attention to the cases; that the Social Service personnel labor in the classic situation of limited men facing unlimited difficulties, speaking only numerically. These are the few problems which this necessarily abbreviated study has encountered; many more doubtless exist beneath the philosophical facade justifying the practices and proceedings regarding District juveniles. To unearth these problems, as well as to cope with those delineated in this article, is a project awaiting the illumination of a civic-committee inquiry.

Such a study may well consider a practical integration of the Bill of Rights guarantees relating to criminal proceedings with the basic philosophy of the Juvenile Act. Tailoring conventional constitutional safeguards to implement the act would serve to circumvent questionable administrative and judicial procedures developing as a consequence of an overwhelming case load. Additionally, the District's appellate courts, although they have shown an admirably expressed interest in juvenile processes in recent years, may be well advised to base their appraisals of these processes less on the theory of the Juvenile Court Act than on the practices of the authorities operating under or in conjunction with it.

Finally, the Congress of the United States must bring a more expansive point of view to the threatening lack of manpower now available for Juvenile Court judicial and administrative social work. Since 1906 when the court was established, only one judicial position has been deemed necessary for the adequate discharge of juvenile casework, despite a population growth over the years of from 300,000 to 880,000 in the city, 350,000 to 2,100,000 in the metropolitan area, and an increase in judge-ships from 7 to 16 in the Municipal Court, from 5 to 15 in the United States district court, and from 3 to 9 in the United States court of appeals, and the establishment of a three-man Municipal Court of Appeals. The number of D.C. residents below the age of 18 alone is today estimated at 250,000. In the view of some legislators a juvenile court should perhaps perform with the machined logic of a chiclet dispenser, but other informed sources believe not unjustifiably that implementation of the system's philosophy should be conditioned not by whether one judge can equal the world mark for the number of cases handled in a year, but by some minimal interest in child welfare.

JOHN J. FLYNN
JOHN G. MURPHY, JR.
DECISIONS


Appellant Torcaso, appointed notary public, was denied his commission by the county clerk when he refused to sign the declaration of belief in the existence of God required by the Maryland Constitution as a qualification for public office. The lower court sustained a demurrer to appellant’s petition for mandamus against the county clerk. On appeal Torcaso contended that the provision deprived him of his “liberty to disbelieve” and discriminated against him as a nonbeliever. The Court of Appeals of Maryland affirmed the order of the court below dismissing the petition. Held, a state constitutional provision requiring a declaration of belief in the existence of God as a qualification for public office does not violate the fourteenth amendment to the federal constitution.

When a state excludes a nonbeliever from public office, federal constitutional problems become apparent in two areas: equal protection of laws and establishment of religion. The first amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” It is now well settled that the fourteenth amendment prohibits state interference with the religious guarantees of the first amendment. The Torcaso case raises the possibility of a different kind of aid to religion from that adjudicated in the Supreme Court cases in which the establishment clause was at issue. These cases have involved (1) monetary aids: to a District of Columbia hospital operated by a religious group, to Indians as payment of funds held in trust by the federal government for the religious education of Indian children, and to parents as reimbursement for parochial school transportation costs; (2) military exemptions to clergymen; and (3) “released time” religious instruction programs in public schools.

1 Md. Const., Declaration of Rights, art. 37.
3 U.S. Const. amend. I.
5 Bradfield v. Roberts, 175 U.S. 291 (1899).
6 Quick Bear v. Leupp, 210 U.S. 50 (1908).
The use of tax funds to purchase text books for parochial school use was upheld as a valid public purpose in a case in which the establishment question was not raised.\textsuperscript{10} In the lower courts, recently, the attack has also been directed against (1) Sunday laws,\textsuperscript{11} and (2) bible reading in public schools.\textsuperscript{12} The only bible-reading case to have reached the Supreme Court thus far was dismissed for a lack of standing to sue because the taxpayer’s children had already graduated.\textsuperscript{13} Two early cases involved Sunday laws challenged on other grounds.\textsuperscript{14}

An establishment of religion has been found in only one instance,\textsuperscript{15} but the Supreme Court has never faced the question where the establishment was said to arise from the exclusion of a class on grounds of religious disbelief. The Court has never determined whether article VI, clause 3 of the federal constitution providing “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States” is applicable to the states. Assuming it is not, a religious test might still be invalid as violative of the establishment clause. The broad interpretation given that clause through the Supreme Court’s adherence to a doctrine of absolute separation of church and state lends feasibility to this position.

Language in \textit{Cantwell v. Connecticut}\textsuperscript{16} indicated that the prohibitions of the establishment clause might be limited to laws compelling a religious belief, but when the Court undertook to define an establishment in \textit{Everson v. Board of Educ}.\textsuperscript{17} and the two “released time” cases,\textsuperscript{18} prohibited state action was enlarged to include any preference for religion. In \textit{Everson} a statute authorizing reimbursement of school transportation costs to parents was not an establishment...
of religion even though by its terms parochial school children were included. But Mr. Justice Black, writing for the majority, warned:

The "establishment of religion" clause of the first amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force . . . a person to profess a belief or disbelief in any religion.19

This "no aid" principle has been widely criticized on an historical basis,20 as a social policy,21 and in the light of voluminous state decisions to the contrary.22

The necessary preference was found in McCollum v. Board of Educ.23 where the Court struck down a "released time" program of religious instruction in public schools, but the Court retreated somewhat from its former position when, in Zorach v. Clauson,24 it upheld a similar program conducted away from school property. The Zorach majority insisted it subscribed to the absolute separation theory announced in Everson and McCollum, but was now willing to recognize that, although the Government must be neutral with respect to religion, it need not be hostile,25 nor need it discourage religious expansion. This would be discrimination in favor of the nonbeliever.26 However, the Court indicated no change in its policy that impartial government aid to all religions will violate the establishment clause. The questionable factual distinction of McCollum made in Zorach may indicate a new hesitancy by the Court in finding a preference, but it appears that a preference once found will amount to an establishment of religion.

In Fowler v. Rhode Island,27 the Supreme Court held that a municipal ordinance construed to exclude a group of Jehovah's Witnesses from holding a religious meeting in a public park, but allowing the privilege to other sects violated the first and fourteenth amendments. The majority opinion does not indicate upon which of the first amendment clauses the decision rests, but the Court's language is similar to that used in the establishment cases: "[The

19 330 U.S. at 15.
20 O'Neill, Religion and Education Under the Constitution (1949); Corwin, The Supreme Court as National Schoolboard, 14 Law & Contemp. Prob. 3 (1949).
25 Id. at 312.
26 Id. at 314.
27 345 U.S. 67 (1953).
application of the ordinance] amounts to the state preferring some religious groups over this one. 28

Normally, however, the constitutional ground upon which exclusions of a class are challenged has been the equal protection clause of the fourteenth amendment. Equal protection means the protection of equal laws, 29 but states may make classifications which have a reasonable basis. 30 Wide latitude is given the states in setting qualifications for state office 31 or state employment, 32 but even here equal protection requirements are not met if a class is excluded arbitrarily. 33 Such arbitrary action on religious grounds, but not involving state standards for public office, was found in Niemotko v. Maryland. 34 There the arrest of a group of Jehovah’s Witnesses who used a municipal park for bible talks after being denied a permit solely because of their religious views violated the equal protection clause of the fourteenth amendment.

In the instant case the Maryland court relied on the common-law attitude toward atheists as the reasonable basis for excluding appellant from the office of notary public. The court determined that the distinction between believers and nonbelievers as a security for good conduct in office had not so lost its meaning that to adopt it would be arbitrary. The common law equated the ungodly with the untrustworthy. The nonbeliever’s inability to make an oath disqualified him as a witness at common law because the sanction of divine retribution following false swearing was deemed the only acceptable means of insuring truth telling. 35 Professor Wigmore suggests that the true purpose of an oath is not to exclude a competent witness, but to add a stimulus to truthfulness wherever that is possible. 36 In recognition of this fact, most jurisdictions now allow an affirmation in place of an oath, but vestiges of the disability remain. 37 It would be cynical perhaps to suggest that many good men are not deterred from perjury because of moral dictates, but it seems equally unreasonable to restrict a facility for veracity to the believer. Only eight states exclude a nonbeliever from public office through constitutional provisions. 38 The Torcaso court suggests that the state is reasonably seeking to secure good

28 Id. at 69.
35 6 Wigmore, Evidence § 1816 (3d ed. 1940).
36 Id. § 1227.
37 Ark. Const. art. 19, § 1; Md. Const., Declaration of Rights, art. 36.
38 Ark. Const. art. 19, § 1; Md. Const., Declaration of Rights, art. 37; Miss. Const. art. 14, § 265; N.C. Const. art. VI, § 8; Pa. Const. art. 1, § 4; S.C. Const. art. 17, § 4; Tenn. Const. art. 9, § 2; Tex. Const. art. 1, § 4.
conduct in office when it excludes the nonbeliever. It is submitted that this equation of honesty with belief is likewise unreasonable and outmoded.

