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I am indeed privileged to communicate these few thoughts to the readers of this, the first issue of the Northern Kentucky State Law Forum. In the shorter view perhaps an apology is appropriate for the creation and distribution of still another legal publication in a professional field already saturated with the promulgation of scholarly research. In the larger view, apology is not only inappropriate but entirely contradictory to our objective of advancing the body of knowledge of the legal profession. I am sincerely committed to the proposition that the Northern Kentucky State Law Forum will make substantial contributions to legal science as its issues manifest the efforts of contributors in the areas of legal research. Every law review conjures up an image of the issuing school in the minds of its readers. Those of us associated with this law review intend to portray a handsome image to our relatives in the legal profession. We have dedicated our imaginations, our energies and our resources toward this end.

The publication of the Law Forum at this point in time is primarily due to the efforts of Professor Anthony Zito, Associate Professor of Law, who suggested approximately one year ago that some “experimentation” be undertaken to ascertain when a quality law review could be expected to be published by the College of Law. The fact that the law school has only a night division suggested that a scholarly publication was impractical because of conflicting demands on students for day employment. As a result, the original “experimentation” looked forward to the publication of an internal journal with development into a law review when the day division was established in the Fall of 1974. However, the experimentation developed such eagerness and enthusiasm in the students that a “law review” became not only possible but highly desirable at a time earlier than anticipated. It should not be unexpected that a worthwhile goal generates enthusiasm and accomplishment in geometric progression, but I am still surprised when the goal is achieved in such a short time.

It is fitting and proper that this first issue of the Law Forum be dedicated to Professor Zito and that initial group of eager and enthusiastic students who transformed experimentation into full-blown law review activity. The Faculty, Administration and Alumni of Chase College of Law herein acknowledge their appreciation and thanks to those initiators.
A final note is in order. The first issue of the Law Forum would not be possible at this time without the help of the Benefactors Club of the Alumni Association. The entire cost of this issue has been underwritten by the Benefactors. All of us are indebted to them for their faith in, support of, and dedication to the programs of the Salmon P. Chase College of Law of Northern Kentucky State College.

W. Jack Grosse
Dean
College of Law
THE ORIGIN AND DEVELOPMENT OF
THE SALMON P. CHASE COLLEGE OF LAW*

C. Maxwell Dieffenbach**

The Salmon P. Chase College of Law is an accredited part-time law school of approximately 500 students devoted to a progressive and cooperative policy in the advancement of legal education. Chase recognizes the necessity of many students for full-time employment to pay all or the greater part of their law school expenses. It is an affiliate of Northern Kentucky State College and, in addition, is further supported by an endowment fund, grants and student tuition, governed by a board of trustees and operated by a faculty of 14 full-time and 30 part-time instructors. The law library has about 51,000 volumes.

The school, since 1917, was located in the Central YMCA Building in downtown Cincinnati at Central Parkway and Elm Street. Since the summer of 1972, it has been situated at the Northern Kentucky State College campus in Covington. A 1961 survey indicated that its graduates represented approximately 25% of the Cincinnati Bar Association and 32% of the attorneys in the Cincinnati Legal Directory.

"The Night Law School" and "The YMCA Law School" were familiar names used in the past. They were abbreviations for "The Night Law School of the McDonald Educational Institute of the Young Men's Christian Association of Cincinnati." In 1943 the present name became effective and honored Salmon P. Chase, a Cincinnatian who served as Governor of Ohio, U.S. Senator from Ohio, Secretary of the Treasury under Lincoln and Chief Justice of the United States.

THE BEGINNING YEARS 1893-1916

The Cincinnati Commercial Gazette on September 13, 1893, broke the news that a "Night Law School" had been established as a branch of the Cincinnati and Hamilton County YMCA. Seventeen students appeared for the first class on October 16 in the Tower Room of the, then new, YMCA Building at Seventh and Walnut Streets (presently, the Shubert Theatre). Within a few weeks the class enrollment increased to thirty-nine.

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** Professor of Law, Northern Kentucky State College; B.S.C.E., University of Alabama; M.A., University of Cincinnati; J.D., Ohio Northern University; Member of Ohio Bar.
The missionary work of Robert M. Ochiltree made this announcement possible. As the first dean, he guided this new approach to legal education over a rough and unfamiliar path so that by the end of his tenure in 1916, part-time legal education had achieved a solid position in our legal system. His tools were:

1. The same curriculum and study materials used in the full-time day law schools.
2. Judgment, persistence and a personality that inspired other members of the bench and bar of outstanding professional reputation to come to the aid of this struggling new venture.
3. Students who fully realized their opportunity and responded with enthusiasm and diligence.

This son of a prosperous Indiana farmer and quarry owner learned the trades of farming and stone-cutting during his youth. Studies at Valparaiso University earned him a license as a public school teacher, and he taught for several years prior to enrollment in the Cincinnati Law School from which he received his LL.B. in 1892. Mr. Ochiltree then returned to his father's farm to harvest a crop of wheat he had previously sown and to teach there during the 1892-1893 school year to repay debts incurred for his legal education.

The indebtedness paid off, he returned to Cincinnati in May of 1893, to devote his life to the legal profession. After interviewing various Queen City law firms, he formed an association with Mr. James D. Henry with offices at Third and Walnut Streets. During these interviews he found the son of one lawyer studying for a special examination to be taken in the fall which permitted entrance to the Cincinnati Law School with advance standing.

When he learned of others attempting the same task, he was moved to organize a group of similar "hopefuls" and conduct a special course of study during that summer geared especially to this examination. A necessary and helpful qualification was supplied in the form of a letter of recommendation by the Hon. Jacob D. Cox, dean of the Cincinnati Law School, specifically endorsing him as a qualified instructor. His previous teaching experience and his background as a recent law graduate stimulated a high interest from the students.

He soon realized the need for a part-time program for students desiring admission to the bar but without sufficient means to sustain the full-time study of law as was the requirement in the law schools of that day. The other side of such a venture was the creation of a part-time teaching opportunity for himself and other members of the bench and bar who had the time, aptitude and interest to contribute to their profession.

"The YMCA Night Law School," (no publisher) written in 1943, by Ochiltree as a "Memoir" (and so cited herein) strongly indicates on
ORIGIN OF CHASE

pages 15, 20 and 23, that he was under the impression he was founding the first part-time “night” law school in the United States. It probably was the second, following the 1887 founding of the Chicago-Kent College of Law, now an affiliate of the Illinois Institute of Technology in Chicago. Actually, “Chase” was the first night YMCA law school in the United States and the fifth law school founded in Ohio, being preceded only by the Cincinnati Law School in 1833—Ohio Northern University in 1885—Ohio State University in 1891—and Case-Western Reserve University in 1892.

The Cincinnati and Hamilton County YMCA had recently moved into its new structure at Seventh and Walnut Streets. Knowing it had for some time been sponsoring classes and lectures of an educational nature, Ochiltree presented it with the opportunity to enlarge its offerings by including an evening law course. The reluctance to accept was apparent from the unusual requirement that the enrolling students be charged only the $5.00 per year YMCA membership fee, no part of which was to go to Ochiltree. Ochiltree comments on this situation:

“Evidently the students soon came to feel that the law course promised results for at the end of the first two months (just before the Christmas holidays) they presented me with an envelope containing five twenty dollar gold pieces. It was a surprise event in the tower classroom. The President (YMCA), Mr. William McAlpin, and Mr. Howser engaged me in conversation in the office, while the class assembled and made ready for the surprise. I accepted it as an expression of interest and personal compliment; also another “hurdle,” similar to those set up in the newspaper item announcing a night law school. The attendance kept up remarkably well, and in the following May, the class was duly photographed on the high entrance steps of the building.” (Memoir p. 11)

The Salmon P. Chase College of Law pioneered a new concept in legal education. The structure and growth during the beginning years now becomes important, a summary of which follows:

Entrance Requirements

They were similar to those of the day law schools. A high school diploma or the equivalent was required, yet it was not unusual to find applicants with college attendance or even a degree or two. Judge Frederick L. Hoffman, a member of the first class, who had an A.B. from Bates College of Lewiston, Maine, and had recently come from Boston as an Instructor at the Franklin Preparatory School, exemplified this. Judge Hoffman enjoyed a distinguished judicial career and devoted much of his time to the Law School. He was a member of the faculty for forty-eight years and served as
President of the Alumni Association until June of 1940. In 1955, when a chapter of the Phi Alpha Delta Law Fraternity was installed at the Law School, it was identified as the "Hoffman Chapter."

Curriculum

This was designed to extend over a three year period with classes meeting on Monday, Wednesday and Friday to permit study time on alternate nights. Ochiltree started out with a four night class arrangement, but after two years it was dropped. In the fall of 1895, the three night schedule was adopted as being one that would achieve more efficient use of time both by faculty and student. A tribute to the wisdom and foresight of the founder is the fact this same study plan has withstood the test of time and is presently in use, not because of tradition but due to its proved effectiveness.

The three year part-time plan covered the same course of study as the two year full-time degree course prevalent in day schools at that time. Ochiltree's division of twenty-one subjects to cover this material continued to 1919 when the four-year plan was adopted. It is difficult to translate Ochiltree's degree program into the present day fifty-minute hour equivalent, but a fair estimate would be forty-eight semester hours. The study materials included Blackstone's Commentaries (American Edition by Cooley), Kent's Commentaries (Holmes Edition) and Anson on Contracts (American Edition). As Dean Ochiltree phrased it:

"... we stuck strictly to the study and discussion of the above learned writers on the common law of England and America, and laid the foundation of a course of study to be extended to include all the subjects taught in the standard law schools." (Memoir p. 9)

A day department was tried in 1903, but was soon abandoned for lack of interested students.

Degree-Granting Authority

In 1900 the State of Ohio approved the YMCA as a degree granting institution. The Law School's first commencement was held on June 28, 1900, when the degree of Bachelor of Law was conferred on sixty-five candidates. Graduation requirements included admission in the Ohio Bar, and commencements were purposely set late in June so examination results would be available to determine eligibility. Twenty-two of the sixty-five degrees went to the "Class of 1900," all of whom had passed the bar examination earlier that month. The remaining forty-three LL.B. degrees were received by members of the classes previous to 1900. The requirement of admission to practice was last listed in the bulletin for the school year 1918-1919.
During the twenty-three Ochiltree Years, a total of five hundred students were admitted to the Bar and the graduating classes varied in number from five to forty-one with an average of twenty-two members.

Library and Tuition

As noted earlier, the tuition in 1893, was $5.00 per year and covered the cost of YMCA membership, none of which went to the Law School. This was raised to $10.00 per year in the fall of 1894; $5.00 going to Ochiltree for faculty honorariums and costs of maintaining the school. While the library received book donations from many sources, beginning in 1896, $2.00 of the tuition going to Ochiltree was set aside for the library fund, which increased with future tuition raises. From this fund and outside contributions, library accumulations grew to 1,000 volumes by 1906, and to more than 2,000 volumes at the end of the Ochiltree regime in 1916. By 1906, tuition had reached the magnificent sum of $40.00 per year, of which $22.00 went to salaries for the dean and faculty. In 1911, it rose to $50.00 per year with an additional examination charge of $5.00; this continued for the remainder of the period.

Faculty

Ochiltree taught all classes for the first two years. In the fall of 1895, with an enrollment of 106 spread over all three years, he enlisted the aid of Thomas H. Darby, Judge of the Court of Common Pleas 1919-36, and Charles P. Mackelfresh, a member of the first class who accelerated his study and was admitted to the Ohio Bar in the summer of 1895. During this period of twenty-three years, Dean Ochiltree and twelve other faculty members taught the full semester program to an enrollment averaging 126 students, varying from 105 to 157. The following judges and attorneys serving on Ochiltree's faculty at various times are well remembered today for their many contributions to Cincinnati, generally, as well as to their profession:

Judge Coleman Avery  Frank M. Coppack
Judge Howard Ferris  Charles A. Groom
Judge William A. Geoghegan  Rankin D. Jones
Judge Frederick L. Hoffman  Albert H. Morrill
Judge Howard C. Hollister  William V. Muller
Judge Lewis M. Hosea  John R. Schindel
Judge James Garfield Stewart  Walter Schmitt
Judge Charles E. Weber  Walter M. Schoenle
Judge Moses F. Wilson  Constant Southworth
Judge Dan Thew Wright  Charles F. Williams
Frank F. Dinsmore  William H. Wittacker
James S. Ermston
The Ochiltree years came to a close by a merger wherein the YMCA Night Law School became the Evening Department of the Cincinnati Law School. On August 1, 1916, a bulletin entitled "The Evening Department of the Cincinnati Law School" was issued. It set student registration for any time after September 14, and classes to begin on September 21, 1916. Page 4, in part, read:

"On August 1, 1916, the Faculty that formerly conducted the Cincinnati YMCA Night Law School became the Faculty of the Evening Department of the Cincinnati Law School. . . ."

Also on page 3, Ochiltree was listed as dean, and immediately following was the faculty consisting of ten of the twelve members of the YMCA faculty shown in that school's bulletin for the year of 1915-16. Apparently, the YMCA did not consider this a valid merger, as the Night Law School also issued a bulletin the latter part of August stating:

"Registration may be made at the office of the Y.M.C.A., corner of Seventh and Walnut Streets, at any time after September 1st, between the hours of 8:30 A.M. and 10:00 P.M."

At this time drastic administrative changes occurred. Rather than a dean, three directors of the YMCA, who were members of the bar, were designated as the officers of administration. The faculty listed eighteen members of the bench and bar, none of whom had appeared in the bulletin for the previous year. An opening meeting for students and faculty was scheduled for September 20, in the YMCA Assembly Hall.

Up to now the relationship existing between Ochiltree and the YMCA was one of contractual arrangement with Ochiltree holding an effective control over the academic and administrative responsibilities of the Law School. With the end of the Ochiltree regime these functions became a part of the YMCA and were carried out in accord with the general policy of that organization.

As the beginning of a phasing-out program, the Evening Department of the Cincinnati Law School did not accept a freshman class of 1917. This freed Ochiltree of his academic obligations and permitted him to work entirely on his growing law practice.