The possibility of religious establishment was dismissed without discussion in the instant case, the court commenting that in Maryland "religious toleration . . . was never thought to encompass the ungodly." This rationale fails to coincide with the Supreme Court's interpretation of the limits of the establishment clause. In both *McCollum* and *Zorach* the petitioners were nonbelievers.

The Supreme Court might well re-examine its absolute doctrine of "no aid" to religion, especially in the vital area of education. We are, truly, a people with a deeply rooted religious tradition. To determine a policy of such social importance on the basis of the historical intent of the Founding Fathers is itself a questionable norm, but when the result of that inquiry into intent is questionable history as well, the issue needs re-evaluation. But a reconsideration of the "no aid" theory out of deference to our Christian tradition need not justify the result which the *Torcaso* court reaches. The discriminatory exclusion of a nonbeliever from a privilege of state citizenship because of his lack of belief is a more obvious and onerous preference for religion than the instances previously so challenged. To recognize the tradition of our people through our institutions is one thing; to discriminate against a nonbeliever because of that tradition is another. State religious qualification for public office, it is submitted, is an area where a "no aid" test can be of value. If the exclusion of a nonbelieving citizen from public office is not so arbitrary as to satisfy the strict requirement of fourteenth amendment equal protection, it is adequately discriminatory as a religious test to meet the Supreme Court's present "no aid" requirement of an establishment of religion.

WILLIAM J. MCNICHOLS


Under an agreement made with defendant Commonwealth Pictures Corporation, plaintiff McConnell was to negotiate with Universal Pictures Company to obtain for defendant certain motion picture distribution rights. Plaintiff succeeded in securing such rights and received from defendant an initial payment of $10,000 on the contract. However, when defendant refused to comply with a

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39 162 A.2d at 443.

40 Justice Black adopted this idea as the basis for the majority opinion in *McCollum*, relying on the lengthy dissent of Justice Rutledge to that effect in *Everson*. For a criticism of this approach in the area of religious liberty see Antieau, The Limitation of Religious Liberty, 18 Fordham L. Rev. 221 (1949).
further contractual provision requiring him to pay plaintiff a stated percentage of his annual gross receipts, plaintiff sued for an accounting. Defendant affirmatively defended that plaintiff had secured the distribution rights by bribing an agent of Universal Pictures in violation of New York law. Plaintiff's motions to strike the defense and for summary judgment were granted by the trial court, and the order was affirmed on appeal. On defendant's further appeal from the order, the Court of Appeals of New York reversed. Held, where a party has resorted to gravely immoral and illegal conduct in the performance of a valid contract, recovery under the contract will be denied as a matter of public policy.

Pursuant to a fundamental of contract law, courts have long refused to assist the parties to a contract of illegal creation or objective, but this rule has not heretofore clearly applied to contracts which, though legitimate in form and intent, are subsequently performed in an illegal manner by one of the parties. Considerable case law to the contrary indicates that the legitimacy of the contract, not that of its performance, determines its enforceability. Initiating this line of authority is the Massachusetts decision of *Barry v. Capen*, where an attorney was engaged by defendant to propose to certain city commissioners that a street be laid out through defendant's property. Defendant attempted to resist the attorney's suit for legal fees under the contract by contesting that the attorney's actions in approaching the commissioners may have constituted undue influence and thereby rendered the contract illegal. Incidental to its affirmation of the lower court decision granting recovery, the court stated that if the contract in its creation were legal, "it would not be made illegal by misconduct on the part of plaintiff in carrying it out." Eight years later another Massachusetts case, *Fox v. Rogers*, reiterated this view by allowing a plumbing contractor to recover for work done in laying a drain for defendant,

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1 N.Y. Pen. Law § 439.
7 Arlington Hotel Co. v. Ewing, 124 Tenn. 536, 138 S.W. 954 (1911).
8 151 Mass. 99, 23 N.E. 735 (1890).
9 Id. at 100, 23 N.E. at 735.
although he was not a registered plumber and had not used cast iron as required by statute. The numerous cases since which either directly or indirectly follow the Barry rule that illegal performance will not bar recovery on an otherwise valid contract appeared so overpowering to the trial court in the instant case that it found a decision for defendant to be "foreclosed by authority." But the court might validly have found these cases less prepossessing than it did, for they have not been free of criticism. Their passing reiteration or adoption of the Barry view appears to have been superfluous to their disposition of the problems which confronted them; in large part, the cases either (1) did not involve the problem of highly immoral or illegal conduct, or (2) portrayed the illegality of plaintiff's acts only as an unimportant incident of his full contractual performance, or (3) involved contracts in which the basic issue was the validity of the contract itself. In fact, both Barry and Fox have been adversely distinguished by a recent decision, Tocci v. Lembo, where the issue of illegal performance was presented unencumbered to a Massachusetts court for the first time.

In Tocci, the court refused recovery to a building contractor who had failed to get authorization from the Civilian Production Administration to erect a house for defendant. Specific authorization was required by law, owing to the shortage of certain materials at the time. In treating the case as one of novel impression, the court dismissed Barry as being a decision which concerned itself with the illegality of performance only as that issue bore on the illegality of the contract itself. Fox was distinguished on the ground that plaintiff's violation of the statute there involved was only incidental to his performance, and the question of public policy was a doubtful one. The Tocci court then went on to agree with Professor Williston's view that a primary basis for refusing enforcement of a contract is the "illegality of plaintiff's conduct either in entering into or in performing the contract." This basis for refusal had found expression in earlier cases, but as with the cases reflecting the Barry decision, the illegality of plaintiff's performance was not an integral or indispensable element of the reasoning which compelled the final decision in each situation. For the most part, the cases involved contracts which were illegal in themselves.

10 Cases cited note 6 supra.
11 1 Misc. 2d at 755, 147 N.Y.S.2d at 81.
14 Id. at 710, 92 N.E.2d at 255.
15 Id. at 709, 92 N.E.2d at 255.
16 6 Williston, Contracts § 1761 (rev. ed. 1938).
17 325 Mass. at 710, 92 N.E.2d at 255-56.
New York recognition of the Barry rule appears in the case of Dunham v. Hastings Pavement Co., 19 which involved the propriety of plaintiff's action in securing bidding rights for the defendant with the City of New York. Both the initial opinion 20 and the opinion denying reargument 21 strongly endorsed the idea that an otherwise valid contract would not be rendered unenforceable by illegal performance. Dunham is distinguishable, however, insofar as the plaintiff's acts under the contract were scrutinized by the court only to aid in determining whether those acts disclosed an illegal intention by the parties at the time of contract formation. 22 Such an intention would, of course, have rendered the agreement unenforceable. The majority of the court in the instant decision failed to utilize the case in any respect, in spite of the heavy reliance placed on it by the trial court, 23 plaintiff's counsel, 24 and the dissenting opinion. 25

Perhaps the most significant New York precedent with respect to the validity of illegal performance as a defense was discussed by the McConnell dissent. In Southwestern Shipping Corp. v. National City Bank, 26 plaintiff was allowed to recover the proceeds of an illegal transaction which were held by defendant bank as a depository, even though the court admitted that plaintiff would not have been granted relief had he sought recovery from the other party to the transaction. The illegal activity involved an assignment of funds and would not have been completed until the funds were actually transferred to plaintiff. The decision has been viewed as an extension of the New York "exception" which allows a party who has participated in a completed illegal transaction to recover the proceeds from a mere depository unconnected with the transaction. 27 The dissent in McConnell felt that the conclusion in the instant case was "contrary to the spirit, if not the letter of . . . Southwestern" 28 since defendant in the McConnell case was also unconnected with the illegality. The majority, however, thought that for Southwestern to be applicable the defendant would have to be unconnected with not only the illegality but with the contractual transaction as well; since defendant here was a party, the court denied Southwestern's force as precedent. 29

In resolving McConnell, the majority made no mention of Tocci and did not

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23 1 Misc. 2d at 754, 147 N.Y.S.2d at 81.
24 Brief for Respondent, pp. 7-9.
25 7 N.Y.2d at 473, 166 N.E.2d at 498-99, 199 N.Y.S.2d at 489.
28 7 N.Y.2d at 474-75, 166 N.E.2d at 499, 199 N.Y.S.2d at 490.
29 Id. at 472, 166 N.E.2d at 498, 199 N.Y.S.2d at 487-88.
comment on *Barry* but indicated that it relied for precedent, "so far as precedent is necessary,"30 upon its decisions in *Sirkin v. Fourteenth St. Store*31 and *Reiner v. North Am. Newspaper Alliance*.32 Later in the opinion, however, the court expressed the feeling that its decision might represent a "distinct step beyond *Sirkin* and *Reiner".33 This added qualification was necessary since these cases did not present the problem of illegal performance. In both, the contracts were properly called illegal in their inception: in *Sirkin*, the plaintiff sought but failed to obtain recovery under a sales contract with defendant which plaintiff had procured by bribing defendant’s purchasing agent; *Reiner* denied recovery under a contract entered into by plaintiff in violation of an obligation arising under a separate contract.