YEARS OF STRUGGLE 1916-1951

The YMCA approach to education had been focused on what might be referred to as training. The Law School Bulletin of 1923-1924, illustrated this in the attention it drew to the offerings in other, more practical, subject areas. The basic reason for its involvement in this field was to help young people develop job skills and im-
prove their financial status by spare time study. Also, it was the intent of the YMCA to offer courses not available in the local schools and at a cost within the means of most families. It did this by influencing able teachers to give their spare time at little or nominal compensation, emphasizing reward in the thought of helping others. This concept is shown by the following sentence in the same bulletin:

"The United YMCA Schools stand for a quarter of a century of successful spare-hour teaching and are in a position to give the most service for the least money."

This effort by the YMCA was a great public service and many young people were immeasurably benefited by the courses offered, but trying to fit a law school into this framework involved heated controversy and heroic compromise. Ochiltree and the Law School deans following him were repeatedly faced with obstacles when trying to make changes in the Law School operation to meet innovations being adopted by the "day" schools. Dr. Raymond P. Hutchens, Dean of Chase Law School 1951-1968, for a doctoral thesis (University of Ottawa, 1960) made a study of the operation of a law school within the organizational structure of the YMCA and expressed his conclusion as:

"It is evident from this study that it is impossible to operate an accredited college level educational program within the conventional pattern of organizational structure of the YMCA and conform to the standards required by the recognized educational authorities. It is possible, however, for an educational institution to retain an affiliation with the YMCA and comply with the requirements of the college accrediting agencies if the YMCA grants broad powers of administrative authority to those directly responsible for the operation of the educational program." (Page 141)

The struggle under Dean Ochiltree involved controversy and compromise. As at least he did have direct communication with the Board of Directors. For several years (1916-1918) following his departure, the Law School was operated by three members of the YMCA Board acting as officers of administration. They completely and effectively integrated the Law School into the YMCA structural organization. This left the deans who followed with the struggle of attempting to run a law school as powerless instruments of the Board. The YMCA hierarchical procedure required the dean to submit the recommendations to the Educational Director who submitted them to the Executive Secretary of the Central Branch. Next they were given to the General Secretary who eventually presented them to the Board. Such remoteness granted little, if any, opportunity for effective advocacy on the part of the dean. The partial or limited autonomy of the Ochiltree regime was lost, but the fact that the Law School
continued to show a profit, even during the depression, plus the prominence of its faculty and the influence of its alumni provided a sufficient security to guarantee its survival.

This, however, was not enough. Forces outside the area of YMCA influence were setting standards for legal education and the institutions providing it. These standards did not take on authoritative significance until 1924, when the various states started the adoption of such standards by requiring a candidate for admission to practice be a graduate of a school "approved" by the Section of Legal Education of the American Bar Association.

While the Ohio Supreme Court did not adopt them, it was apparently influenced by these standards when it raised the pre-legal educational requirement to two years of college undergraduate work in 1925 (effective October 15, 1927) and, in 1935 amended its Rule XIV, Admission to the Bar (effective July 1, 1939), by requiring all candidates for the bar examination to be graduates of a "recognized" school. For an Ohio institution, the definition of a "recognized" school was that it be a member of the League of Ohio Law Schools. Out-of-state schools had to be approved by the A.B.A. or its equivalent. If a candidate for the Ohio Bar Examination was from a school in another state, not approved by the A.B.A., the Court designated the Secretary of the League to determine, after inspection, that school's equivalence. This made the League of Ohio Law Schools (referred to hereafter as the League) the Court's arm for accreditation in Ohio.

Merton L. Ferson, Dean of the University of Cincinnati Law School, and Grauman Marks, Chairman of the Legal Education Committee of the Ohio Bar Association, were largely responsible for bringing the League into existence. Its purpose was to upgrade legal education in Ohio by adopting quantitative and qualitative standards for the law schools, eliminating the system of law office apprenticeship, and establishing a bar examination consistent with a modern law school curriculum. The League looked to the Association of American Law Schools for its standards but decided not to adopt the Association's requirements for full-time law teachers and law libraries. It was basically interested in setting minimum standards for all law schools in Ohio, both day and evening, so that a candidate for the bar examination would have a reasonably high proficiency in general law as well as that of a specific jurisdiction. This recognized the value of part-time legal education and provided assurance that it would not be inferior to that of the full-time programs. Stanley A. Samad, Dean of the University of Akron School of Law, identified the specific areas of upgrading:

"The standards that were adopted were designed to effectuate the following ends; to eliminate the proprietary aspects of legal education
in Ohio; to require a curriculum in evening schools equivalent to that of the day schools, with a minimum of 1080 hours of classroom instruction in law, and with the elimination of courses designed to coach students for the bar examination; to insure satisfactory academic standards; to limit the admission of 'special students,' that is, those with less than two years of formal college education; to provide an adequate law library, the implementation of which was left to the Executive Committee; to require complete individual records for each student showing period of attendance, grades, credentials for admission, and administrative action affecting the student, to prevent students dismissed at one school from continuing at a second school; to require adequate plant facilities and reasonable educational practices."

(10 Western Reserve Law Review 234, March, 1959)

On June 20, 1934, the YMCA Board of Directors authorized the Law School to become a charter member of the League. Such membership subjected the School to an inspection based on the League's standards. The teeth needed for an authoritative investigation were provided by the Ohio Supreme Court's requirement that membership in the League and compliance with its standards were necessary for an Ohio law school to achieve the status of a "recognized" school so that their graduates would be eligible for the bar examination.

The first inspection revealed many poor practices; for instance, five schools had less than 3,000 volumes in their library and one school had no library at all. After several inspections, by the fall of 1941 all twelve schools were in compliance. Except for the years of World War II, biennial inspections were conducted in all Ohio schools.

Now that state accreditation had been accomplished, national accreditation came under serious consideration by both the Law School and the YMCA Board, probably the most important reasons being:

(1) The surpluses realized by the Law School due to returning veterans.

(2) The Court of Appeals in Kentucky by 1945, had adopted the A.B.A. requirement of an "approved" school for admission to the Bar of that state. This development would prohibit Chase graduates from taking the Kentucky Bar Examination, affecting a large part of our student population.

(3) The amount of veterans' benefits were geared to the accreditation status of the institution providing the instruction.

(4) The growing number of Ohio law schools with A.B.A. approval (a majority by 1950) kept pushing for equivalent League standards.

In February of 1948, Dr. Raymond P. Hutchens, then Educational Director, submitted a report of the deficiencies of the Law School in
meeting A.B.A. standards and urged that immediate action be taken to grant a greater degree of Law School autonomy looking to eventual A.B.A. accreditation by:

(1) The establishment of a separate Board of Regents, with YMCA representation, to accept the responsibility for complete operation of the Law School.

(2) Provide the authority for this governing body to control the expenditure of Law School surpluses.

After many months of conference, debate and compromise, the YMCA Board of Directors on June 22, 1949, passed a resolution setting up a committee to devise a plan to carry out such autonomy as needed to obtain national accreditation and to hold surpluses arising after January 1, 1949, for Law School use. Much work by all interested parties was devoted to this project which included an unofficial inspection by the A.B.A. in February, 1950. Dr. John C. Hervey, advisor to the Section of Legal Education of the American Bar Association, in his unofficial report emphasized the importance of the Law School's having authority to operate its own affairs completely separate and apart from the YMCA administrative policy, and that all surpluses created by the Law School be devoted exclusively to its use.

Eventually, on July 25, an amendment to the YMCA Articles of Incorporation was approved which gave not a completely independent entity by separate incorporation as was desired, but a partial autonomy acceptable by the A.B.A. Section of Legal Education and a much higher degree of freedom than ever realized during the Ochiltree regime. It provided for a separate Board of Regents with reasonable YMCA representation, which had authority over all phases of the Law School's operation.

This was an achievement worth the struggle! This act by the YMCA Board of Directors well shows their profound interest in the survival and growth of the Law School and a realization that for a successful future it must operate outside the structural organization of the YMCA.

The Law School's life and development during this period of struggle are interesting and illustrate not only survival but also accomplishment by use of a rationally motivated persistence.

Entrance Requirements

From 1893 to 1951, the pre-legal educational requirements set by either legislative or court rule were adopted and followed as they became effective. In summary they were:

(1) A high school diploma or the equivalent from 1893 through September, 1926.
(2) One year of college from October, 1926 through September, 1927.
(3) Two years of college after October 15, 1927.

The A.B.A. increased its pre-law standard to three years of college, effective in September, 1952. Chase, with its strong desire for national accreditation, followed this lead and raised its admission requirements to this standard in September, 1951. The Ohio Supreme Court later adopted the three-year college prerequisite with an effective date of January 1, 1954.

Curriculum

As the new dean, Gilbert Bettman convinced the YMCA Board that the LL.B. program should be extended to four years, and the bulletin for 1919-1920, carried this new standard for those entering in September, 1919. The Court revised its Rule XIV, in 1923, to include this requirement of four years of study for all part-time law schools and those studying under a tutorial program. Dean Bettman’s experiences and suggestions were influential in this forward step made by the Ohio Supreme Court.

The new four-year program immediately advanced the graduation requirement to 64 semester hours; by the middle thirties, gradual additions forced it up to the League’s standard of 72 hours. An overriding desire for national accreditation and a healthy parity position as to curricula offered by the day schools resulted in a further increase to 81 semester hours for students entering in September, 1951. Summer sessions provided the opportunity to earn the additional nine hours.

Library and Tuition

The League of Ohio Law Schools inspected Chase for the second time in September, 1939, and listed 5,204 law volumes in our library. This was an increase of approximately 3,200 volumes over a twenty-three year period. The war years and lower enrollment (1942, 71; 1943, 72; 1944, 53; 1945, 84) did not stimulate interest in increasing library accumulations.

The League was dormant during this period but immediately revived its pressures following the end of World War II, and Chase responded. The 1948 inspection revealed a count of 5,977 volumes, which was only a 773 volume increase for the 10 years since the 1939 inspection—but the next biennial inspection in 1950, noted total volumes as 8,722; a 2,745 volume increase in 2 years. This 47% increase in so short a time illustrated the strong interest by both the YMCA and the Law School in retaining state accreditation and obtaining future approval by the A.B.A.

Starting with a $50 per year tuition at the beginning of this period, there was a gradual increase over the years until by September, 1951,
it had reached $253 per year. The sharpest advances occurred between 1947 and 1951.

**Faculty and Enrollment**

This period started with Robert S. Fulton, Charles C. Benedict and Milton Sayler, all YMCA Board members and attorneys, acting as officers of administration for the Law School. They continued as the executive authority until Charles C. Benedict was made dean in 1918. He retired in the spring of 1919, when Gilbert Bettman accepted the deanship and held it for the next 10 years. Dean Bettman's appointment as Attorney General of Ohio necessitated his resignation on October 16, 1929.

Floyd C. Williams assumed this office on that date and held it until April 15, 1936, when Judge Stanley Matthews succeeded him and continued in that capacity until the end of this period. A completely new faculty was selected for classes beginning in September, 1916. By the end of this 35-year period, 92 members of the bench and bar had given generously of their time and experience as instructors, the following for 15 years or more:

- Leo J. Brumleve, Jr.
- Judge John C. Dempsey
- Judge Edward T. Dixon
- The Hon. Charles H. Elston
- John N. Gatch
- Loren G. Gatch
- Judge Robert N. Gorman
- Michael G. Heintz
- Judge Frederick L. Hoffman
- Lester Auer Jaffe
- Judge Bert H. Long
- Judge Stanley Matthews
- Judge Thomas H. Morrow
- James B. O'Donnell
- Carl Phares
- Judge Simon Ross
- Judge Louis J. Schneider

The enrollment for these years of depression and war varied from a low in 1944 of 53 students to a high in 1949 of 418; the median being 162 and the average 174. The graduates totaled 1,059 with a low in 1944 of 6 and a high of 73 in 1950, both the median and average being 30 per class.

**YEARS OF TRANSITION—1951-1971**

The 1952-53 bulletin announced the organization of the Board of Regents under the leadership of Judge Louis J. Schneider, Class of 1915, as Chairman. At the same time, Judge Stanley Matthews became Dean Emeritus, Dr. Raymond P. Hutchens, Class of 1948, was promoted to Dean of the Law School and Stanley E. Harper, Jr. and Frederick W. Mebs were added to the faculty as the first full-time instructors. A concerted effort was then made to obtain national accreditation.
On March 9, 1954, the Section of Legal Education of the American Bar Association provisionally approved the Law School. Two years later it was provisionally approved by the New York State Board of Regents, and in 1959, full approval was granted by both accrediting authorities. The autonomy granted by the YMCA had set a climate within which Judge Schneider, Dean Hutchens and the Board of Regents could and did operate to accomplish this long sought goal.

The next objective was complete independence from the YMCA by a separate incorporation under the laws of Ohio as a non-profit, educational institution. This was realized in September, 1968, during the deanship of C. Nicholas Revelos; the moving force being Harold J. Siebenthaler, Class of 1914, then Chairman of the Board of Regents.

These years of struggle for national accreditation and independence involved many changes in the character of the Law School.

Entrance Requirements

In September, 1955, admission requirements were raised from three years of college to a bachelor's degree from an approved school, but it was still possible to enter with a minimum of 90 college credit hours “in exceptional cases of high academic achievement.” As of January 1, 1960, the Ohio Supreme Court Rule XIV, required a bachelor's degree; this terminated all opportunity for admission with less if an opportunity to try the Ohio Bar Examination was desired. Due to its general acceptance by the accrediting authorities, the Law School Admission Test designed and administered by the Educational Testing Service of Princeton, N. J. became an admission requirement as of September, 1965. Previously, the Iowa Legal Aptitude Test was administered by the Law School following student enrollment.

Curriculum and Degree Change

The degree program was increased from 81 to 84 semester hours in September, 1954, and to 90 hours in the 1963-64 bulletin, but back to 84 hours in 1970. Revisions were made in curriculum; additional offerings of public law courses and electives permitting in-depth study of particular areas of interest were scheduled during the third and fourth years and in the summer sessions. The 1957-1958 bulletin announced a mandatory comprehensive examination as a graduation requirement, but this was discontinued in May, 1965.