In addition to express recourse to the *Sirkin* and *Reiner* cases, the court implicitly gathered support from the breadth of its rationale in the recent decision of *Carr v. Hoy*.34 There the plaintiff was denied relief in an action to recover the confiscated proceeds of his illegal activity, the court stating that it would not furnish plaintiff an opportunity "to prove his own wrongdoing as a basis for his supposed 'rights'."35 It is important to note, however, that *Carr* was a suit for conversion of moneys obtained by the plaintiff by illegal means and subsequently taken from him by an arresting sheriff, the defendant; no contractual rights whatever were involved in the decision.

The majority in *McConnell* loosely implemented the *Carr* concept of denying plaintiff recovery where he must prove wrongdoing to obtain it by stating that such denial will follow only where some *major* act of illegality is found which "takes the form of commercial bribery or similar conduct and in which the illegality is central to or a dominant part of the plaintiff’s whole course of conduct . . . ."36 Concerned with the problem of forfeiture where recovery is denied, the dissent criticized the legal amorphism of this "major" and "minor" categorizing of illegality by stating that such distinctions were "neither workable nor sanctioned by authority."37

This brief review of the law in the area suggests that the *McConnell* majority had less than an overwhelming set of precedents by which to be guided. Moreover, until a more elaborate definitional treatment is forthcoming with regard to the caliber of act which will invoke the rule, the dissent’s objection to the roughness of the "major-minor" distinction may be appreciated. A third objection to the decision, that defendants in such cases will henceforth reap a

30 Id. at 470, 166 N.E.2d at 497, 199 N.Y.S.2d at 486.
33 7 N.Y.2d at 471, 166 N.E.2d at 497, 199 N.Y.S.2d at 487.
34 2 N.Y.2d 185, 139 N.E.2d 531, 158 N.Y.S.2d 572 (1957).
35 Id. at 188, 139 N.E.2d at 533, 158 N.Y.S.2d at 575.
36 7 N.Y.2d at 471, 166 N.E.2d at 497-98, 199 N.Y.S.2d at 487.
37 Id. at 474, 166 N.E.2d at 499, 199 N.Y.S.2d at 490.
windfall, can be anticipated, but if this argument stands alone, it may be dismissed; better a windfall for innocence than profit for iniquity. Public policy's balance of interests favors enforcing the law over preventing receipt of unearned rewards by nonoffending parties. Yet, these quick answers are too pat, however predictable, and omit in reasoning (1) the defendant's failure to discharge his legal promise, and (2) the sanction of the penal law already awaiting plaintiff for his violation. Regarding the former, the *Southwestern* majority itself pointed out that "the law seems clear that defendant may not escape from its contractual liability . . . by asserting the illegality of the . . . agreement by reason of which it received the proceeds." With respect to the latter, *McConnell* in effect establishes an alternative and additional punishment for one party's deliction while liberating a second party altogether from the consequences of his own legal failure, the contractual default.

The broad public policy upon which this decision is founded is meritorious—the courts indeed should not assist the fulfillment of an illegal project—but perhaps, on the *McConnell* facts, is to be weighed against a second policy, that which covets the sanctity of a legal promise. It is fair to observe that the extension of the first policy by this decision tends to impair the second, while *McConnell* reached an opposite conclusion, the reverse would not be true; allowing the plaintiff recovery would have compelled defendant to meet his legal obligations under the contract, while plaintiff himself would yet be susceptible under the penal law to punishment for his illegal act. However, in final defense of the decision, it may still have the valuable effect of dissuading persons involved in lucrative contracts from performing their promise in violation of a penal law in those tempting instances where the benefits to be gained under the agreement far outweigh the minor penalties which will be imposed for such violation.

Notwithstanding the broad but perhaps irrelevant rationale of *Carr*, these general observations, taken in connection with the instant decision's tenuous reliance on the clearly distinguishable cases of *Reiner* and *Sirkin*, together with its questionable restriction of the *Southwestern* holding, work to weaken that solid foundation in precedent and logic to be desired for any fresh judicial projection into an uncertain and sensitive area of the law.

JEROME C. GORSKI

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38 Under New York law bribery is a misdemeanor punishable by a term of 1 year and/or a $500 fine. N.Y. Pen. Law § 439.

39 6 N.Y.2d at 461, 160 N.E.2d at 840, 190 N.Y.S.2d at 357.

In 1950 a union welfare and retirement fund conforming to the requirements of section 302(c)(5) of the Taft-Hartley Act1 was established by a collective bargaining agreement between the United Mine Workers and a number of coal operators. As one of the signatory companies, Benedict Coal Corporation agreed to pay a royalty into the fund for each ton of coal produced for use or for sale, while on its part the union agreed to no-strike clauses. Coal produced by Benedict within a certain period resulted in a calculable royalty of $177,762.92 due and owing to the fund. Of this, $76,504.24 was withheld on the ground that strikes and work stoppages by the promisee union in violation of the collective bargaining agreement excused payment of that amount. The fund trustees as third-party beneficiaries of the agreement sued for the unpaid royalties, and Benedict cross-claimed against the union for damages sustained by the strikes and stoppages.

The district court gave judgment and an order of immediate execution to Benedict on its cross-claim, the money to be paid into the registry of the court. It also granted judgment to the trustees but refused them immediate execution and interest. Instead it ordered that the trustees’ judgment be satisfied only out of the proceeds collected by Benedict from the union.2 The United States Court of Appeals for the Sixth Circuit affirmed the district court except as to the damages awarded Benedict, which it deemed excessive.3 On certiorari the Supreme Court sustained the holding that the union had violated the collective bargaining agreement, but modified the decision below to provide for immediate execution and interest on the trustees’ judgment for the full amount of the unpaid royalty. Held, absent express stipulation in a collective bargaining agreement, the union’s performance of its promises is not a condition precedent to management’s duty to contribute to a third-party beneficiary welfare fund.4

Under the prevailing American rule a third party may enforce a promise made for his benefit even though he is a stranger to the contract and to the consideration.5 But the third party, whose rights are limited by the terms of

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3 259 F.2d 346 (6th Cir. 1958).
the contract, has no greater right of enforcement than the promisee; the promisor may set up against the third party any equity or defense, including set-off, which he might have raised against the promisee. Generally the beneficiary takes subject to due performance of all express and implied conditions affecting the promise in which he is interested.

Unless a statute requires otherwise, the collective bargaining agreement must embody the same essential elements found in a simple contract and will be subject to the same principles of construction and interpretation. Liberal rules of construction will be applied, however, for the benefit of the employee who is the usual beneficiary of such agreements. Even with today's wealth of labor legislation, the collective bargaining agreement is still to be accorded the status of a contract. But the anomalous nature of the agreement, together with the decided effect of this legislation, at times prevents a literal application of commercial third-party beneficiary contract law. Illustrative of this departure from traditional principles is the decision in the instant case.

Speaking for the Court, Mr. Justice Brennan said the union's performance of its promises was not a condition precedent to Benedict's duty to contribute to the royalty fund, the operator's obligation being an independent covenant. Benedict's duty to pay became fixed by the mere production of coal. Further, the amount of the trustees' recovery could not be affected by union breaches, for it was not expressly so provided in the agreement, "which is the measure of the third party's rights." An inference, said the Court, that the parties intended such a limitation to the rights of the trustees may be desirable in the usual third-party situation where the promisor has no interest in the

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12 361 U.S. at 466.

13 Id. at 467.
beneficiary, but the collective bargaining agreement in this case "is not a typical third-party beneficiary contract." Benedict's interest in the fund was found to be as great as that of the union, not only because the two shared fund management, but also because, in jointly creating the fund with the union, the coal operator was providing another form of employee security from unemployment, illness, old age or death—"a commonplace of modern industrial relations."

An additional basis for denying to Benedict Coal the right to set off its damages against its obligations was the similarity the Court found between royalty payments and employees' wages. Since such payments were but "another form of compensation to the employees," to permit the set-off, the Court reasoned, would be to allow Benedict to recoup its damages by decreasing wages. Thus, concluded the Court, it could not be inferred that the parties to the agreement "intended that the trustees' claim be subject to offset."

Finally, the Court drew support for its decision from the "impact of the national labor policy" and "congressional intention." The Taft-Hartley Act provides that money judgments against a union obtained in a district court shall be enforced against the union only as an entity and against its assets. In answer to Benedict's claim to set off union damages against fund payments, the Court stated that the concern which Congress expressed in protecting union members from personal liability for union wrongs, over which they had no control, could be extended "with even greater force to protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in the conduct of union affairs." In short, Benedict held that the collective bargaining agreement, because affected with a public interest, was something more than the usual contract for the benefit of a third party. Traditional contract law therefore would not apply and set-off against the third-party beneficiary would not be permitted unless expressly provided for in the agreement.