After an extensive study, the American Bar Association advocated a change from the Bachelor of Law (LL.B.) degree to that of Juris Doctor (J.D.) as the first degree in law. In line with a general adoption by the law schools, Chase first granted the Juris Doctor to the Class of 1962. Upon application the J.D. was then made avail-
able to all former graduates in lieu of their LL.B. On November 15, 1968, at the diamond (75th) anniversary celebration of the Law School's Alumni Association, more than 350 graduates returned to receive the Juris Doctor degree.

The Law School conducted an extensive Continuing Legal Education program from 1955 until 1963, when the Ohio and Cincinnati Bar Associations exercised active leadership in this field.

Library and Tuition

The drive for national accreditation put strong emphasis on a rapid increase in accumulations and acquisitions for the library. At the time of provisional approval by the A.B.A., in 1954, 11,000 volumes were in the stacks; this total was gradually increased to 20,000 volumes in 1965, and 40,000 volumes had been acquired by June of 1971. This increase in library holdings was financed largely by a library fee which began in 1951 at $5.00 per semester per student and in 1958 advanced to $5.00 per course where it has remained. Tuition gradually increased from $12.50 per credit hour in 1951 to its present rate of $40.00 per hour.*

Faculty and Enrollment

Dr. Hutchens succeeded Judge Matthews as dean in 1952, and was followed by C. Nicholas Revelos in 1968. He held office until the spring of 1970, when W. Jack Grosse, Class of 1962, succeeded him. The full-time faculty started with two instructors (Harper and Mebs) in September, 1952, and increased to ten by the end of this period in 1971. This reduced the hours taught by part-time men so only C. Robert Beirne and Bernard J. Gilday, Jr., achieved a 15-year teaching record in this period, but Carl Louis Meier, Milton M. Bloom and Dunham Matthews would be added by combining their teaching time in this and the previous period.

At this time, however, recognition must be given to the following members of the bench and bar with a teaching record of 25 years or more since the founding of the Law School:

- Judge Frederick L. Hoffman
- Judge Stanley Matthews
- Judge Edward T. Dixon
- Judge Bert H. Long
- C. Robert Beirne
- Lester Auer Jaffe
- Judge John C. Dempsey

In 1955, Col. Harry T. Klein, Class of 1909, past Chairman of the Board of Texaco, Inc., and a faculty member from 1916 to 1921, made a gift of Texaco stock which resulted in the creation of the Chase College Foundation, a major endowment of the Law School.

* This is the rate for Kentucky residents. The rate for non-Kentucky residents is presently $45.00 per hour.
The School enrollment has varied during these years from 143 students in 1957 to 449 in 1971; the average being 228 and the median 222. A total of 753 graduates received their law degree in those 20 years; the average and median being 38 students per class.

**Affiliation**

Even before full accreditation was achieved, pressure was being exerted for Chase to obtain larger and more suitable physical facilities and to affiliate with a recognized institution of higher learning.

Under the leadership of Chairman Siebenthaler and Dean Grosse, a merger agreement was executed on July 9, 1971, with Northern Kentucky State College and was approved by the Council on Public Higher Education of the Commonwealth of Kentucky on July 26, 1971.

The merging law component was named The Salmon P. Chase College of Law of Northern Kentucky State College. The physical move of the Law School to the present site of the Northern Kentucky State College in Covington was completed in the summer of 1972 and law classes officially commenced at that site in September of that year.
EVIDENCE: THE PENITENT-CLERGY PRIVILEGE

By James K. Gaynor*

I. INTRODUCTION

The thought that a priest, rabbi, or minister might be forced to testify as to what had been told him in confidence by a penitent would be reprehensible to most Americans. Nevertheless, the penitent-clergy privilege did not come from the common law as we inherited it from England.1

Its development began in New York, according to Dean Reese, who wrote a comprehensive treatment of the subject.2 A Roman Catholic priest was permitted to claim the privilege in 1813 but four years later, a Protestant clergyman was denied the privilege because his denomination did not require confession in the sense that it was a part of Roman Catholic doctrine. The result was the granting of the privilege by statute in 1828 to all clergy with respect to confessions made in a professional character “in the course of discipline enjoined by the rules of practice of such denomination.”

The seal of the confessional has been a basic tenet of Church doctrine since the dawn of the Christian era. The Roman Catholic priest who violates the secrecy is subject to immediate excommunication which can be revoked only by papal authority.3 The layman waiting to confess who overhears the confession of another and repeats it would be guilty of a very serious sin.

In 1393 a Bohemian priest, Father John Nepomucen, since canonized, was martyred by King Wenceslaus IV because he refused to reveal what had been told him in the confessional by Queen Sophie.

There is a legend that a French priest spent many years on Devil’s Island because a murderer had confessed a homicide to him and then accused the priest of the crime and caused his conviction. The murderer finally confessed on his death bed and the priest was exonerated.

II. STATUS OF THE PRIVILEGE

The privilege seems to have disappeared in England after the Reformation. Dean Reese quoted the Archbishop of Canterbury

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1. 8 J. WIGMORE, EVIDENCE §2394 (McNaughton rev. 1961).
3. CODE OF CANON LAW, CANON 2369.
as saying that it could not be sanctioned in the canon law of the
Church of England until Parliament changes the law of evidence.4

The privilege spread among the American states and has been
granted by statute in all of the states except Alabama, Connecticut,
Mississippi, and New Hampshire. There are no decided cases on
the privilege in these jurisdictions.5 In most cases, the statutes
limit the privilege to communications made in the course of discipline
enjoined by the rules of the denomination of the clergyman.

There are very few reported cases relating to the privilege prob-
ably because, as related by Dean Reese in giving the reason for
enactment of the Delaware statute,6 the controversies which caused
the clamor for enactment did not reach the appellate level.

Only one serious criticism of the privilege has been found in a law
review article. Quoting *obiter dicta* by Mr. Justice Murphy, the
writer concluded that the privilege violates the First Amendment.
He also quoted earlier *dicta* by Mr. Justice Field that the con-
fidentiality of the confessional should be protected.7

The writer of the article, a law professor, concluded that “the
courts should find that the priest-penitent privilege as typically
applied is unconstitutional.”8

Mr. Justice Murphy, a Roman Catholic, had said in passing that
the freedoms of speech and religion are subject to any requirements
for the essential operation of government, including compulsion to
give evidence in court.9 It hardly can be said that Mr. Justice
Murphy was quoted out of context, but it may be speculated that
he really did not realize the impact of what he was saying.

*An Amazing Example*

A leading case involving the privilege arose in the District of
Columbia in 1958.10 A woman was charged with cruelty to her
children by chaining them to a bed. Wishing to receive communion,
she confessed to her minister who was of a Protestant denomination
which recognized but did not require confession.

5. Citations to the statutes are in a comment, *Privileged Communications Between
Clergy and Penitent—Need of Statute in Mississippi*, 39 Miss. L. J. 324. Texas
adopted such a law after this comment was published; *Vernons Ann. Civ. St. Art.
3715a* (1967).
7. *Totten v. United States*, 92 U.S. 105 (1875). This case involved an action
for services as a secret agent during the Civil War. In holding that public policy
would forbid such a suit, other examples of privileged communications were given
including disclosure of confidences in the confessional.
8. R. Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—
(1942) (concurring opinion).
Her minister was called as a character witness on her behalf and was horrified to hear her testify under oath that she had not chained her children to the bed. The minister sought a private conference with the trial judge, apparently after considerable soul-searching, and told the judge about the confession. The minister was called as the court’s witness and testified as to the confession without objection.

The conviction was reversed for other reasons, but a majority of the appellate court seemed just as horrified at the breach of confidence by the minister as the minister seemed to have felt when he heard the accused’s perjury.

Proposed Uniform Rules

Only a few of the states have adopted comprehensive codes of the rules of evidence and it was not until late in 1972 that the Supreme Court prescribed Rules of Evidence for United States District Courts and Magistrates.11 These will become effective when the Congress expresses its approval, which is pending as of this writing.

The American Law Institute adopted a Model Code of Evidence in 1942. It provided for the privilege, but included in the section was the following language:

(2) A person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing a communication if he claims the privilege and the judge finds that (a) the communication was a penitential communication . . . and (c) the claimant is the penitent, or the priest making the claim on behalf of an absent penitent.12

This would imply that the clergyman or penitent would have to reveal the communication to the trial judge who then would determine whether the evidence should be inadmissible as privileged. One writer, in commenting upon this provision, said:

The communication must be of “culpable conduct . . . by a penitent.” It would seem to be of questionable propriety for the judge to have to dig into enough details of the confession to be able to make such a preliminary determination before upholding the privilege. Moreover what is meant? — is it criminal conduct or merely immoral? — does it apply to blamable conduct in the tort sense even though not ethically wrong? Will any judge try to find out? 13

It may be observed that neither the Model Code of Evidence of the American Law Institute, nor the Model Code of Evidence drafted

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by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1953, have been free from criticism.

A more recent proposed rule is Rule 506 of the *Rules of Evidence for United States District Courts and Magistrates* entitled "Communications to Clergymen," which is as follows:

(a) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

A note of the Advisory Committee which drafted the rules states that state statutes fall in both narrow and broad categories, and that the committee believed the latter to be more appropriate.14

III. APPLICATION OF THE PRIVILEGE

The decided cases in which the privilege has been allowed are far fewer than those in which it has been denied.15

In a Minnesota case, a Lutheran minister was cited for contempt of court for refusal to testify in a divorce proceeding by a woman as to what her husband had confessed. In reversing the lower court and dismissing the contempt order, the court found that the husband had talked to the clergyman in his professional character so the communication was privileged.16

Rather unusual circumstances were involved in a case decided by a federal court sitting in Iowa. The plaintiff brought an action for defamation against his wife and two other women. The wife, a Roman Catholic, sought a separation from her husband and gave

15. The cases are collected in 22 A.L.R. 2d 1152 (1952).
confidential information to a priest and this was corroborated by the statements of two others as, said the court, was required by Roman Catholic procedure. There was no indication that the information was given in the confessional and the husband sought discovery of what the three had told the priest. The court held that the penitent-clergyman privilege applied. 17

In a paternity action in Indiana, the unwed mother, a Roman Catholic, spoke to her priest about the matter, although it was not in the confessional. The communication was held to have been privileged since she spoke to the priest as her pastor. 18

The father of a fourteen-year-old girl in Iowa brought an action to recover damages for carnal knowledge of the girl which resulted in her giving birth to an illegitimate child. Before the child was born, she was called before the Presbyterian Church session consisting of the pastor and three ruling elders. She confessed, and the defendant sought the substance of the confession. It was held that under the Confession of Faith of the Presbyterian Church, the communication was privileged. 19

Denial of the Privilege

Both Missouri and Arkansas have statutes which provide that the statement be made in the course of discipline enjoined by the rules of the denomination to be privileged. In a Missouri case, statements to a minister were held not to have been privileged because the minister was of a different denomination than the person making the statement, 20 and in an Arkansas case, which involved the contest of a will, the decedent made penitential statements to a minister and said he would like to join his church but apparently did not. The statements in the Arkansas case, which included sorrow for adultery, were held not to have been privileged. 21

In an Iowa case, an accused was charged with conspiracy to injure the morals of a woman. One defendant met a minister in a railway station although he was not a member of that minister’s church. The defendant gave the minister his version of what had happened, seeking to justify himself. He then asked for spiritual assistance and comfort. The court held that the minister could testify as to what he was told before the defendant asked for spiritual assistance and comfort but that the rest of the communication was privileged. 22

In the contest of a will in Kansas, where there were two different wills by the deceased, he had been visited by a priest while in the

20. State v. Morgan, 196 Mo. 177, 95 S.W. 402 (1906).
hospital. Information he gave the priest as to the location of one of the wills was held not to have been privileged. 23

A man charged with bigamy in Nebraska called his pastor, the rector of an Episcopal Church, to the jail and asked him to intercede with his lawful wife for settlement of the criminal proceedings. This communication was held not to have been privileged. 24

In Wisconsin, a Roman Catholic priest received an anonymous letter about a fire which purposely had been set. The letter purported to be a confession and the writer asked the priest to publish it in order to exonerate others. When the arsonist was apprehended and tried, the communication to the priest was held not to have been privileged. 25

In New Jersey, one Cevetello, who had stabbed a man in the early hours of the morning, went immediately to a Roman Catholic convent to see Sister Margaret, who had been one of his school teachers. He took Sister Margaret and another nun to the scene of the stabbing and they then took him to the police station. Sister Margaret gave a statement to the police but when called before the grand jury, she refused to testify, claiming the penitent-clergy privilege. Her contempt citation was affirmed. 26

An Arkansas man charged with assault with intent to commit rape sent a letter to his pastor requesting prayers for him and the letter tended indirectly to be a confession of the charge. Over objection, the letter was admitted in evidence. In affirming the conviction upon appeal, the court said that the letter was not pursuant to a duty enjoined by the rules of practice of that particular church. 27

Kentucky has a statute similar to that of Arkansas. One Johnson, accused of homicide, was visited in the jail by a Methodist minister on the night of the homicide and told the minister, "I lost my temper and killed him." The statement was held to have been admissible because there was nothing in the record to indicate that it was penitential in character or in the course of discipline of the minister's denomination. 28

An action was brought in Minnesota to recover damages for the wrongful death of a woman who was riding as a passenger in an automobile driven by the defendant. The deceased's child was riding in the car. Her pastor called upon the child in the hospital twice "prepared to give spiritual advice or comfort if the occasion required . . . but none was asked." The child told him about the occurrence and said that her mother called a warning just before the collision.

The child, upon direct examination at the trial, testified that no warning was given. The minister was permitted to testify about the conversation with the child in the hospital.29

In a most unusual New Jersey case, a woman brought an action against a Roman Catholic priest for slander. A witness was permitted to testify that while confessing to the priest, he called the witness and other named persons devils and said they were half-way in hell.30

In considering these eleven cases in which the privilege was denied, there seems no question that the courts ruled correctly in most of them. Under the new federal rule, however, the evidence would have been inadmissible in some of the cases, possibly the Missouri case, the two Arkansas cases, and the Kentucky case. As for Sister Margaret, there was no privilege. It comes from the power of absolution in the sacrament of penance in Roman Catholic doctrine, and the power to absolve in the confessional is given only to bishops and priests.31 In the New Jersey case involving slander, it was the penitent who could claim the privilege rather than the priest and it was in the interest of the penitent to testify.