A proper understanding of the decision requires consideration of several recent cases which sought to clarify the status of the collective agreement under existing labor laws. In Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., a union brought suit under section 301 of the Taft-Hartley Act to enforce the payment of wages fixed by a collective bargaining agreement and withheld from employees by Westinghouse. The Court held in dismissing the action that the right to sue for wages is an "individual right" of.

14 Id. at 468.
15 Ibid.
16 Id. at 470. (Emphasis added.)
18 361 U.S. at 470.
the employee and that section 301 granted no federal jurisdiction to entertain such suits by the union for a nonunion right.\textsuperscript{20} Therefore, unless diversity exists, an employee action would have to be brought in a state court.

An equally notable case, Textile Workers v. Lincoln Mills,\textsuperscript{21} held that under Taft-Hartley a union may enforce union contractual rights in the federal forum. Importantly, the case also established that section 301 of the act is not merely procedural in nature, but affords to the federal courts authority to fashion a body of federal law for the enforcement of collective bargaining agreements.

The rejection in Benedict of strict third-party beneficiary contract principles owes its origin at least in part to Westinghouse. In the latter case, had contract law been followed, the union as the promisee of the collective bargaining agreement would have had the right to sue the promisor to enforce payment of the beneficiary-employees’ wages,\textsuperscript{22} which had also been fixed by the agreement. A repudiation of strict contract law in construing collective agreements is readily justified in view of this case, for were third-party contract tenets narrowly followed, and had the employees sued for their wages, their action could be aborted by set-off of any damages owing to management by the union. This would be most unjust. Indeed the Benedict Court specifically mentions by way of dictum that set-off in this situation is not permitted.\textsuperscript{23}

The determination in the instant case that royalty payments will have to be made without the benefit of set-off urges a consideration of who would have a right to sue in a similar case to force Benedict’s compliance with its contractual obligation. In stating that “royalty payments are really another form of compensation to the employees,”\textsuperscript{24} the Benedict Court appears to suggest that these payments, which become due and owing as coal is produced, like wages are to be considered employee “individual rights” as that term is defined in Westinghouse.\textsuperscript{25} From this would arise a right in the employee to enforce payment by private suit, but as in Westinghouse, the suit could not be brought under section 301 of Taft-Hartley in the federal forum. In the instant case, suit was by the fund trustees, entering the federal court on grounds of diversity. Other beneficiaries of the fund, which like the collective agreement is industry-wide, are employees of other coal operators, retired miners and dependents of miners. Assuming the needed diversity, would these other beneficiaries—particularly those with a vested right to fund assets—be permitted to enforce in the federal courts Benedict’s collective agreement as to royalties? No case in point has

\textsuperscript{20} Id. at 460-61.
\textsuperscript{21} 353 U.S. 448 (1957).
\textsuperscript{22} 2 Williston, Contracts § 379A (3d ed. Jaeger 1959).
\textsuperscript{23} 361 U.S. at 469-70.
\textsuperscript{24} Id. at 469. The Court in fact expressly refrained from concluding that the same treatment necessarily should be accorded to royalty payments and wages, but failed to clarify the extent of this statement.
\textsuperscript{25} 348 U.S. at 460-61.
been found but with the carte blanche *Lincoln Mills* granted federal courts to fashion a body of federal law to enforce collective agreements, the possibility exists that such an action would be entertained, especially if the fund trustees failed to bring suit.

A more vexing question arises as to the right of a *union* to enforce employer payments due and owing a welfare fund under a collective agreement. *Benedict* likens fund payments to wages, while *Westinghouse* prohibits suits by a union under Taft-Hartley to enforce payment of wages withheld in violation of a collective agreement. Together these cases seem to negate a union right to compel an employer to make fund payments. Several lower federal courts which have faced the problem have arrived at different conclusions. *Local 90, Stove Mounters’ Union v. Welbilt Corp.* and *United Constr. Workers v. Electro Chem. Engraving Co.* both held that a union may bring suit under section 301 of Taft-Hartley as the right to sue is not a “uniquely personal right,” nor is the suit founded on a violation of contract provisions which so relate to compensation peculiar to individual benefit that the cause of action belongs to the individual employee. On the other hand, *Garfield Local 13-566 Oil Workers v. Heyden Newport Chem. Corp.* arose on the same facts as *Stove Mounters’* and *Electro Chem.* but held that section 301, because of the *Westinghouse* decision, precluded suit by the union.

Assuming that the reasoning used in *Stove Mounters’* and *Electro Chem.* is valid, the union would have a right to bring suit; yet if such reasoning had been applied in *Benedict*, the coal company would have been able to offset union damages against fund payments. Accordingly, it is submitted that in the light of *Benedict, Stove Mounters’* and *Electro Chem.* are not correct if they hold that a suit for payments owed to a welfare fund is a union right. But since the more desirable result is to allow a union to sue for the benefit of employees, should not *Westinghouse* be overruled or modified to permit a union action based on an individual, nonunion right?

Much of the difficulty in this area probably stems from adherence to the position that a collective bargaining agreement, as a contract, calls for the application of traditional third-party beneficiary commercial law. But it is apparent that collective labor agreements are sui generis, and contract law is to be applied only as an implement to construe them. Indeed, a leading authority on contracts suggests it be admitted that a new kind of beneficiary, a “labor beneficiary,” has emerged. He will have rights and be subject to defenses not applicable to the familiar creditor and donee beneficiaries.


Until the complex pattern of collective agreement relationships is complete, it may be anticipated that novel principles of law will continue to issue from the courts. An omen may be discerned in a recent statement by Mr. Justice Douglas, citing Benedict, "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."31 Cognizant of this expressed judicial intent and the problems highlighted by Benedict, one is justified in expecting that the development of this body of law will be rapid.

GEORGE F. STRADAR, JR.


The United Steelworkers Union appealed from decisions by the Fifth1 and Sixth2 Circuits denying its application under section 301 of the Taft-Hartley Act3 for specific performance of arbitration clauses of collective bargaining agreements and from a decision by the Fourth Circuit4 modifying a district court decree5 of full compliance with an arbitration award. In each case the union and the employer had a collective bargaining agreement which embraced a no-strike clause6 and a broad provision for arbitration7 as the terminus of the grievance procedure.


6 In the Enterprise case, the record did not disclose an express no-strike clause; however, it appeared that the parties treated the agreement as prohibiting the employees from striking. Brief for Petitioner, pp. 5-6 n.4, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
7 In the American case any disputes "as to the meaning, interpretation and application of the provisions of this agreement" were to be arbitrated. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 565 (1960). In Warrior, "should differences arise between the Com-
The dispute in United Steelworkers v. American Mfg. Co.\(^8\) arose out of a company refusal to reinstate a union member injured at his job, the company claiming that the worker was not physically able to do the required work and had received compensation benefits for a permanent partial disability. The union filed a grievance based on a seniority provision in the collective bargaining agreement contending that the worker was entitled to reinstatement. The union’s application for specific enforcement of the arbitration clause was denied on the grounds that the grievance was “a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties.”\(^9\)

The grievance in United Steelworkers v. Warrior & Gulf Nav. Co.\(^10\) arose when the company contracted out work previously done by union employees, thus precipitating a layoff of union members. The union charged that the company’s action violated a no-lockout provision of the collective bargaining agreement and was therefore a proper subject of arbitration. The company declined to arbitrate on the ground that contracting out work was strictly a function of management and, by express provision of the collective agreement, excluded from arbitration. The company’s contention was sustained by both the district court\(^11\) and the Fifth Circuit.\(^12\)

In United Steelworkers v. Enterprise Wheel & Car Corp.\(^13\) arbitration had been ordered in a dispute over the dismissal of eleven workers striking to protest the discharge of a fellow employee. The arbitrator found that the dismissal of the men was unwarranted even though their strike was improper. Although the collective bargaining agreement had expired, the arbitrator awarded reinstatement with back pay, minus pay for a ten-day disciplinary suspension for the improper strike. The district court ordered full compliance with the award\(^14\) but the Fourth Circuit held that since the collective agreement had expired, the subsequent reinstatement and back pay award could not be enforced.\(^15\)

The Supreme Court consolidated the cases for argument and announced the three decisions the same day as companion opinions. Held: (1) Where the