IV. PROBLEM AREAS

The new federal rules, as indicated by the advisory committee,32 take a broad view. It is the conclusion of this writer that they take the broadest possible view. However, a vast majority of the cases come under state law and the states are not bound by the federal rules in this respect.

The federal rule grants the privilege if it is "to a clergyman in his professional character as spiritual adviser" and "to other persons present in furtherance of the purpose of the communication." The writer was involved in a case in which an accused visited a chaplain’s office, where a Roman Catholic priest and an Episcopalian priest were seated together, and confessed to having committed an offense. Would the privilege apply? Conceivably, had he gone to each individually and confessed, it would have applied at least in some states. It is not difficult to conclude that the privilege did not apply, even though he may have been seeking spiritual advice.

The writer once knew a married couple who both were ministers of the Nazarene Church and together conducted revivals. Suppose a member of their church went to their home, and speaking to both of them and seeking spiritual solace, confessed having committed a crime. Should this communication be privileged? It most certainly

would be under the federal rules and it is submitted that even under the strictest state rules, it should be privileged. 33

Can the privilege be waived by the penitent if it is to his advantage? Roman Catholic theologians agree that it can be, although the matter is not specifically set forth in the Code of Canon Law. Scholars of other faiths with whom the matter has been discussed agree, and it certainly would be permissible under the federal rule.

If the privilege is waived by the penitent as to part of his confession, does this open the door to other matters confessed by him but as to which he does not waive the privilege? Reason would indicate that it would not open the door.

In the attorney-client privilege, if one communicates with his attorney in the hall of the court house in such a loud voice that others overhear the conversation, the privilege is waived. 34 If a Roman Catholic is waiting to confess and overhears the confession of another, should he be permitted to testify as to what he heard, even though he is willing to suffer the sanctions of the Church? It would appear that under the federal rule, the privilege would remain, and it is submitted that in a state court, he should not be permitted to testify as to the penitential communication.

A prospective client may visit an attorney and be told at the outset, "I fear that I may have a conflict of interests so I cannot listen to any confidential information from you." If the prospective client insists upon talking, he has waived the privilege as to anything said by him.

If a dissolute person visits a clergyman and is told at the outset that the clergyman does not wish to talk with him but advises him to see a clergyman of his own faith, and clearly states that he does not wish to hear a confession by the visitor and the visitor continues to talk and admits that he has murdered someone, should this communication be privileged? This is a more difficult situation but it is submitted that there would be no privilege in this case.

In the attorney-client privilege, if the client later states that his case has been improperly acted upon by an attorney, the attorney may break the privilege to the extent that he may defend himself by stating his version of the action. 35 Should similar permission to break the privilege be given a clergyman? It is hoped that in such a case the clergyman would follow the example of the legendary heroic French priest but that if less heroic, the testimony would be held

34. State v. Falsetta, 43 Wash. 159, 86 P. 168, 169 (1906). The court said the privilege has no application to a third person who, by accident or design, overhears the communication. Accord, State v. Sterrett, 68 Ia. 76, 25 N.W. 936 (1885).
inadmissible. There are perils in all professions, and it would seem that this would be one of the risks accepted by the clergyman.

V. CONCLUSION

There are problems involved in the penitent-clergyman privilege for which there is no judicial precedent for guidance. Some solutions have been suggested. Fortunately, the problem does not arise frequently.

It is submitted that the states would be well advised to broaden their rules to conform with the new federal rules, as many of them have followed federal rules of civil and criminal procedure.

The one cited author who considers the privilege unconstitutional appears, to this writer, to advance an argument which is completely void of merit. With respect to the right of privacy, the Supreme Court has said:

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.36

Certainly the right of privacy in seeking spiritual solace should be one of the most cherished rights to be protected.

THE GRAND JURY AND THE ARTICLE 32:
A COMPARISON *

Lawrence J. Sandell **

SCOPE

A comparison of procedural safeguards common to both the federal
grand jury and the military's Article 32 investigation, including a study
of the historical development of both institutions, together with sug-
gestions for improving the Article 32 procedure.

I. INTRODUCTION

Efficiency studies of criminal justice reveal that the grand jury is
seldom better than a rubber stamp for the prosecuting attorney
and has ceased to perform or to be needed for the functions for
which it was established. A compulsory grand jury hearing throws an
unnecessary burden upon the administration of justice.¹ This remark-
able commentary was made not in 1971, but in 1931, by President
Hoover’s Wickersham Commission. Since that time lawyers and writers
have continued to condemn the grand jury.² In a recent assessment of
the grand jury as an institution, Time magazine accurately stated:

The grand jury generally approves whatever charge the prosecutor
indicates that he wants, apparently on the theory that he would not
make an accusation if he could not back it up in a court. As a result,
prosecutors almost always get their way. “I have never known a
grand jury to refuse to indict,” says one prominent California defense
attorney. “Never! They are just rubber stamps for the prosecution.”³

Despite the grand jury’s questionable utility, in the landmark case
of O’Callahan v. Parker,⁴ one of the principal reasons for limiting the

* The opinions and conclusions expressed herein are those of the individual author
and do not necessarily represent the views of either The Judge Advocate General’s
School, U.S. Army, or any other governmental agency.
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1. 1931 NATIONaL COmmISSION ON LAw OBSERVANCE AND ENFORCEMENT, REPORT
ON PROSECUTION 124.
2. Nichols, The Justice of Military Justice, 12 WM. AND MARY L. REV. 482,
495 (1971); Williams, Crime, Punishment, Violence: The Crisis in Law Enforcement,
54 JUDicature 418, 420 (May 1971); Rabinowitz, Reig and Litt, Repression by
Grand Jury, 29 GUILD PRACTITIONER 44 (1971).
jurisdiction of courts-martial was the fact that servicemen tried by
court-martial are not entitled to "the benefit of an indictment by a
grand jury." Presumably, the "benefit" to which Mr. Justice Douglas
referred was the historic role of the grand jury as a protective rampart
between the citizen and the potentially oppressive government. The
framers of the Constitution expressly exempted the military from the
Fifth Amendment requirement of grand jury indictment. Does this
mean that servicemen are deprived of whatever benefits are inherent
in indictment by a grand jury? If all the benefits alluded to in
O'Callahan are provided to servicemen in a comparable proceeding,
then the eminent Justice is guilty of raising form above substance, at
the expense of military justice.

The military's pretrial, or Article 32, investigation has been com-
pared to the civilian grand jury proceeding. In the sense that they

5. Id. at 262.
7. The Fifth Amendment provides: "No person shall be held to answer for a capital,
or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,
except in cases arising in the land or naval forces, . . ." This exception was made in
order to authorize the trial by court-martial of members of the armed forces for all
crimes which under the Fifth and Sixth Amendments might otherwise have been deemed
triable in the civil courts. Ex Parte Quirin, 317 U.S. 1, 43 (1942).
Act of May 5, 1950, Chapter 47, 64 Stat. 108) [hereinafter cited as UCMJ].
§832. Art. 32 Investigation
(a) No charge or specification may be referred to a general court-martial for trial
until a thorough and impartial investigation of all the matters set forth therein has
been made. This investigation shall include inquiry as to the truth of the matter set
forth in the charges, consideration of the form of charges, and a recommendation as
to the disposition which should be made of the case in the interest of justice and
discipline.
(b) The accused shall be advised of the charges against him and of his right to be
represented at that investigation by counsel. Upon his own request he shall be repre-
sented by civilian counsel if provided by him, or military counsel of his own selection
if such counsel is reasonably available, or by counsel detailed by the officer exercising
general court-martial jurisdiction over the command. At that investigation full op-
portunity shall be given to the accused to cross-examine witnesses against him if they
are available and to present anything he may desire in his own behalf, either in defense
or mitigation, and the investigating officer shall examine available witnesses requested
by the accused. If the charges are forwarded after the investigation, they shall be
accompanied by a statement of the substance of the testimony taken on both sides
and a copy thereof shall be given to the accused.
(c) If an investigation of the subject-matter of an offense has been conducted before
the accused is charged with the offense, and if the accused was present at the investiga-
tion and afforded the opportunities for representation, cross-examination, and pres-
entation prescribed in subsection (b), no further investigation is necessary under this
article unless it is demanded by the accused after he is informed of the charge. A
demand for further investigation entitles the accused to recall witnesses for further
cross-examination and to offer any new evidence in his own behalf.
(d) The requirements of this article are binding on all persons administering this
chapter but failure to follow them does not constitute jurisdictional error.
C.M.R. 311 (1957).
serve the same general purpose, the comparison is valid. A study of the history and growth of these institutions reveals that their reasons for being and the purposes they serve are strikingly similar. However, an analysis of the procedural safeguards provided for accused persons at these proceedings indicates that, in many important areas, the prevailing civilian and military philosophies are strikingly dissimilar. Because of the military’s enlightened pretrial practice with respect to discovery, right to counsel, and confrontation of witnesses, it is readily apparent that the military accused is deprived of none of the benefits of an indictment by grand jury.

This article is intended to demonstrate, by comparison, that the procedural safeguards and advantages afforded an accused at the Article 32 investigation far surpass those accorded his civilian counterpart at a grand jury proceeding. In addition, recognizing that the military pretrial investigation procedure is good, but not perfect, suggestions for improving the procedure will be discussed.

II. HISTORY AND NATURE OF GRAND JURY PROCEEDING AND ARTICLE 32 INVESTIGATION

A. Historical Development

The Grand Jury

The grand jury as we know it today is an English institution, but its roots sprang from the Carolingian inquisition of eighth century France. The inquisition was used by the crown as a quasi-judicial inquiry, usually pertaining to land. The inquests were conducted by persons selected from the body of the community where the transaction occurred and consisted of summoning subjects before the king and forcing them to supply the crown with information touching the administration of the government. The inquisition became a Norman institution after 912. William the Conqueror introduced the custom to England in 1066, and inaugurated the practice of using a body of neighbors summoned by a public officer to give, upon oath, a true answer to some question. From the very outset the presentments made by these accusing juries did not constitute an assertion that the person indicted was guilty, but merely that he was suspected. Guilt or innocence was still determined by the traditional modes of trial by

10. See Part I, A, of this article.
11. See Part III of this article.
14. Morse, supra note 12, at 104.
16. Morse, supra note 12, at 106.
battle or ordeal. With the decay of these ancient modes of trial in the twelfth and thirteenth centuries, the accusing jury both accused suspects and judged their guilt or innocence. During the thirteenth and fourteenth centuries, all or some members of the grand jury always formed part of the petit jury which tried a suspected person. This practice was eliminated by statute in 1352.17

Commencing about 100 years after the Norman invasion, the enactment of several statutes helped to insure the place of the accusatorial/inquisitorial body in the common law. The Constitution of Clarendon in 1164, the Assize of Clarendon in 1166, the Assize of Northampton in 1176, and the Ordinance of 1194 all formally recognized the accusing body and made procedural refinements.18 Each hundred, or county subdivision, had its own inquest or accusing jury. During the reign of Edward III in the 14th century, the sheriff of the county returned an additional panel of 24 knights to inquire at large for the county. This “grand inquest” was destined to be permanent by reason of its jurisdiction over the entire county, and because 24 knights were less unwieldy than several groups of twelve from each hundred in the county.19

In America, the constitutional guarantee of grand jury indictment was valued by the founders primarily as an agent to protect the citizen from unjust political prosecutions.20 The basic purpose of the English grand jury was to provide an impartial means of instituting criminal proceedings against persons believed to have committed crimes; the American grand jury was intended to operate substantially like its English progenitor.

Until the eve of the Revolutionary War, American colonists considered themselves Englishmen with all the rights and privileges attached to that status, including the ancient common law right of indictment by grand jury. This was one of the liberties most treasured by Englishmen, and it was natural that they would want to bring it to the New World. In most of the newly-settled provinces, English judicial procedure was spontaneously followed.21

Grand juries flourished throughout the eighteenth century as potent weapons with which to harass British authority. The power of the grand juries lay in their ability to block all criminal proceedings begun by royal officials. Simply by refusing to find a true bill they could effectively prevent the enforcement of criminal statutes. The political importance of juries made the colonists doubly jealous of their

17. Id. at 114.
21. II H. Osgood, American Colonies in the Seventeenth Century 303 (1904).
right to indictment before being brought to trial. They had long op-
posed the practice of royal prosecutors bringing persons to trial upon
an information and several colonies enacted laws expressly prohibiting
use of the information.22

At the end of the Revolutionary War indictment by grand jury was
a dearly cherished right. It was an institution taken for granted by
the people and the leaders of the Revolution. Each of the thirteen
states enacted laws providing for grand juries.23 Following the ratifi-
cation of the new Constitution, there was a great cry from the people
for a Bill of Rights. James Madison submitted twelve proposed
amendments to the House of Representatives, and a grand jury pro-
vision was included in the seventh amendment. The House rejected
the first two amendments and renumbered the proposals so that the
grand jury provision was included in the fifth amendment. The House
adopted Madison’s proposed grand jury amendment without change,
and the Senate amended the language to its present form.24

Former Chief Justice Warren has graphically described the role
played by the modern grand jury:

Historically, this body has been regarded as a primary security to
the innocent against hasty, malicious and oppressive persecution; it
serves the invaluable function in our society of standing between
the accuser and the accused, whether the latter be an individual,
minority group, or other, to determine whether a charge is founded
upon reason or was dictated by an intimidating power or by malice
and personal ill will.25

The grand jury performs this function simply by determining whether
or not there is probable cause to believe that an offense has been com-
mitted.26 But the manner in which it does this leads one to believe
that the grand jury’s only saving grace today is that its decision not
to indict is not subject to review by any other body.27

Article 32 Investigation

While the genesis of the grand jury proceeding is shrouded by cen-
turies of history, the Article 32 investigation is strictly a twentieth

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22. Younger, Grand Juries and the American Revolution, 63 VA. MAG. OF HIST.
AND BIOG. 257 (July 1955).
23. Id. at 265.
24. I. BRANT, THE BILL OF RIGHTS, ITS ORIGIN AND MEANING 64 (1965); 2 B.
26. United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S. 935
(1965).
27. Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969). Of course, there
is nothing to prevent the government from seeking an indictment from another grand
jury, and a persistent prosecutor can always reduce the charge and proceed on
information.
century creation. Prior to 1920 a formal investigation before referring charges was not required in the military. An informal investigation before preferring charges was all that was necessary. The War Department’s policy was that only such charges as upon sufficient investigation were found to be supported by the facts should be referred for trial. General Orders had repeatedly reflected the fact that the referring of charges, without a proper investigation of the facts initially, was a neglect of duty which entailed not only a needless waste of time spent in trial, but also the arrest and confinement of an innocent person. The convening authority could not refer the charges to a general court-martial for trial until he approved them, and approval was not to be given until the convening authority examined the charges.