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\(^9\) 264 F.2d 624, 628 (6th Cir. 1959).
\(^10\) 363 U.S. 574 (1960).
\(^12\) 269 F.2d 633 (1959).
\(^13\) 363 U.S. 593 (1960).
\(^15\) 269 F.2d 327 (1959).
parties to a collective bargaining contract agree to submit all questions of contract interpretation to an arbitrator, a court’s function is solely to ascertain whether the claim of the party seeking arbitration is “on its face” within the agreement to arbitrate;16 (2) A particular dispute, unless clearly excluded from arbitration, will be considered arbitrable, all doubts being resolved in favor of arbitrability;17 (3) An arbitrator’s award, if based upon his own interpretation of the collective bargaining agreement, must be enforced by a court without inquiry into the merits of his construction.18

At common law, although an arbitrator’s award was usually held enforceable,19 an agreement to arbitrate would not be specifically enforced.20 With the passage of time, however, arbitration was recognized as a useful way to settle disputed terms in a commercial contract without having to resort to the expense of money and time involved in a law suit. Accordingly, statutes were enacted to provide for specific performance of arbitration agreements.21 But the rules governing commercial arbitration have long been recognized as inapplicable to the trade agreement.22 As stated more recently, an agreement to arbitrate grievances in a collective bargaining contract is quite unlike the ordinary commercial arbitration agreement, “for arbitration of labor disputes ... is part and parcel of the collective bargaining process itself,”23 and the collective bargaining agreement is “an instrument of government, not merely an instrument of exchange.”24

In Textile Workers v. Lincoln Mills,25 the landmark case in the enforcement of collective-agreement arbitration clauses, the Court failed to make this distinction. Here the Court was confronted with the vexacious language of the Norris-LaGuardia Act,26 which barred the use of injunctions in labor disputes,27 but circumvented the problem by finding that section 301 of the Taft-Hartley Act28 authorized the federal courts to enforce executory agreements

22 6 Williston, op. cit. supra note 20, § 1930.
27 E.g., W. L. Mead, Inc. v. International Bhd. of Teamsters, 217 F.2d 6 (1st Cir. 1954).
to arbitrate.\textsuperscript{29} To the lower federal courts was left the task of fashioning a federal substantive law in the field of labor arbitration, principally drawing precedent from "the policy of our national labor laws."\textsuperscript{30}

Although it had been wisely suggested that the "law stay out" of arbitration but "not the lawyers,"\textsuperscript{31} the courts continued to settle disputes which the parties had agreed to submit to an arbitrator.\textsuperscript{32} If a court felt that the answer to a grievance was readily apparent, it could refuse to order arbitration and rule on the merits, following what is known as the \textit{Cutler-Hammer} doctrine: "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."\textsuperscript{33} This judicial intrusion upon the domain of the arbitrator was not surprising, for the courts viewed the collective bargaining agreement only as an adjunct to the well-evolved law of commercial contracts;\textsuperscript{34} they failed to note its significance as an agreement governing an industrial way of life, to be interpreted in the light of the law of the shop and by an impartial umpire well versed in that law.

With this distinction in mind, the instant decisions attack the rôle the court had played in labor arbitration.\textsuperscript{35} The \textit{American} case rejects the \textit{Cutler-Hammer} doctrine and thereby precludes a court from weighing the merits of a grievance, if it determines, as the Sixth Circuit had done,\textsuperscript{36} that the dispute between the parties is over divergent interpretations of a specific article of their contract. If the petition to the court by its terms reveals a controversy over such an


\textsuperscript{30} 353 U.S. at 456.

\textsuperscript{31} Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1024 (1955).


\textsuperscript{34} See International Molders Union v. Susquehanna Casting Co., 283 F.2d 80 (3d Cir. 1960).

\textsuperscript{35} The Court adopted the reasoning of eminent labor law authorities: Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482 (1959); Cox, supra note 33; Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955).

article and the contract contains a broad, all-inclusive arbitration clause, arbitration must be ordered even if the petitioner's claim appears to be frivolous.38

Of course not every arbitration clause will be as broad as the provision considered in American. When the language of the clause is less extensive or a certain area is excluded from arbitration, the court will be called upon to determine arbitrability.40 In this respect the Warrior case seems to suggest, despite saving language to the contrary,41 that a court must find that the parties have agreed to arbitrate the particular dispute before it unless one of two conditions is fulfilled: (1) either an express provision excludes the dispute from arbitration, or (2) in the absence of an exclusion provision, conclusive evidence of such an intention may be gleaned from other judicially cognizable sources;42 in either event doubts are to be resolved in favor of arbitrability.43

This approach is the converse of that which the courts had heretofore been following.44

While American and Warrior are judicial guideposts in the enforcement of agreements to arbitrate, Enterprise stands as a landmark case to delineate a court's role in reviewing an arbitrator's award. In Warrior the Court noted that when parties agree to arbitrate they intend to bargain for the informed judgment of one versed in the practices of the industry, not for the opinion of a judge with his limited knowledge of the intricacies of the shop;45 the Enterprise doctrine effectuated this intent. No longer may a court overrule an arbitrator's interpretation and award because it differs with him on the correct

38 Volunteer Elec. Co-op. v. Gann, supra note 37, at 3055 (concurring opinion).
40 "The meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary." 363 U.S. at 571 (concurring opinion); accord, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1960).
41 "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 363 U.S. at 582.
42 It was noted that to determine such an intention, a court would have to examine "substantive" provisions of the agreement (i.e., provisions of the contract other than the arbitration clause itself), and courts were cautioned to "view with suspicion an attempt to persuade . . . [them] to become entangled in the construction" of such provisions. 363 U.S. at 585.
45 363 U.S. at 581-82.
meaning of the agreement or because it finds an ambiguity in his ruling.\textsuperscript{46} Thus were the “judicial bulls” effectively removed from the “delicate china shop” of labor arbitration.\textsuperscript{47}

The doctrines announced by the instant cases have become a part of the federal substantive law fashioned pursuant to \textit{Lincoln Mills} and are binding on all courts when they deal with arbitration in the field of labor-management relations.\textsuperscript{48} Since they reflect extreme departures from old precedents, they will obviously create new problems in the area. Undoubtedly, the industrial contract negotiating procedure will be vexed by infighting between the parties over broadening and defining the exceptions to be included in the arbitration clause. Courts will be met with the difficulty of integrating the new concepts into existing agreements negotiated at a time when an entirely different interpretation was intended.\textsuperscript{49} A distinguished authority in the labor field has suggested, by way of a caveat, that the powers granted the arbitrator are now so extensive that he might concern himself with any subject matter related to the shop, notwithstanding the parties’ specific exclusion of it from arbitration.\textsuperscript{50} This conclusion was based on the assumption that if the arbitrator writes no opinion, as he may choose to do,\textsuperscript{51} the court cannot determine whether his award drew “its essence from the collective bargaining agreement,”\textsuperscript{52} or whether he had improperly dispersed “his own brand of industrial justice.”\textsuperscript{53} But, as noted, the \textit{Warrior} doctrine permits a court, proceeding with caution, to examine the “substantive provisions” of an agreement to discover if there was “a purpose to exclude the claim from arbitration.”\textsuperscript{54} It would seem, therefore, that the courts exercising a like caution may examine these provisions to discover whether the arbitrator has improperly resorted to sources which would enable the court to refuse to enforce his award. Whatever may be the proper conclusion, the process of choosing arbitrators clearly will be more difficult since each party, naturally prejudiced to his own view, will more than ever before seek partiality in the all-powerful individual to be selected.\textsuperscript{55}

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\textsuperscript{50} Hays, The Supreme Court and Labor: October Term, 1959, 60 Colum. L. Rev. 901, 927-29 (1960).
\textsuperscript{52} Id. at 597.
\textsuperscript{53} Ibid.
\textsuperscript{54} 363 U.S. at 585.
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The instant cases present a new challenge of self-government to labor and management. Since, for all intents and purposes, judicial intervention into their contracts has been removed, the parties will be forced to work together in good faith, striving harder to resolve differences in pre-arbitration grievance settlements, and upon failure there, to abide by the ruling of the chosen umpire. An alternative of industrial strife with long and costly litigation should alone be sufficient to motivate both sides to meet the challenge successfully.

MAX H. CROHN, JR.

TRADE REGULATION—THE KNOWING INDUCEMENT OR RECEIPT OF DISCRIMINATORY ADVERTISING ALLOWANCES PROHIBITED BY SECTION 2(d) OF THE AMENDED CLAYTON ACT CONSTITUTES AN UNFAIR TRADE PRACTICE UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT. Grand Union Co., No. 6973, FTC, Aug. 12, 1960.

In 1952 respondent Grand Union Company initiated a sign promotion program consisting of a "combined electric spectacular and animated cartoon display" located in the Times Square area of New York City. Pursuant to an agreement concluded with Douglas Leigh, an advertising agency, respondent secured advertisers for the program, nearly all of whom were suppliers who distributed their products in respondent's stores. Respondent received for its services advertising space in the sign display which it could exchange for radio or television advertising. Later, under modified provisions of the contract, respondent received monthly rentals from the sale of its advertising time and a percentage of the payments made by advertisers to the advertising agency. Many suppliers were given specific assurances of in-store promotional services for their products in respondent's stores in return for participation in the sign display.

In 1957 the Federal Trade Commission issued its complaint against respondent charging that it had violated section 5 of the Federal Trade Commission Act by knowingly inducing or receiving from suppliers special payments and benefits which were not made available on proportionally equal terms to respondent's competitors. The hearing examiner in his initial decision held that many of the advertising allowances paid by the supplier-advertisers to and for the benefit of respondent were violations of section 2(d) of the Robinson-Patman Act, and that respondent by the knowing inducement or receipt of


3 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1958) [hereinafter referred to as the amended Clayton Act]. The pertinent paragraph of section 2(d) reads as follows:

[I]t shall be unlawful for any person . . . to pay . . . anything of value to or for the
such payments was guilty of an unfair trade practice within the meaning of section 5 of the Federal Trade Commission Act. Respondent was ordered to cease and desist from the conduct declared to be illegal. Respondent appealed to the Commission alleging that the Commission could not reach practices under section 5 which were not specifically declared unlawful under the amended Clayton Act. Held, the knowing inducement or receipt of discriminatory advertising allowances prohibited by section 2(d) of the amended Clayton Act constitutes an unfair trade practice within the meaning and scope of section 5 of the Federal Trade Commission Act.4

A frequent Commission practice of the past has been to enforce its authority under section 2(d) in proceedings against suppliers for the payment of discriminatory advertising allowances to their customers.5 In recent years the Commission has attempted to enlarge the scope of its enforcement powers in this area by initiating complaints charging buyers with section 5 violations in the inducement of practices declared illegal under section 2(d).6

The payment of discriminatory advertising allowances under section 2(d) has been uniformly interpreted as a per se offense.7 Congress considered the offense of such pernicious character that it banned the practice outright, leaving unrequired any showing of anti-competitive effect.8 But, it has been suggested,9 Congress inadvertently failed to include an additional prohibition against inducement of section 2(d) violations in section 2(f)10 of the amended Clayton Act. Section 2(f) has in consequence been generally11 restricted to the knowing inducement of direct or indirect price discriminations which have been declared illegal under section 2(a).12 Moreover, doubt has been expressed as

benefit of a customer of such person . . . as compensation . . . for any services or facilities furnished by or through such customer in connection with the . . . sale . . . of any products . . . by such person, unless such payment . . . is available on proportionally equal terms to all other customers competing in the distribution of such products . . .

5 E.g., General Baking Co., 38 F.T.C. 307 (1944).
8 Kelley, Should the Law of Section 2 Be Revised?, CCH Robinson-Patman Act Symposium-1948 at 114, 125.
9 Id. at 124-25.
10 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (1958). Section 2(f) provides: "[I]t shall be unlawful for any person engaged in commerce . . . knowingly to induce or receive a discrimination in price which is prohibited by this section."
to whether section 2(f), as worded, can be extended to cover the many "services" and "facilities" included within the meaning of section 2(d).\textsuperscript{13}

The issue before the Commission in the instant case was whether it was within its power under section 5 to prohibit a practice that it found to be in violation of the policy of the antitrust laws, although the practice had not been specifically prohibited by law. Included within this question was whether a per se offense—knowing inducement of 2(d) violations—could be determined under section 5 without any showing of competitive injury.

In answering these questions affirmatively the Commission invoked the broad grant of authority under section 5 found by the Supreme Court in FTC \textit{v. Motion Picture Advertising Serv. Co.},\textsuperscript{14} and earlier rulings.\textsuperscript{15} In \textit{Motion Picture Advertising} the Court declared that the Commission could proceed under the Federal Trade Commission Act "to supplement and bolster the Sherman Act and the Clayton Act . . . ."\textsuperscript{16} The Court found such supplementary authority to be essential for the arrest of practices promising in incipiency to violate one of these acts upon maturity. In the instant case the Commission applied this "incipiency doctrine" and concluded that the inducement of discriminatory advertising allowances was the beginning stage of a later violation of the amended Clayton Act—payment of discriminatory advertising allowances to buyers by suppliers.\textsuperscript{17} The Commission also relied upon the broad interpretation of section 5 contained in the Supreme Court decision of Fashion Originators' Guild \textit{v. FTC},\textsuperscript{18} where the Court had given effect to the Commission's power to suppress any practice as an unfair method of competition if its purpose was contrary to the public policy declared in the Sherman and the Clayton Acts. The Commission found the practice in question in the instant case to be in violation of the policy of the amended Clayton Act, although it had not been specifically prohibited by law.

In rejecting respondent's contention that Congress had intentionally excluded this practice from the proscriptions of the amended Clayton Act, and had thus precluded the Commission from declaring the practice illegal under another law, the Commission placed great emphasis on the legislative history of the act.\textsuperscript{19} It was observed that the main design of Congress was to curb the predatory use of bargaining power by large buyers and to prevent the use of buying power for purposes of exacting discriminatory concessions from suppliers. The Commission was unable to find any congressional intent not to declare the practice in question unlawful and, in such absence, thought

\begin{itemize}
\item \textsuperscript{13} Kelley, supra note 8, at 126 (window display advertising).
\item \textsuperscript{14} 344 U.S. 392 (1953).
\item \textsuperscript{15} E.g., FTC \textit{v. Cement Institute}, 333 U.S. 683 (1948).
\item \textsuperscript{16} 344 U.S. at 394.
\item \textsuperscript{17} No. 6973, FTC at 10-11.
\item \textsuperscript{18} 312 U.S. 457, 463 (1941).
\item \textsuperscript{19} No. 6973, FTC at 6-8.
\end{itemize}
the Federal Trade Commission Act could properly be extended to proscribe discriminatory practices which were related to those specifically prohibited by the amended Clayton Act.20

The dissent challenges this conclusion with respect to the Commission's authority under section 5.21 This challenge is similar in theme to the claim that the Commission has replaced the courts as the ultimate judge of what is an "unfair method of competition."22 A series of Supreme Court cases23 beginning with FTC v. Gratz24 held that whether unfairness obtains or not is a determination ultimately residing in the courts. In these cases, charges under section 5 were set aside because there had been a failure of any showing of competitive injury or tendency to monopoly threatened by the trade practice in issue. But the more recent Supreme Court decision in the Motion Picture Advertising case reflects a complete departure from the Gratz ruling. There the Court stated that the "precise impact of a particular practice on the trade is for the Commission, not the courts, to determine."25 The rationale of the decision was that the point where a method of competition becomes "unfair" was dependent upon particular trade and business factors in the individual situation which it was the Commission's function to evaluate. The question of what is an "unfair method of competition" had devolved from a question of law for the courts into a question of fact for the Commission.

The dissent in the instant case attacked the Commission's ruling as an arbitrary exercise of power, and it maintained that the Commission had no authority to apply to a buyer's practice a per se doctrine which Congress had only directed against the seller.26 None of the cases relied upon by the Commission provided precedent supporting the failure to show probable competitive harm, and only express legislative sanction could authorize the Commission's finding of a per se offense. The dissent concluded further that the "incipiency doctrine" was inapplicable because the practice in question here was not an "incipient" violation of the Sherman or the Clayton Acts. Finally the dissent submitted that it was unable to find any authority allowing the Commission to declare as "unfair methods of competition" all practices which did not conform to such vague standards as "the policy of the anti-trust laws" or "the spirit of the amended Clayton Act."27

20 Id. at 10.
21 No. 6973, FTC at 3-4. (Pagination of the dissenting opinion is independently numbered.)
24 253 U.S. 421, 427 (1920).
25 344 U.S. at 396.
26 No. 6973, FTC at 3-4.
27 Ibid.
This charge of arbitrary power is justifiably leveled where the Commission has resorted to section 5 in an attempt to reach practices which Congress has consciously excluded from an expressly applicable provision of the Clayton Act. For example, in *FTC v. Eastman Kodak Co.* the Commission had sought to enlarge its remedial powers under the Clayton Act's section 7 anti-merger bans, which were confined to the acquisition of stocks, by declaring unlawful under section 5 of the Federal Trade Commission Act the acquisition of assets as well. In refusing to permit this extension of authority the Supreme Court reasoned that Congress had defined the boundaries of illegality in the express provisions of the Clayton Act and that excepted conduct could not be declared unlawful under section 5.

The instant case lies in a more sensitive area of discretion, *i.e.*, where section 5 is used to prohibit the inducement of conduct declared illegal per se under the amended Clayton Act. In declaring the practice of inducement unlawful, the Commission appears to have implemented the spirit of the Robinson-Patman amendment, for its main legislative design, as the Commission observed, was to protect against mass-buyer coercion—as it existed in specific discriminatory practices. It is evident that the Commission was guided by the legislative recognition that buying power was considered the source of the evil and the seller "an innocent victim compelled usually in self-defense to grant the concessions demanded."