As amended in 1920, Article of War 70 provided, *inter alia*, “No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made.” The investigation was required to include inquiries as to the truth of the matter set forth in the charges, the form of the charges, and what disposition of the case should be made. Additionally, the accused was permitted to cross-examine available witnesses against him, and to present anything he desired in defense or mitigation. Note that this procedure was required before charges could be referred to trial by any court-martial. The only additional requirement for a general court-martial was the appointing authority’s obligation to refer a charge to his staff judge advocate for consideration and advice before directing trial by general court-martial.

The pre-referral investigation was normally conducted by the accused’s commanding officer, who summoned the accuser, the accused, and all available witnesses before him. The witnesses were sworn but no record of their testimony was made. The commanding officer could, at his discretion, permit the appearance of counsel for both the defense and the prosecution, but this was the exception rather than the rule. Before receiving any statement from the accused, the commanding officer was required to warn him that he need not make a statement, but that if he did it may be used against him. If it appeared that charges would be referred to trial, the investigating officer had to reduce the testimony of each witness to a clear statement or summary which was to be read to the witness, and signed and sworn

29. *Id.* at 151.
30. *Id.* at 154-155.
32. *Id.*
33. *Id.*
35. *Id.*
to by him. The investigating officer was also permitted to include with other statements signed, unsworn statements from distant witnesses who were unavailable. 36

Article of War 70 was amended in 1937 37 to require a formal pretrial investigation only for those charges which were to be referred to general court-martial for trial. The amendment was intended to simplify the court-martial procedure in cases referred to summary and special courts-martial. The majority of those cases involved minor infractions of regulations or neglects of duty, and a preliminary investigation resulted, practically, in trying the case twice, involving added and unnecessary expenditure of time by the investigating officer and witnesses. 38

The 1928 Manual 39 was amended to reflect this change, together with other changes affecting the testimony of witnesses at the pretrial investigation. If the investigating officer advised the accused of the expected testimony of a witness and the accused did not want to cross-examine him, the witness did not have to be called, even if he were available. 40 Additionally, witnesses were no longer required to be sworn or to sign their statements, although the investigating officer was empowered to require either or both. 41

By the Act of June 24, 1948 42 the pretrial investigation provisions were removed from Article of War 70 and included in Article of War 46(b). The following provision was added:

The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command. 43

The 1949 Manual 44 again changed the procedure for witnesses. They were not required to be examined under oath, but they were required to sign and swear to the truth of the substance of their statements after they had been reduced to writing. 45

An expanded pretrial investigation procedure was included in Article 32 of the 1950 Uniform Code of Military Justice. 46 In its present form, unchanged since 1950, Article 32 retains much of the substance in-

36. Id. at ¶76d(8).
40. Id. at ¶35a.
41. Id.
43. Id.
45. Id. at ¶35a.
cluded in its Article of War predecessors. The investigating officer must now advise the accused of the charges to be investigated and of his right to counsel at the investigation. If charges are forwarded for trial they must be accompanied by a statement of the substance of all the testimony taken, and the accused is entitled to a copy of all statements.\textsuperscript{47} If the accused was present at the investigation of an offense before charges were preferred, and he was afforded all the rights provided by Article 32(b), no further investigation is required after a charge involving the same subject matter has been preferred unless the accused demands it.\textsuperscript{48} Finally, the controversial Article 32(d) makes the entire Article binding on all persons administering the Code, while providing that a failure to adhere to the requirements of the Article does not constitute jurisdictional error.\textsuperscript{49}

**B. Nature of the Proceedings**

Historically, the Article 32 investigation and the grand jury proceeding evolved for the same purpose: to protect the individual from baseless criminal charges. Procedurally, however, in all respects save one,\textsuperscript{50} the nature of the military investigation is better suited than the

\textsuperscript{47} UCMJ, 10 U.S.C. §832(b).

\textsuperscript{48} UCMJ, 10 U.S.C. §832(c).

\textsuperscript{49} Shortly after Article of War 70 was amended in 1920, (see note 31, supra) The Judge Advocate General of the Army opined that the pretrial investigation was jurisdictional, and that lack of substantial compliance deprived the court of jurisdiction. Then during World War II, The Judge Advocate General approved a board of review opinion that the pretrial investigation provision was directional only, and that lack of substantial compliance did not affect jurisdiction. Following the war, however, in a *habeas corpus* proceeding, a federal court held that compliance with the pretrial investigation provisions was jurisdictional. Confusion reigned supreme. Many courts adopted that holding, but found substantial compliance and denied *habeas corpus* writs. U. S. Judge Advocate General's Dept. (Navy), Index and Legislative History, Uniform Code of Military Justice, Washington, U.S.G.P.O., 668 (1950).

The United States Supreme Court finally spoke in Humphrey v. Smith, 336 U.S. 695 (1949). Smith was convicted by court-martial of rape and assault with intent to commit rape. He filed a writ of *habeas corpus* challenging the validity of the conviction. The court held that Congress did not mean for Article of War 70 to be jurisdictional. There was no intent to make an otherwise valid court-martial wholly void because the pretrial investigation fell short of the standards prescribed by Article of War 70.

The present Article 32(d) provision is based on the decision in Humphrey v. Smith. Legal and Legislative Basis, Manual For Courts-Martial 53 (1951). The drafters intended that the pretrial investigation procedure should be mandatory, but that less than full compliance which does not materially prejudice the accused's substantial rights should not be jurisdictional error. U. S. Judge Advocate General's Dept. (Navy), Index and Legislative History, Uniform Code of Military Justice, Washington, U.S.G.P.O., 999 (1950).

\textsuperscript{50} Manual For Courts-Martial, United States, 1969 (Revised Edition) [hereinafter cited at MCM, 1969]. §34a, makes the recommendation of the Article 32 investigating officer advisory only. The convening authority is free to disregard the investigating officer's recommendation to dismiss a specification or a charge, while a grand jury's decision not to indict is binding. Perhaps it can be argued that one man's opinion ought to be questioned, while the combined judgment of several minds need not be. Nevertheless, a "thorough and impartial" investigation followed by a
civilian grand jury proceeding to provide an accused person with meaningful pretrial safeguards.

The Grand Jury

The proceeding before a grand jury constitutes a judicial inquiry, and it has been called an integral part of our judicial system. The scope of a grand jury investigation is limited neither by the probable result of its inquiry nor by doubts whether any particular individual will be found subject to indictment. Its inquiry need not be preceded by any definition of the crime to be investigated or the persons against whom an accusation is sought. Since a grand jury does not decide innocence or guilt, its proceedings have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. The Supreme Court eloquently emphasized this in 1919:

It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning.

Moreover, there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal, and ordinarily no requirement that the evidence introduced be only such as would be admissible at trial.

Courts have often said that the Constitution itself makes the grand jury “a part of” the judicial process. It would be more accurate to say that the grand jury is “attached” to the judicial process, in much the same fashion that a parasite lives on and derives sustenance from another organism. A grand jury is a part or branch of a court having general criminal jurisdiction, and has no existence apart from the court which calls it into being. A grand jury functions only after it has recommendation which is advisory only can do little to stem the tide of baseless charges. Relying on one man’s opinion is certainly not without precedent in civilian practice. In many states the decision of a justice of the peace who conducts a preliminary hearing not to bind a charge over for trial is final.

52. Id. at 301.
56. 38 C.J.S. Grand Juries §1b (1943).
been summoned and impaneled by a court invested with the requisite criminal jurisdiction.\textsuperscript{57}

By its own terms the Fifth Amendment requires a grand jury indictment only for capital or infamous crimes.\textsuperscript{58} It is not the nature of the offense, but the punishment which determines whether a crime is "infamous" within the meaning of the Fifth Amendment. It has long been the Federal rule that crimes punishable by imprisonment in a prison or penitentiary, with or without hard labor are infamous crimes.\textsuperscript{59}

Once the grand jury is properly impaneled it is permitted to operate free of the procedural chains which generally shackle a judicial proceeding. The Federal grand jury may institute an investigation based on its collective suspicion that crimes have been committed, without any knowledge of the names or descriptions of the crimes or persons who may be involved, and without the necessity of a charge having been filed against anyone.\textsuperscript{60} The Supreme Court has stated that the jurors may inquire for themselves whether a crime cognizable by the court has been committed;\textsuperscript{61} they need not sit idly by waiting for evidence of suspected offenses to be brought to them. Refusing to suppress, prior to indictment, evidence allegedly obtained as the result of an illegal search, a Federal court reached the anomalous conclusion that the office of the grand jury in our system is so important that its ability to function should not be limited by questions of propriety as long as constitutional rights are not infringed.\textsuperscript{62}

Such rulings have helped create the aura of absolute independence which surrounds grand juries. In actual practice most grand juries have little to do with the investigation of crime, but are used by prosecutors to review evidence already gathered by police agencies and prepared by the prosecutor's staff.\textsuperscript{63} There are statistics to indicate that, although grand juries will occasionally operate independently and exercise initiative and freedom of judgment, they are more likely to be a fifth wheel in the administration of criminal justice in

\begin{itemize}
  \item \textsuperscript{57}Id. at §2.
  \item \textsuperscript{58}Supra, note 7.
  \item \textsuperscript{59}Ex Parte Wilson, 114 U.S. 417 (1885); Mackin v. United States, 117 U.S. 348 (1886). But the courts have made an exception to the general rule in the case of criminal contempts. See Green v. United States, 356 U.S. 165 (1958). The current Federal Rules provide that an offense punishable by death, imprisonment for a term in excess of one year or at hard labor must be prosecuted in indictment. Fed. R. Crim. P. 7(a).
  \item \textsuperscript{60}38 C.J.S. Grand Juries §34a (1943).
  \item \textsuperscript{61}Hale v. Henkel, 201 U.S. 43 (1906).
  \item \textsuperscript{62}United States v. Harte-Hanks Newspapers, 254 F.2d 366 (5th Cir. 1958), cert. denied 357 U.S. 938 (1958). The court seems to say that an illegal search would be a mere impropriety, rather than the infringement of a constitutional right. This is difficult to comprehend, but perhaps the court found some solace in holding, parenthetically, that there was not an illegal search in this case.
  \item \textsuperscript{63}Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966).
\end{itemize}
that they rubber stamp the wishes of the prosecutor. An indictment is invalid unless it is signed by the U.S. Attorney, and to this extent the grand jury is subject to the control of the prosecutor. “In truth the grand jury is quite dependent on the prosecutor. Though there are exceptions, ordinarily it will be the prosecutor who determines what witnesses to call and who examines the witnesses.” The grand jury is even powerless to compel the attendance of witnesses. It depends on the court to issue subpoenas.

**Article 32 Investigation**

Descriptions of the nature of the Article 32 investigation have a familiar ring to them. The investigation is a proceeding similar in character to a grand jury investigation. An Article 32 investigation is not a mere formality, but rather an integral part of the court-martial proceedings and is judicial in character. It serves the two-fold purpose of operating as a discovery proceeding for the accused, and standing as a bulwark against baseless charges. The Article 32 investigation is not a trial on the merits, and the strict rules of evidence applicable at trials need not be followed. But this does not detract from its character as a judicial proceeding. An Air Force board of review determined that the investigation was sufficiently a judicial proceeding for it to affirm a conviction of obstructing justice against a person who interfered with a witness who was to testify at a pretrial investigation. The U.S. Court of Military Appeals affirmed a conviction for perjury at the Article 32 investigation, holding that the investigation was a “judicial proceeding or in a course of justice” within the meaning of Article 131, UCMJ.

Like the grand jury indictment, the requirement for an Article 32 investigation is based upon the punishment for a crime rather than on the nature of the offense. It is required only when it is anticipated that charges may be referred to a general court-martial for trial, and only a general court-martial can adjudge a punishment which includes death, dishonorable discharge, total forfeitures or confinement in excess of six months.
An Article 32 investigation also depends for its existence on the intervention of some outside force. When an officer exercising summary court-martial jurisdiction feels that the charged offenses are so serious that it may be appropriate to forward them with a recommendation for trial by general court-martial, he will appoint a commissioned officer to investigate the charges. The Manual suggests that the investigating officer should be a mature field grade officer, or one with legal training and experience, but the only real limitations on the power of appointment are that neither the accuser nor any officer who is expected to participate in the trial of the case as military judge or counsel may be appointed. While a grand jury may investigate anyone or anything, the scope of the Article 32 investigation is limited to the matters set forth in the charges. Within this limitation, however, the investigating officer is encouraged to extend his investigation as far as may be necessary to make it thorough.

The Achilles heel of the Article 32 investigation is the fact that the investigating officer's recommendations are not binding on the convening authority. Another fault which ought not to be overlooked is the ever present spectre, or appearance, of command influence. Schiesser and Benson point out:

The Article 32 officer is usually a member of the local command, and is usually a line officer rather than a member of a Judge Advocate General's Corps. He is rated by local commanders, who themselves may be rated by the convening authority involved. The opportunities for command influence are virtually unlimited, insofar as the relationship between the Article 32 officer and the convening authority is concerned.

The authors admit, however, that in the vast majority of cases convening authorities follow the advice and recommendations of their staff judge advocates, and presumably all staff judge advocates would advise against referring baseless or unfounded charges to trial. The characteristics common to both the civilian grand jury and the military Article 32 investigation are readily apparent. Although both are judicial proceedings, neither is bound by rigid evidentiary rules, and neither can exist until an outside force breathes life into them. They are blessed with broad powers of investigation, and they are intended to serve as protective barriers against intimidating accusers.

75. MCM, 1969, supra note 50, ¶32e.
76. Id. ¶34a.
77. Id.
78. Id.
80. Id. at 514-515.
81. Id. at 515.
It is the critical area of differences between the two proceedings which turns the tide in favor of the Article 32 investigation as the proceeding which provides the most meaningful safeguards for the individual. An examination of additional safeguards normally associated with judicial proceedings will highlight the fact that the serviceman does not lose any advantages because he is not entitled to indictment by grand jury.

III. COMPARISON OF PROCEDURAL SAFEGUARDS

A. Right to Counsel

The Grand Jury

There has been a paucity of litigation involving a defendant's right to counsel at a grand jury investigation, because he has none. A person is not entitled to have counsel present with him while he testifies before the grand jury. The only persons who can be present while the grand jury is in session are the attorney for the government, the witness, interpreters, and stenographers. Perhaps the defendant would be entitled to counsel if he were permitted to cross-examine witnesses against him at grand jury investigations, but that, too, is doubtful. In 1960, Chief Justice Warren emphasized that it has never been considered essential that a person being investigated by the grand jury be permitted to cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, this right has not been extended to grand jury proceedings because of the disruptive influence its injection would have on the proceedings, and also because the grand jury merely investigates and reports; it does not try. So even if confrontation were extended to grand jury proceedings, it could still be argued that, since the question of guilt or innocence is not involved, representation by counsel before a grand jury would not be required.

Since 1960, however, the Supreme Court has made some far-reaching declarations in the right-to-counsel area, and some of its comments can be applicable to grand jury proceedings. In Escobedo v. Illinois, the court stated that it would exalt form over substance to make the right to counsel depend on whether at the time of the interrogation the authorities had secured a formal indictment. In Miranda v. Arizona, the court pointed out that counsel's presence at an interrogation would insure that statements made in the

86. Id. at 486.
government-established atmosphere are not the product of compulsion.\textsuperscript{88} In \textit{Coleman v. Alabama},\textsuperscript{89} the Supreme Court held that a preliminary hearing is a critical stage of the criminal process where the accused is entitled to aid of counsel. The Court then cited \textit{Wade}\textsuperscript{90} for the proposition that the accused is entitled to the assistance of counsel at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.\textsuperscript{91} The language from \textit{Wade} is significant because a lineup, like the grand jury interrogation may occur prior to any indictment or accusation. Yet during the investigation, when an individual may be only one of several suspects, he is entitled to the presence of counsel. Viewed from the standpoint of a nervous layman in a hostile atmosphere faced with the distinct possibility that he may incriminate himself, there is no justifiable distinction between a custodial interrogation in the station house, a pretrial lineup, and interrogation during subpoena-compelled attendance at a grand jury investigation. Yet in spite of \textit{Miranda}, \textit{Escobedo} and \textit{Coleman}, the courts continue to hold that there is no constitutional right to counsel in the grand jury room.\textsuperscript{92}

The Pennsylvania Supreme Court recently evidenced a remarkable example of 19th century reasoning in attempting to balance the need for orderly grand jury proceedings against the need to protect a witness' privilege against self-incrimination. In \textit{Commonwealth v. McCloskey}\textsuperscript{93} the court announced that a grand jury witness has a limited right to counsel during his testimony. The supervising court must instruct the witness that he may consult with counsel prior to and following his appearance, but not during his testimony. The witness must also be instructed that, should he become confused, or doubtful as to whether his answer to a given question may incriminate him, he can come before the court accompanied by counsel and obtain a ruling as to whether or not he should answer the question. The court condemned the practice of permitting a witness to leave the grand jury room and consult with his attorney at the door prior to responding to every question because such a practice would cause undue delay and all but terminate the institution of the investigating grand jury. As the two dissenting justices infer, it is inconceivable how the majority can determine that their suggested procedure would not constitute a serious interruption of the grand jury investigation. Further, to deny a witness the opportunity of adequate consultation

\textsuperscript{88} Id. at 466.
\textsuperscript{89} 399 U.S. 1, 10 (1970).
\textsuperscript{90} United States v. Wade, 388 U.S. 218 (1967).
\textsuperscript{91} Coleman v. Alabama, 399 U.S. 1, 7 (1970).
\textsuperscript{93} 443 Pa. 117, 277 A.2d 764 (1971).
with his counsel is to render his right under the Fifth Amendment meaningless.

Because of the layman's inability to deal with the privilege against self-incrimination by himself, at least one commentator has stated that counsel must be allowed in the grand jury room.4

Resolution of the scope of the privilege against self-incrimination and the applicability of the waiver doctrine on a question-by-question basis certainly raises issues as difficult and as complex as those which required the appointment of counsel because of "special circumstances" and "potential prejudice" even under the pre-Gideon cases.5

Mr. Meshbesher is absolutely right. There is no longer a compelling reason, if, indeed, there ever was one, why the expanded Sixth Amendment right to counsel provisions long enjoyed by servicemen should not be equally applicable to those unfortunate private citizens facing a hostile prosecutor before a grand jury.

Article 32 Investigation

The Army has acknowledged the accused's right to counsel at a pretrial investigation for more than half a century.6 It was not until 1957, however, that the United States Court of Military Appeals determined that "counsel" meant "lawyer," and not just any officer. In United States v. Tomaszewski,7 the Court enumerated the following three reasons for its holding that Article 32 and the 1951 Manual required the appointment of a lawyer to represent the accused as counsel at a pretrial investigation: 1) An Article 32 investigation is required only for charges referred to a general court-martial for trial, and at a general court-martial the accused is entitled to be represented by a lawyer; 2) Not to have a lawyer would defeat the purpose of the investigation as a discovery proceeding; and 3) If a lawyer is present to cross-examine a witness, a verbatim transcript of his testimony is admissible at a subsequent trial if the witness is unable to appear in person.8 Because of Tomaszewski, the words "certified under Article 27(b)" were inserted after "counsel" in paragraphs 34b and 34c(3) of the 1969 Manual to reflect this change in the law.

The accused can always retain a civilian attorney to represent him at a pretrial investigation,9 and the United States Court of Military Appeals has indicated that it will not stand for any attempts to

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5. Id. at 196.
6. See Part II, A, of this article.
8. Id. at 78.
10. UCMJ, 10 U.S.C. §832(b).
deprive the accused of this right. In United States v. Nichols, the accused's civilian counsel was not permitted to attend the Article 32 investigation because the charges and the investigative files were classified, and the attorney did not have the requisite security clearance. In reversing, the court pointed out that, although Congress could have done so, it did not impose any qualifications on a civilian lawyer's right to practice before a court martial. Therefore, the accused's right to a civilian attorney cannot be limited by a service-imposed obligation to obtain clearance for access to service-classified matters. The court stated that, where there is a question of a security risk, the burden is on the government to prove that civilian counsel is disqualified, rather than the converse.

In an earlier case, however, an Air Force board of review demonstrated little sympathy for an accused who attempted to use his right to civilian counsel as a sword rather than a shield. When requests for postponements of the investigation due to the unavailability of his civilian counsel were denied, the accused objected to the continuance of the proceedings, refused to call or examine any witnesses, and objected to his military counsel's examining witnesses. On two occasions the accused said that he had two different civilian attorneys, but neither of them ever appeared for him. On appeal, the accused contended that he had been prejudiced because he was denied the right to be represented at the pretrial investigation by individual counsel of his own choice. The board rejected the accused's contention, stating bluntly that his insistence on representation by civilian counsel was apparently part of a well-conceived plan to impede and hamper the proceedings. The board was not convinced that the failure to await the pleasure and convenience of the accused's civilian counsel constituted an irregularity, in view of the Manual admonition that the pretrial investigation should not be delayed if the accused is unable to provide civilian counsel of his own choice within a reasonable time after being given the opportunity to do so. Needless to say, only peculiar and aggravated circumstances would warrant such a holding.

In United States v. Courtier, the United States Court of Military Appeals stated that the right to the assistance of counsel of one's own choice during the pretrial proceedings, when such counsel is reasonably available, is a substantial right entitled to judicial enforcement. In Courtier, however, the court did not practice what it preached. The accused's request to be represented by individual

102. Id. at 349.
104. Id. at 576.
105. Id. at 577.
military counsel at the Article 32 investigation was denied. Both the accused and his detailed counsel unsuccessfully objected at the investigation to proceeding without the requested individual military counsel. At trial the accused's motion for a new Article 32 investigation was denied, and he was thereafter convicted pursuant to his guilty plea. Because of the accused's plea, and because the requested lawyer had been detailed as assistant defense counsel about one month prior to trial, the court refused to set aside the conviction. Judge Ferguson dissented. He would have reversed on the basis that, since the convening authority had not acted on accused's request for individual military counsel, the accused had been denied the effective assistance of counsel at the Article 32 investigation.

B. Rules of Evidence and Right of Confrontation

The Grand Jury

Any discussion of a defendant's right of confrontation before the grand jury is necessarily a brief one. He simply does not have that right. Unless he is testifying as a witness, a defendant is not permitted in the grand jury room, and his attorney is not permitted under any circumstances. Writing for the majority in Hannah v. Larche, Chief Justice Warren stated that it has never been considered essential that a person being investigated by the grand jury be permitted to cross-examine witnesses who may have accused him of wrongdoing. This right has not been extended to grand jury proceedings, according to Warren, because of the disruptive influence its injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try an individual. The court's explanation, or excuse, does not withstand critical analysis. The Article 32 proceeding only investigates and reports, but the right of confrontation afforded at that proceeding surely does not constitute a disruptive influence. Rather it affords the accused an invaluable right at a critical stage of a criminal proceeding. The archaic rule of nonconfrontation which binds the grand jury proceeding is totally out of step with today's enlightened concepts of criminal justice.

As is the case with the military's pretrial investigation, the grand jury is not bound by the formal rules of evidence. Neither the Fifth Amendment nor any other constitutional provision prescribe the kind of evidence upon which grand juries must act, and the

109. Id. at 449.
courts will rarely quash an indictment because of some deficiency in the evidence. The Federal courts zealously protect the grand jury's right to indict on any evidence, without regard to its competency or truthfulness. Their reasoning is that if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great. Before a trial on the merits a defendant could always insist upon a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. Therefore, an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits. Even the fact that all the evidence before the grand jury was hearsay is not a sufficient ground for challenging the indictment. The possibility that, following indictment, there may be little or no competent evidence upon which a defendant may be tried does not seem to trouble the Federal courts. The Court of Appeals for the District of Columbia stated, "The very existence of the institution of the Grand Jury presupposes the possibility that this body may err in issuing an indictment." The court went on to explain that the nature of its function contemplates that a grand jury will hear from many sources, uninhibited by the strict rules of evidence and untested by the traditional adversary tools such as cross-examination. Therefore, so long as the grand jury itself is not tainted in the sense that it was improperly constituted, or that its members were necessarily biased, its actions, if valid on their face, are valid.

For the same reasons, the Federal courts make short shrift of challenges to indictments which were based wholly or partly on illegally obtained evidence. Thus in Laughlin v. United States, where it was determined that the grand jury considered illegally obtained recordings of telephone conversations, the court stated that all that was required was an indictment valid on its face. The defendant has ample opportunity at trial to prevent any ultimate prejudice stemming from the government's illegal actions. In West v. United States, the court flatly stated that there is no case which extends the rule prohibiting the consideration of illegally obtained evidence at trial to grand jury proceedings.

111. Id. at 363.
114. Id.
115. 385 F.2d 287 (D.C. Cir. 1967).
116. Id. at 291.
118. Id. at 56.
Although a grand jury may consider any illegally obtained evidence which is presented to it, the Federal Court's 7th Circuit would not go so far as to permit the grand jury to issue a subpoena for the production of physical evidence, the seizure of which would have violated the witness' Fourth Amendment rights. In In re Dionisio, the court reversed a lower court's contempt citation which was based upon the defendant's refusing to obey a grand jury order to go to the U. S. Attorney's Office to furnish voice examplars to be compared with voices contained on previously obtained FBI recordings of telephone conversations. The court held that the Fourth Amendment bars wholesale intrusions upon personal security, and that the interposition of the grand jury between the witness and the government did not eliminate the Fourth Amendment protection which would otherwise bar the government's obtaining the evidence.

In a similar vein, a Federal District Court in Ohio has recently held that if a grand jury's questions are based on evidence obtained by any violation of a witness' Fourth Amendment rights he is justified in refusing to answer the questions. The court held that a district court may consider a motion to suppress in a proceeding ancillary to a grand jury hearing. The possibility that a larger number of witnesses in cases involving other than electronic violations of the Fourth Amendment may seek suppression hearings is not enough to justify curtailment of Fourth Amendment rights.

Article 32 Investigation

A pretrial investigation is a quasi-judicial proceeding. Since the purpose of the investigation is to secure information, the investigating officer is not bound by the strict rules of evidence. This practice makes the Article 32 investigation a valuable discovery vehicle for the defense. The defense counsel is attempting to pry as much information as possible from the government witnesses so he is not likely to raise technical objections to their testimony. In many cases he will eagerly take advantage of the relaxed procedure to engage in a "fishing expedition" with the witnesses. Even in the few instances when the government is represented by counsel and the investigation becomes a quasi-adversary proceeding, it still retains its character as a discovery device and the investigating officer, who may be placed in the uncomfortable position of having to rule on the government counsel's objections, is still instructed that the formal rules of evidence are relaxed at the Article 32 investigation.
For the foregoing reasons, there are relatively few cases which raise the issue that the investigating officer considered incompetent evidence in making his recommendations. In United States v. Brakefield, the accused contended on appeal that the evidence at the Article 32 investigation did not amount to a prima facie case or constitute sufficient probable cause to convene a general court-martial. The Court of Military Review held that the federal rule prohibiting a defendant from challenging a grand jury indictment on the ground that it is not supported by adequate or competent evidence should be applied to courts-martial in the absence of an indication of a clear abuse of discretion or malicious intent.

Most of the decided cases in this area touch on the accused's right of confrontation at the pretrial investigation, where the defense has claimed prejudice because the investigating officer has either considered the written statements of absent witnesses, or has failed to secure the attendance of all the witnesses requested by the defense. Thus in United States v. Samuels, the defense objected to the investigating officer's considering the written statements of 58 witnesses who had been transferred and who were more than 100 miles away at the time of the investigation. The court held that, while unavailability affects the accused's right to cross-examine a witness, it does not preclude the investigating officer's considering the witnesses' statements, provided that they are under oath or affirmation.