The Commission's application of a per se standard against the buyer under section 5 would therefore appear to be a further manifestation of its desire to effectuate legislative intent. It can be argued that the buyer's inducement and the seller's payment are so closely related in cause and effect that a consistent standard must be applied to both practices. Furthermore, it would be contrary to the legislative policy, as expressed in the Robinson-Patman Act, to require a showing of competitive injury against the buyer, whom Congress considered "the source of the evil," while maintaining a per se standard against the "innocent" supplier who has usually acted in self-defense.

Of course, any justification that might exist for the Commission's application of a per se standard against the buyer's inducement does not erase the inherent dangers that accompany such wide authority. Moreover, although the Commission has acted in accord with legislative intention, the assumption does not automatically follow that per se standards in the area of discriminatory advertising allowances are defensible. In fact, the standard of illegality in section 2(d) has been severely criticized and remedial legislation has been suggested to restore a more reasonable rule.

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28 274 U.S. 619 (1927).
30 No. 6973, FTC at 6-9.
31 Id. at 7.
32 Oppenheim, Should the Robinson-Patman Act Be Amended?, CCH Robinson-Patman Act Symposium—1948 at 141, 145.
However vague the pronouncement may be, the Commission's authority under section 5 "to supplement and bolster" the Clayton Act is established and, in no small measure, has expanded through the use of the "incipiency doctrine" which allows Commission action before any real anti-competitive injury occurs. The dissent's position that the charge must be, but was not in the instant case, founded upon an "incipient" violation of the Clayton Act unduly curtails the Commission's supplementary enforcement powers under section 5; under this restricted view the Commission would be unable to proceed against practices which coercively induce violations under the amended Clayton Act unless there were specific authority in the act to do so.

In affording the Commission a stronger hand in enforcement of Robinson-Patman provisions, the decision in the instant case has the additional virtue of timeliness, for the Commission has recently initiated a large scale investigation of alleged 2(d) violations in the food industry. Since June 1960, more than 400 orders to food corporations have been sent out under the authority of section 6(b) of the Federal Trade Commission Act, requiring these organizations to submit special reports on their trade activity. Additionally, more than 200 questionnaires seeking information on receipt of promotional allowances have been issued to major food chains. The present decision clearly amplifies the Commission's power to proceed against those trade-regulation violations which the forthcoming reports and replies may be expected to disclose.

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33 38 Stat. 721 (1914), 15 U.S.C. § 46(b) (1958). The pertinent paragraph of section 6(b) permits the Commission:

To require . . . corporations engaged in commerce . . . to file with the commission in such form as the commission may prescribe . . . reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing.

BOOK REVIEWS

The federal antitrust laws have been credited with suppressing monopolies in the American economy. However, they have not halted the growth of so-called oligopolistic situations in many sectors of our economy where a few corporations dominate the market, determine output and price. Oligopolies held together by agreements, combinations, or conspiracies are vulnerable to attack under the antitrust laws, but the statutory provisions were never designed to provide a net which would snare corporations who maintain their relative power positions in the market by “conscious parallelism,” a policy of watching the opposition and reacting to keep in step.

The Department of Justice has tried to extend application of section 2 of the Sherman Act1 to cover these oligopolies, but without great success.2 Statutory deficiencies cannot be made up by prosecuting diligence. Now Harvard Professors Kaysen and Turner3 have forged an axe designed especially to get at the root of the oligopoly problem. They would outlaw unreasonable market power, regardless of how acquired, and provide for dismantling that power where possible and necessary. As the Sherman Act makes no such provision at this time, the authors recommend appropriate amendatory legislation.

The title to this book would indicate that it contains an objective analysis of antitrust policy as stated in the statutes, as interpreted by the courts and enlightened by the legislative history. Such is not the case. The book contains the authors’ notions of what antitrust policy should be, an analysis of the extent to which such policies are at present being attained and the judicial and legislative reforms necessary to meet their standards. The title might more aptly read “Recommended Antitrust Policies and How They Might Be Carried Out.”

The authors begin with an analysis of certain evidence, derived from 1954-census data, relating to the value of shipments of products primary to each census industry. This study persuades them that structurally oligopolistic markets exist in large and important sectors of

3 Dr. Turner is Professor of Law; Dr. Kaysen is Professor of Economics.
the economy in the United States, particularly in manufacturing. Although the character of the available data requires the employment of rude procedures to classify products and markets in any meaningful way, the authors have supported their contentions as to the existence of significant oligopoly situations. Their economic conclusions provide the quantitative background for the policy recommendations that follow.

The authors suggest four alternative general goals for antitrust policy: (1) limitation of the power of big business; (2) performance (in the sense of achieving efficiency and progressiveness); (3) “fair dealing”; and (4) protection of competitive processes by limiting market power.\(^4\) Of these goals—all of them economic—the authors choose the last as the most desirable and feasible guide. They suggest that “the primary goal of antitrust policy be the limitation of undue market power to the extent consistent with maintaining desirable levels of economic performance.”\(^5\) To attain this goal the authors “propose amendments to the antitrust laws that would (1) enable a direct attack on undue market power without regard to the presence or absence of conspiracy in the legal sense, and (2) severely limit forms of conduct that contribute to, or are likely to contribute to, the creation of undue market power.”\(^6\)

From this it can be seen that the principal purpose of their statutory revisions is to get at the “unreasonable market power” of oligopolies which now escapes the antitrust laws due to the absence of an agreement or conspiracy essential to a Sherman Act charge. The authors would approach the existing oligopoly situation either by undertaking a short-term drive to crop the market power of existing corporations \(à la\) the Public Utility Holding Company Act of 1935,\(^7\) leaving it to the remaining legislation, particularly the anti-merger provisions, to block the recurrence of the oligopoly power. Or they would permanently amend the present legislation so that it would apply both to present conditions and future developments. The authors would permit their Procrustean program to be carried out either under a statute generally defining market power and requiring a fairly extensive economic inquiry in each case, or by employment of an arbitrary statutory standard more easy of application and potentially harmful.

“A firm possesses market power when it can behave persistently

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\(^5\) Id. at 45.
\(^6\) Ibid.
in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.\footnote{Kaysen & Turner, Antitrust Policy: An Economic and Legal Analysis 75 (1959).}

The defendant would, upon proof that it has market power, have the burden of showing that the market power is "reasonable" because based on economies of scale, patents, or new processes, products or marketing techniques. Market power not proven to be reasonable would be deemed unreasonable and, as a consequence, subject to remedial action in the form of dissolution or divestiture.\footnote{Id. at 81.} Such Draconian remedies are to be mitigated to avoid substantial cost in terms of economic performance.\footnote{Id. at 80.} However, by throwing the burden of proof on the defendant, doubts would be resolved in favor of reducing power rather than maintaining power.\footnote{Id. at 82.}

In order not to suppress growth possibilities entirely, the authors would permit firms to grow to any size so long as it is done through diversification and achieved by internal growth rather than by merger.\footnote{Id. at 86.}

The authors would retain the per se unlawful categories of restraints of trade developed by the courts. This would include agreements among competitors to limit production, divide markets or boycott third parties. But as the authors would eliminate intent as an element of proof in cases of unreasonable market power (the existence of such power would be the standard not its genesis), they would limit the criminal provisions of the Sherman Act to per se offenses. They would limit private treble-damage suits to the same narrow list of activities. Given the premises adopted by the authors relating to market power, these recommended statutory changes are internally consistent.

To back up their prohibitions on unreasonable market power, the authors recommend certain other statutory changes relating to price-fixing and price-influencing agreements, mergers, patents and collective refusals to deal and would set up a special court for adjudicating monopoly cases and other Sherman Act cases in which divestiture is sought. Review would be by direct appeal to the Supreme Court of the United States. For an extended anti-oligopoly program, a new prosecuting administrative agency would handle matters before the special court.

The authors would repeal the Miller-Tydings\footnote{50 Stat. 693 (1937), 15 U.S.C. § 1 (1958).} and Robinson-Patman
price discrimination in narrowly defined circumstances and to make "cost" a more easily available defense.

Taking their policies in hand, the authors test the laws and case decisions to see how their policy goals are met at the present time and how their policies could be applied to handle problems of size, integration, mergers, patents and price discriminations. To show their comprehension that antitrust policies sweep across the whole economy and at times conflict with other arms and aims of the federal government, brief commentaries are included on the rationale of government-granted exceptions from the antitrust laws, and the role of taxation, tariffs, government procurement programs and aid to small business in promoting or hindering competition.