United States v. Lassiter is an unusual example of a case in which the court seemingly went out of its way to apply the doctrine of waiver against the accused. The defense counsel moved that all the witnesses the government intended to use at the trial be produced at the Article 32 investigation. All but one of the witnesses were unavailable and, without objection, the investigating officer considered their unsworn statements. At trial the law officer denied a defense motion to dismiss the charges, or to refer them to another investigation, because of the unavailability of the government witnesses. In a hair-splitting split decision, the court held that the defense waived any objection to the investigating officer's improper consideration of the unsworn state-

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125. UCMJ, 10 U.S.C. §832(b).
127. Id. at 287. The court would probably not make this distinction today, and would undoubtedly find that the witnesses were available and should have been at the Article 32 investigation in person. In United States v. Davis, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970), the court held that, since a serviceman subject to military orders is always within the jurisdiction of the military court, he is not unavailable simply because he is stationed more than one hundred miles from the site of the trial. The same rationale should apply with respect to military witnesses at the pretrial investigation.
ments, because the objection at trial was addressed only to the unavailability of the witnesses, and did not specifically mention the investigator’s improper action. Judge Ferguson dissented, stating that since the defense did object generally to the inadequacy of the pretrial proceedings, a mere failure to make a specific objection should not amount to a waiver.

There are two cases which indicate that physical presence or absence are not the only factors used to determine whether a witness is available and whether an accused has been denied his right of confrontation. In United States v. Craig, the accused and his counsel were denied access to a classified report at the pretrial investigation because defense counsel was not cleared for “confidential” information. It was held that counsel with a proper security clearance should have been appointed. This amounted to a denial of the accused’s statutory right of confrontation at the pretrial investigation.

The second case is United States v. Doyle, where the victim of a rape was brought from the hospital to the Article 32 investigation. After some preliminary questioning the investigating officer determined that the victim was in a state of shock, and he stopped the examination. A previous statement made by the witness to criminal investigators was read to the accused and incorporated into the report of investigation. The board of review held that, in this context, the word “available” should be used in its general sense of being available for examination. Availability is not dependent solely upon the factor of physical presence, but also includes others, such as a state of physical health that will permit one to undergo examination. In the absence of such a state of health, the witness was unavailable.

Neither the Article 32 investigation nor the grand jury proceeding are bound by rigid evidentiary rules. The grand jury is always, and the Article 32 investigation is usually, an ex parte proceeding, but with one vital difference. In the civilian proceeding the defendant is never present, unless he happens to be a witness, while in the military the accused and his counsel are always present. The Article 32 investigation is a discovery proceeding, and the rules of evidence should be relaxed so that the accused can take full advantage of the opportunity to obtain information. The grand jury, however, is anything but a discovery device. On the contrary, it is designed to operate in secrecy, and a defendant doesn’t even have a right to know the identity of the witnesses against him.

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129. Id. at 314.
130. Id.
132. Id. at 469.
134. Id. at 638.
C. Discovery and Disclosure

The difference between a military and civilian accused's pretrial discovery rights is as great as the difference between secrecy and disclosure. The keynote in the military is disclosure, and that in the federal practice is secrecy. It takes little imagination to determine which is the more advantageous practice, for both the individual and the government, and the federal courts are slowly and reluctantly beginning to realize this.

The Grand Jury

An individual being investigated by the grand jury is not only excluded from their proceedings unless he is a witness,135 but he is not entitled to know what occurred before the grand jury.136 He has no right to know who the witnesses were, or what they said. The prohibition against disclosure is contained in rule 6(e), Federal Rules of Criminal Procedure. That rule permits disclosure of grand jury proceedings only to the attorneys for the government, unless a court directs disclosure in connection with a judicial proceeding. A defendant may be permitted to inspect his own grand jury testimony, but only upon court order, and only if his testimony was recorded.137 It is readily apparent that rule 16(a)(3) permits a defendant to "discover" only that which he already knows. In stark contrast to the military practice, the civilian defendant is entitled to inspect papers and documents in the possession of the government only if he can convince a court that the documents are material to the preparation of his defense and that the request is reasonable.138 Even if a defendant is fortunate enough to be aware of the existence of statements or other physical evidence, the requirement that he show materiality to the preparation of the defense presents a formidable obstacle when he has not seen the documents and is not familiar with their content.

A fissure in the facade of nondisclosure of grand jury proceedings in the federal courts has only recently begun to appear, but during its long years of existence the policy of absolute secrecy has had powerful and respected advocates. In denying a defendant's right to inspect grand jury minutes, Judge Learned Hand stated:

It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence;

136. Id.
he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused . . . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.\textsuperscript{139}

However, another jurist aptly makes the point that those who oppose pretrial discovery because it would give an undue advantage to the defendant overlook the fact that the protection afforded the defendant against discovery is in large measure counterbalanced by the abundant resources for investigation available to the prosecution.\textsuperscript{140}

A review of the 'secrecy' cases until 1970 reveals that, with few exceptions, courts tended to adhere to Judge Hand's thinking and kept the lid of secrecy on grand jury proceedings. In \textit{United States v. Procter \& Gamble Company},\textsuperscript{141} Mr. Justice Douglas set forth the following reasons for the long-established policy of secrecy: (1) to encourage witnesses to testify freely without fear of retaliation; (2) to prevent the escape of those whose indictment may be contemplated; (3) to insure the utmost freedom to the grand jury in its deliberations; (4) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at the trial of those indicted by the grand jury; and (5) to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation.\textsuperscript{142} The court then reiterated the general rule that the indispensable secrecy of grand jury proceedings must not be broken except where there is a compelling necessity, and the circumstances which create the compelling necessity must be shown with particularity.\textsuperscript{143} The court did concede that using a grand jury transcript at trial to impeach a witness, to refresh his recollection, or to test his credibility would be cases of particularized need where the secrecy of the proceedings could be lifted discretely and limitedly.\textsuperscript{144}

The following year, in \textit{Pittsburgh Plate Glass Company v. United States},\textsuperscript{145} the Supreme Court restated the instances of particularized need set out in \textit{Procter \& Gamble}, held that whether to allow disclosure is discretionary with the trial judge, and emphasized that a mere showing that a trial witness testified before the grand jury does not entitle the defendant to inspect the grand jury testimony.\textsuperscript{146} In

\textsuperscript{139} United States v. Garsson, 291 F. 646, 649 (S.D. N.Y. 1923).
\textsuperscript{140} Traynor, \textit{Ground Lost and Found in Criminal Discovery}, 39 NY. U. L. Rev. 228 (1964).
\textsuperscript{141} 356 U.S. 677 (1958).
\textsuperscript{142} Id. at 681, n. 6.
\textsuperscript{144} Id. at 683.
\textsuperscript{146} Id. at 399.
Dennis v. United States, the Supreme Court found that a particularized need had been shown by the defendant, where the government admitted in its brief that the interest of secrecy was minimal since the witness had repeated his testimony so often.

Dennis really did not dilute the earlier Supreme Court decisions. In both Pittsburgh Plate Glass Co. and Procter & Gamble, the defendants sought wholesale disclosure of grand jury testimony as a matter of right, while in Dennis the defendants sought disclosure of particular testimony for which they had demonstrated a particular need. Following Dennis, however, the Circuit Courts began to chip away at the Supreme Court's rigid rules of secrecy. In United States v. Youngblood, the Second Circuit stated that it did not read Pittsburgh Plate Glass Co., Procter & Gamble and Dennis as limiting the discretion of the trial court to order disclosure only when a particularized need is shown. Rather, those cases merely indicate a minimum standard to which the courts must adhere, and they do not limit a court's power to order disclosure in additional situations where a showing of particularized need has not been made. The court then announced a new rule for future trials in the Second Circuit. Where a witness has testified at trial, and disclosure is limited to that portion of a witness' grand jury testimony which was the subject of direct examination at trial, the traditional reasons for grand jury secrecy are largely inapplicable, and disclosure of the grand jury testimony should be permitted without requiring a showing of particularized need. Obviously even this rule is not entirely satisfactory. First, the witness' grand jury testimony need not be transcribed at all. Secondly, because he is familiar with the witness' prior testimony, the prosecutor can be very selective in the subject matter of the direct examination at trial. But the government may not always be able to control these factors, and half a loaf is better than none.

In Cargill v. United States, the court held that, irrespective of a showing of particularized need, a request for the grand jury testimony of a specific witness to use during his cross-examination at trial to impeach him, to refresh his recollection, or to test his credibility, should be granted. Again, in Allen v. United States, the court stated that, in the absence of the reasons for secrecy contained in

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148. Id. at 871-72. The court also confirmed the trial court's discretionary power under rule 6(e), Fed. R. Crim. P., to direct the disclosure of grand jury testimony in connection with a judicial proceeding.
149. 379 F.2d 365 (2d Cir. 1967).
150. Id. at 369.
151. Id. at 369-370.
152. 381 F.2d 849 (10th Cir. 1967), cert. denied, 389 U.S. 1041 (1968).
153. Id. at 852.
154. 390 F.2d 476 (D.C. Cir. 1968), motion to modify opinion denied, 404 F.2d 1335 (D.C. Cir. 1968).
Pittsburgh Plate Glass Company, the mere fact that a witness’ prior testimony was given to a grand jury is not a clear and compelling reason to immunize it from later scrutiny after he has testified on the same subject at trial. There is a growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice.\footnote{155.
Allen v. United States, 390 F.2d 476, at 480-81 (D.C. Cir. 1968).}

The foregoing discussion of a defendant’s right to discovery of grand jury minutes was based upon the state of the law until 1970. Until that time the courts had always held that the Jencks Act\footnote{156.
18 U.S.C. §3500 (1970).} which authorized a court to order the United States to produce any statements of a witness called by the government who has testified on direct examination, did not apply to grand jury minutes.\footnote{157.
18 U.S.C. §3334 (1970).} amended the Jencks Act to include grand jury minutes within the definition of a “statement” which must be produced. The federal courts will now be able to disregard the rigid particularized need\footnote{159.
"Particularized need" is another one of those phrases, like “service connected,” which courts love to grab hold of without really knowing what it means. Traynor, supra, note 140, at 230 states: “No one seems quite certain about the particulars of particularization.”} rule which thwarts a defendant’s discovery and disclosure privileges. It should be noted, however, that even the new statutory amendment does not mention, much less recognize, a defendant’s right to pretrial discovery of a witness’ grand jury testimony. The courts and Congress have gone only as far as permitting a defendant to examine a witness’ prior testimony at trial, after the witness has testified if the witness’ grand jury testimony was recorded.

The civilian defendant has a long way to go before he reaps the benefits of the carte blanche pretrial discovery rights which his military counterpart now enjoys, but inroads are slowly being made. In a “Pentagon Papers” case, a California district court has announced that a witness is entitled to a record of his own grand jury testimony, if it was recorded, without a showing of compelling necessity or particularized need.\footnote{160.
In Re Russo, 10 Cr. L. 2145 (October 17, 1971).} The court pointed out that witnesses themselves have been free since 1946 to disclose what transpired during their presence in the federal grand jury room, and that there is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the government’s ability to investigate crime and bring offenders to justice.\footnote{161.
Id. at 2146.}
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ruling will help a defendant who has testified as a witness before the grand jury to obtain a transcript of his own prior testimony. However, the civilian defendant in federal court is still unable to obtain copies of the grand jury testimony of other witnesses prior to trial.

Article 32 Investigation

Congress recognized that, in order to insure a fair and expeditious military trial, an accused should not have to come to court guessing. Article 32(b) of the code provides specifically that the accused shall be advised of the charges against him at the investigation, that he has the right to cross-examine witnesses, and that a copy of the charges and statements of the witnesses after the investigation shall be given to the accused. From the time he first becomes a suspect until charges are preferred, the accused is kept aware of the nature of the charges and the witnesses against him. A suspect cannot be interrogated unless he is first informed of the nature of the accusation.162 Before charges are forwarded, the accused's immediate commander must inform the accused of the charges against him, and must complete and sign the certificate to that effect on the charge sheet.163 At the outset of the investigation the accused is again informed of the offense charged against him, the names of the witnesses against him, and of his right to cross-examine available witnesses.164 In the Army, the investigating officer is directed to contact the accused's counsel prior to the investigation for the purpose of delivering a complete copy of the file to him.165

The pretrial investigation is designed to operate as a discovery proceeding for the accused,166 and it should be obvious from the foregoing discussion that it accomplishes that purpose. The accused is informed, on several occasions, of the offenses he is charged with. Before the formal investigation begins he knows who the prosecution witnesses will be, and he has copies of their statements and can interview them. He is present throughout the entire investigation and has the opportunity to hear the testimony of the witnesses against him and to cross-examine them. Yet, despite the military's enlightened pretrial procedure, there is still room for improvement.

IV. RECOMMENDED CHANGES IN ARTICLE 32 PROCEDURE

The Article 32 investigation is not a perfect medium; there is room for improvement. The military justice enthusiasts who crow

162. MCM, 1969, ¶34b.
163. Id., ¶32f(1).
164. Id., ¶34b.
165. Supra, note 123.
that the military is way ahead of the civilian community in providing due process guarantees would do well to hesitate and consider Sherman's observation that "Probably the most objective assessment of military and civilian court procedural due process rights would find them roughly equal, with perhaps a slight edge for the civilian procedures, primarily because of the command control aspect which still affects certain military rights." 167 The spectre of command control, real or imagined, continues to permeate the Article 32 procedure. The commander appoints one of his men as investigating officer, and is free to disregard the investigating officer's recommendations.

Some reforms are necessary, but effecting them is no simple matter. Commanders have historically opposed any changes which derogate from their control over command discipline. While testifying before a congressional committee in 1879, General William T. Sherman said:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.168

More than 80 years later the Powell Committee reported that field commanders were unhappy with pretrial investigations because they were increasingly difficult to conduct and they consumed too much time.169

Nevertheless, in recent years there has been increasing agitation, particularly by members of Congress, for substantial changes in the administration of military justice in addition to those effected by the Military Justice Act of 1968. It would be useful to examine those portions of the proposed changes which deal with the pretrial investigation.