The authors obviously appreciate many of the difficulties inherent in the market-power standard which they propose. Their work has been carefully done and reflects years of consideration of the defects of the present antitrust laws and the problems of oligopolies.15 A short review of their work unfortunately lends the impression of arbitrariness where the authors actually qualified their assertions and an air of positiveness where doubts have been expressed. With this caveat in mind, I shall attempt to point out certain basic problems which in my view inhere in the authors' proposals and which have not been satisfactorily answered. First, as to the general style employed by the authors, the use of technical economic terminology is bound to make uneasy the non-economist reader who fears that there is little truly scientific in the efforts of economists forecasting the future impact of a recommended course of legislation. It must be possible to write on economic matters without being tedious.

The authors, both of whom are educated as economists, assume that the goals of the antitrust laws can be stated in terms solely of economics. I find that I am unable to agree with any such proposition. Economic aspects of competition are but one facet of a complex jewel just as anatomy tells us only a little about a man. Struggles against monopolies and restraints of trade are found in Anglo-American history at least since the Middle Ages. In early times the problem was expressed in terms of morality. "The ideal of the Common Law was a moral ideal: honest manufacture, a just price, a fair wage, a reasonable profit. To

supply a bad article was morally wrong, to demand excessive payments for goods or for labour was extortion, and the right and wrong of every transaction was easily understood.16 This ideal later became tarnished if not indeed largely abandoned as the economy and society became more complex. But the problems of trade regulation were not considered reducible to mere economic goals as late as 1890 when the Sherman Act became law. Congress chose to express its views in a "charter of freedom"17 having a "generality and adaptability comparable to that found to be desirable in constitutional provisions."18 The antitrust goals, in my view, are concerned with the interplay of the rights and duties of individuals and of society with all of the breadth and complexity that such concepts entail.

Turning now to the recommendations of the authors, it is not self-evident that the market-power criterion, if legislated, would be an improvement over the present law. While adoption of a market-power standard may permit the dissolution of oligopolies, would it improve competition? This is conjectural. Firms in oligopolistic sectors of the economy would probably refrain from undertaking measures to improve productivity or increase sales for fear of making themselves eligible for the guillotine. During the lengthy litigation requisite to dissolving firms offending the new statute, management would soft-pedal competitive activities to reduce evidence of market power.

In order not to pen-up completely managerial talent of large corporations, the authors would not challenge the size of an enterprise, so long as the corporation expanded internally and through diversification. But I submit that it is a curious notion of how to improve competition to shove giant corporations with enormous capacity to generate capital and to weather competitive fights into areas of the economy which at present might be characterized by small firms. As viability is the ultimate standard of success, the small firm is often at a distinct disadvantage in the face of superior financial resources.

The recommended employment of a special court and a new prosecuting administrative agency are a useful adjunct to the authors' economic solution of the oligopoly problem. The dragons to be slain are never so vividly apparent as in the first days of a new federal agency. Men of vision, ability, ambition and frustration flock to the new agency, exhilarated by the challenges apparent in a well-marked and well-stocked

17 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).
18 Id. at 360.
The spirit of public interest fed by the congressional hearings on which the new legislation is based burns brightly. The urge to tinker on a vast scale with the American economy draws all the talent required for the job and, no question about it, vast inroads can be made into the oligopoly market-power situations before enthusiasm is blunted by second thoughts about the wisdom of chosen remedies, and a realization of the complexities of the problems. But I am not sure that speed will be possible in view of the vast economic problems which would have to be considered. And unlike the 1930's there is now in existence a large, experienced corps of attorneys and businessmen able and willing to combat government agencies and unconvincing that central control of any portion of the economy is prima facie wise or well advised.

The authors are confident that the economy will survive the needed blood-letting. True, the modern corporation appears to remain vigorous under a mounting burden of government regulations, but there can be no question that given a constant amount of manpower and attendant equipment, the more time and energy that has to be devoted to contending with government regulations, the less there is for economic endeavors.¹⁹

The authors are apparently willing to risk the appointment of the right type of judge to the special court which would have jurisdiction of all cases in which dissolution might be a remedy. Intransigent judges could ruin their program. By contrast, under the present setup the entire enforcement of the antitrust laws does not depend upon the economic and social notions of a single panel of judges.

In a time of growing concern as to how management of giant corporations is to be made accountable in view of the wide gulf between ownership and corporate control, it seems a step backwards to recommend now that the criminal penalties of the antitrust laws be stringently limited to the narrow compass of per se offenses. There can be no question that the antitrust laws have been most effective in the private counsels of corporations in dissuading conduct which might lead to an indictment. That effectiveness will be reduced as the scope of criminal penalties is narrowed.

Considered as a separate proposal, the recommendation that private treble-damage suits be likewise limited to per se offenses is a high price to pay for efficiency in combatting oligopolies. From the early days when Justice Department antitrust budgets were very meager, the Government has looked to private suits as a very useful co-partner

in enforcement of the antitrust laws. True there were very few such suits in the first fifty years of the Sherman Act. But that is no longer the case. Many are the defendants in federal suits who have conserved the Government's energies for other prosecutions by agreeing to a consent decree rather than run the risk of conviction and consequent private treble-damage suits.

Admittedly the present method of regulating trade under the federal antitrust laws is less efficient than the well-organized, freshly honed instrument of regulation the authors have in mind. But it is my view that the deadly efficiency which the authors seek to give to the antitrust laws by introduction of the concept of unreasonable market power would recoil and bring down a demand for suppression of the antitrust laws. Judge Wyzanski shrewdly observed:

They [the courts] would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at the immediate realization of the social, political, and economic advantages of the dispersal of economic power.20

Like juvenile delinquency, the antitrust problem is one that can never be said to be solved. The dramatis personae to whom the law applies constantly changes. The social, political and economic framework within which the law operates changes subtly. Consequently, constant attention is needed to keep the antitrust laws in a state where they best serve society.

I agree with Professor Edward S. Mason in his preface to this book that it requires an unusual degree of temerity to present the public with another study of antitrust policy, particularly with a study that proposes substantial legislative amendment. However, it is sometimes said that progress is effected only by those who are dissatisfied with things as they are. For the merit that may be in their proposals, Professors Kaysen and Turner deserve a hearing and an equally well-considered response.

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The United States has entered into more than one hundred and thirty commercial treaties during the years since 1778, the first treaty with France. These treaties represent the most pervasive commitments made by the United States concerning the entry of persons and their treatment in the United States—their right to work, their taxation, their access to courts, the protection of their property, their right to inherit, their right to worship—as well as their vessels and goods. Since most of the provisions of these treaties are self-executing, i.e., intended to have effect as domestic law without the necessity of securing supplementary domestic legislation, they are important in defining legal rights not only as between countries, but also as between governments and persons and between citizens and aliens.

This book by Professor Wilson, the first which has appeared on American commercial treaties, is therefore doubly welcome. It represents the first effort by an able scholar to examine systematically some of the more important provisions of the commercial treaty. As a consequence, perhaps it will quicken interest among American lawyers who have, by and large, shared the insularity of their countrymen during the past century and a half regarding an instrument which has had growing importance in recent years as its scope has expanded. It is not unlikely that further critical study will also be encouraged since the present work does not purport to be an exhaustive analysis of all provisions of the commercial treaty.

Professor Wilson's book consists rather of nine substantive chapters, each dealing with selected aspects of the treaty: those relating to entry of aliens, right to work, property protection, exploitation of natural resources, internal taxation, right to form and conduct companies, judicial remedies, religious freedom, and obligations regarding military service. Among others, those provisions of the treaty which are concerned with treatment of goods, vessels and navigation, commercial arbitration, monopolies and restraints of trade are dealt with unsystematically or not at all. About half the chapters are adapted from articles by Professor Wilson which originally appeared in the American Journal of International Law, and that on "Companies" represents an adaptation of an article in that publication by Dr. Herman Walker, who along with Professor Wilson has made the commercial treaty a field of specialty.

These chapters are very useful. Each traces the historical development of the particular provisions under study and mentions, mostly in
footnotes, American judicial opinions construing and applying them. While emphasis is upon descriptive and historical material, and not upon critical analysis, the material is well organized and will be of great assistance to the analysis needed in the application of treaty provisions to particular facts.

The book makes clear that the dominating characteristic of the modern American commercial treaty is the establishment of a regime of non-discrimination between alien and citizen over a wide area of activity; that such a non-discriminatory pattern of behavior encourages international trade and friendship; and that in overwhelming part the treaty records and binds the existing domestic laws of the treaty-partners and does not contain new and dramatic innovations in the domestic legal regime of the countries concerned. More ambitious efforts along multilateral lines have been attempted from time to time but have foundered because they have failed to consider that mutuality of interest which is required before commitments can be made between nations of uneven resources, history, and patterns of thought. Such efforts have also failed to recognize that a nation's domestic laws represent a distillation of the policies resulting from its internal struggles among competing interests, and are therefore not likely to be brittle under outside pressures. The American commercial treaty has recognized these facts of life, has innovated only marginally, and has served to preserve a wide area of equal treatment among aliens and citizens against the continuing erosion which inward-looking nationalism unremittingly generates.

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BOOKS RECEIVED


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