A. The Powell Report

The Powell Committee, apparently more concerned with delays than with command control, recommended speeding up the pretrial procedure by having the investigation conducted by the same lawyer who would ultimately act as trial counsel, accompanied by a defense counsel. The advantage of this procedure is that counsels' activity would constitute their preparation for trial, so that they could proceed with a minimum of delay when charges were referred to trial.170

168. Id. at 4.
170. Id.
This recommendation obviously did not receive a cordial reception. The revised edition of the 1969 Manual still prohibits an officer who is expected to become a member of the prosecution from acting as an investigating officer.\textsuperscript{171} It has been the author's experience that Article 32 investigations are usually conducted and completed with reasonable dispatch. The Powell Committee's recommendation fails to address the real weakness of the Article 32 investigation: it is still subject to command control.

B. The Hatfield Bill

In June 1971, Senator Mark Hatfield introduced a bill\textsuperscript{172} in the 92nd Congress which was designed, in part, to reduce command control of the pretrial investigation procedure. The Hatfield Bill divides the world into armed forces judicial circuits, each commanded by an Armed Forces Judicial Circuit Officer.\textsuperscript{173} Upon written request from a convening authority, the judicial circuit officer will detail an investigating officer to investigate charges.\textsuperscript{174} The investigating officer submits his report of investigation to the judicial circuit officer for review. If the judicial circuit officer disagrees with a recommendation of the investigating officer not to refer a charge to trial, then he is required to make a written report and indicate his reasons for determining that there is legally sufficient evidence to refer the charge to trial.\textsuperscript{175} If the convening authority disagrees with a recommendation of either the investigating officer or the judicial circuit officer that a charge not be referred to trial by general court-martial, he may submit the charge to The Judge Advocate General of the service of which he is a member for review and final decision.\textsuperscript{176}

Senator Hatfield’s bill solves the problem of command influence of the investigating officer, since that officer cannot be a member of the convening authority’s command. However, the investigating officer’s recommendation not to refer a charge to general court-martial is still subject to review and the procedures required to overrule that recommendation can lead to interminable delays.

It can be argued that, in practice, a judicial circuit officer and a convening authority will not take the time or effort required to overrule the investigating officer’s recommendation. Perhaps. However, a convening authority with an axe to grind will not be too concerned if an accused spends an additional 30 or 60 days in pretrial confinement pending a final decision by The Judge Advocate

\textsuperscript{171} MCM, 1969, §34a.
\textsuperscript{172} S. 2171, 92d Cong., 1st Sess. (1971).
\textsuperscript{173} Id., subpara. (1).
\textsuperscript{174} Id., subpara. (8).
\textsuperscript{175} Id., subpara. (10).
\textsuperscript{176} Id., subpara. (11).
General. If an individual is sufficiently mature, impartial, experienced and educated to be appointed investigating officer, his decision not to refer a charge to trial by general court-martial ought not to be subject to review.

C. The Bayh Bill

In March 1971, Senator Birch Bayh introduced a bill in the 92nd Congress which would substantially revise the Uniform Code of Military Justice. The revised Article 32 eliminates an investigation conducted by an investigating officer. Instead, a suspect must be taken before a military judge within 24 hours after arrest or after charges have been preferred. At this initial appearance the military judge will inform the accused of the charges, of his right to counsel, and of his right to have a preliminary examination. The accused is allowed a reasonable time to consult with counsel, and he may waive the preliminary examination. If the accused requests a preliminary examination it must be conducted by the military judge within a reasonable time. There the accused may cross-examine witnesses and discover and introduce evidence. If the military judge determines that there is probable cause to believe that an offense has been committed by the accused, he will hold the accused for trial. Although the bill is silent on the matter, it appears that the military judge's determination that there is no probable cause is final.

The obvious advantages of this plan are that the preliminary examination would always be conducted by legally trained personnel not subject to command influence, and that the military judge's determination of lack of probable cause is not subject to review. Furthermore, an accused would have the option of waiving the preliminary examination. The accused would receive all of the benefits, without any of the disadvantages, of the present Article 32 procedure.

The Bayh Bill also has its disadvantages. It permits a preliminary examination for all charges, whether or not trial by general court-martial is contemplated. This would be a totally impracticable burden without a substantial increase in judicial personnel. Even if a preliminary examination were requested in only half the cases, there would be more than 25,000 examinations per year in the Army. At those installations where a military judge is not permanently stationed, it would be difficult, if not impossible, to comply with the requirement that an accused be brought before the military judge within 24 hours after arrest or after charges have been preferred. Further, it is conceivable that this procedure would narrow the present scope of the accused's discovery rights at the pretrial investigation. The requirement to determine the existence of probable cause may not necessitate examining
all the evidence surrounding each specification. Once a judge finds probable cause, he may be able to limit the accused’s right to call or cross-examine additional witnesses by simply ending the investigation.

D. A Suggested Procedure

There is a very simple way to improve the Article 32 procedure within the existing framework of the Code. First, the investigating officer’s recommendation not to refer a specification or charge to trial by general court-martial should be binding upon the convening authority. This can be accomplished by amending paragraph 34a of the Manual. Second, all Article 32 investigations should be conducted by a special court-martial (Class II) military judge. This has the double advantage of providing an investigating officer who is both legally trained and free from command control. No legislation is required, and such a procedure would not run afoul of the Manual prohibition against designating the person who is expected to become the military judge at the trial of the case as investigating officer.

V. Summary

The grand jury, as we know it today, evolved, flourished and died in England. Ironically, the country which for many centuries nurtured the grand jury determined in the 20th century to abolish it; yet in the United States the military’s jurisdiction has been limited because it does not provide for indictment by grand jury, while at the same time the military’s Article 32 investigation provides an accused with procedural due process which far surpasses the pretrial safeguards which the grand jury indictment offers a civilian defendant.

This paper has examined and compared a few of the defendant’s more important pretrial safeguards. The institutions themselves—the Article 32 investigation and the grand jury—are both designed to protect the individual from unjust prosecution by the government. However, there is a marked difference in the procedural safeguards actually permitted by the military and civilian institutions. At the Article 32 investigation, an accused may be represented by counsel, either military or civilian. An accused who is denied the right to counsel is entitled to a new Article 32 investigation. A civilian is

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178. Alternatively, the investigating officer can be limited to a determination of whether there is sufficient evidence to warrant referring a specification to trial. His determination that there is sufficient evidence should be final. However, once the determination has been made that there is sufficient evidence, the convening authority should then decide whether the case should be tried, and in what form. This alternative would require Congressional action.

179. MCM, 1969, §34a. There is a possibility that a Class II military judge who investigated a case might be required to judge the same case if it were subsequently referred to trial by special court-martial. This is not a serious obstacle. It happens relatively infrequently, and it is not illegal.
not entitled to counsel at a grand jury investigation. The civilian suspect is not even permitted to attend the grand jury proceeding unless he is testifying as a witness.

The military accused has a statutory right to confront available witnesses at the Article 32 investigation. The investigating officer cannot consider the unsworn statements of absent witnesses if the accused objects. There is obviously no right of confrontation at the grand jury proceeding, since neither the accused nor his attorney are permitted to be present. Neither the Article 32 investigation nor the grand jury proceeding are bound by the formal rules of evidence. But if strict evidentiary rules were applied, who would object for the defendant at the grand jury proceeding?

At the Article 32 investigation the government’s file is almost literally open to the accused. He must be told what the charges are and who the witnesses are, and his counsel is given a complete copy of the file by the investigating officer. The pretrial investigation serves as a discovery proceeding for the accused. Just the opposite is true of a federal grand jury proceeding. A civilian defendant has no right to know who the witnesses are, and he is not entitled to know anything about the proceedings. The proceedings can be disclosed only to government attorneys. The defendant must obtain a court’s permission to inspect other documentary evidence considered by the grand jury—a substantial burden when a defendant has no idea what evidence the grand jury considered.

Finally, the grand jury’s unfettered power, when in session, to investigate anyone or anything on the merest suspicion creates the appearance of a vigilante group which has long been regarded as anathema to the proper administration of criminal justice.

It is apparent that an accused in the military, lacking the constitutional “benefit” of grand jury indictment, has a much greater pretrial advantage than his civilian counterpart enjoys. Nevertheless, the Article 32 investigation should be further improved by eliminating any vestige of command influence. This can be done by making the investigating officer’s recommendation not to refer a charge to trial by general court-martial final, and by appointing a Class II military judge as investigating officer in all cases. With the adoption of these recommended changes, the Article 32 investigation will become the finest and fairest pretrial investigative institution in American jurisprudence.
THE CONSTITUTIONALITY OF STATE STATUTES PROVIDING INCOME TAX CREDIT FOR PARENTS OF PAROCHIAL SCHOOL CHILDREN

by

MICHAEL S. DANIAN*

I. INTRODUCTION

The right of parents of elementary or secondary school children to educate their child in a parochial school was constitutionally established in Pierce v. Society of Sisters.1 Moreover, when a parochial school is chosen by a parent, the state's educational requirements of his child are satisfactorily met by attendance at a parochial school if that school's secular educational program is an accredited one.2 In other words, a parent who chooses a parochial school exercises a constitutional right which results in the fulfillment of both the parent's desire to obtain religious instruction for his child as well as the state's interest in secular education.3 Thus, it becomes apparent that the accredited parochial school in our pluralistic society offers not only religious education, but also acceptable secular education. Furthermore, the principal effect of the parochial school is the furnishing of education comparable to the education furnished by the public school system.4 For example, graduates of parochial schools go on to state and private Catholic or non-Catholic universities to become lawyers, doctors, accountants, teachers, and businessmen, just as do graduates of public schools.5

The Pierce decision gave juridical existence to parochial schools and gave them the power to use the truancy laws of the nation to bring Catholic children into a Catholic school for twelve years of their compulsory schooling.6 This decision implied that the further subsidization of parochial schools would be inevitable.7

Since the Pierce decision, the constitutionality of the use of taxes for reimbursement of bus fares and secular textbooks for children in

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1. 268 U.S. 510 (1925).
5. Id.
7. Id.
parochial schools providing secular education has been upheld respectively in *Everson v. Board of Education* 8 and *Board of Education v. Allen.* 9 But, reimbursement for teachers' salaries, textbooks and instructional materials in specific secular courses in parochial schools as well as payment to nonpublic elementary school instructors of a supplement equal to 15 per cent of their annual salary were held to be unconstitutional in *Lemon v. Kurtzman.* 10 This decision held unconstitutional a substantial method of supporting the cost of secular education provided by parochial schools. Moreover, the effect of this case, in which the method of support of the cost of secular education provided by parochial schools was based on the secular-sectarian distinction established constitutionally in *Everson* and *Allen,* has been an economic crisis that severely threatens the continued operation of the parochial school system. 11 And, should the demise of these and other private schools occur, the cost to United States citizens would be more than $4 billion annually in operating expenditures and an additional $5 billion for new educational facilities, or a total of at least $9 billion. 12

The more common methods currently being considered or used to substantially support the cost of secular education provided by parochial schools are “shared-time” arrangements, educational voucher systems, and state income tax credit statutes. Under the so-called “shared-time” arrangement, the parochial school students attend classes in the public school conducted by public school teachers for part of the day, or alternatively the public school teachers conduct certain classes for parochial school students in the parochial school. 13 The system of educational vouchers is one where the state issues a voucher in a certain amount to the student, the student selects his school, and the state honors the voucher by paying the amount of the voucher to the public or private school, as the case may be. 14 In the case of state income tax credit statutes, the parents are allowed to credit a portion of the secular education cost provided by a parochial school against their state income tax. 15

The constitutionality of the foregoing methods of supporting the secular educational programs of parochial schools is not clear at the present time. The “shared-time” arrangement and the voucher sys-

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12. Id.
14. Id. at 182, 183.
15. *Note: Aid to Parochial Schools—Income Tax Credits,* 56 Minn. L. Rev. 189 (1971-72).
tem have been examined in terms of the secular purpose, primary effect, and excessive entanglement standards of recent decisions of the Supreme Court, and such examination indicated that these methods meet the constitutional standards. The state income tax credit method which was enacted into law in Minnesota was examined in terms of the foregoing standards in an article which indicated that the method was probably unconstitutional. But, subsequent to this article, a Minnesota lower court upheld the constitutionality of this method. In Ohio, the second of the two states which have enacted statutes on income tax credit, the constitutionality of the statute has been challenged in a federal district court, but no decision has been reported as of the writing of this article. Thus, at the present time there appears to be some indication that these methods are probably constitutional, but without a Supreme Court decision, the constitutionality of these methods must remain uncertain.

The purpose of this article is to present a view in support of the constitutionality of the state income tax credit method of substantially supporting the cost of secular education provided by parochial schools. This view will be based on (1) standards or tests enumerated by the Supreme Court in cases decided under the establishment clause of the First Amendment, and (2) on the free exercise clause of the First Amendment.

II. STATE INCOME TAX CREDIT STATUTES

The Minnesota statute which allows parents of parochial school children to credit up to $100 of educational expenses per pupil against their state income tax went into effect in the same year as the Lemon decision. In the year following the Lemon decision, an income tax credit bill was enacted by the Ohio legislature providing parents with a maximum credit of $90 per pupil. Under both of these statutes, the credit to which the parent is entitled is computed by formulae which contain factors regarding average public school costs per pupil in the state and total taxes due to the state. In general, the effect of these statutes is that educational taxes paid by parents of parochial school children which previously were used for secular education in public schools with the result of no benefit to such parents are now used for expenses of secular education in parochial schools so as to benefit these parents.

17. See supra note 15 at 227.
III. THE CONSTITUTIONALITY OF INCOME TAX CREDIT STATUTES

The discussion that follows argues for the constitutionality of the state income tax credit method of supporting secular educational programs provided by elementary and secondary parochial schools and is based first, on the establishment clause and second, on the free exercise clause. This discussion concerns mainly the Minnesota and Ohio statutes on income tax credit. To the extent that comparable statutes are enacted by other states, this discussion is applicable.

The Establishment Clause

Under the establishment clause, a state income tax credit statute is constitutionally valid if it meets the three standards or tests enumerated by the Supreme Court in Abington School District v. Schempp and Walz v. Tax Commission. These tests, the first two of which were stated in Schempp and the third in Walz, as applied to an income tax credit statute, may be stated as follows:

(1) Does the statute have a secular legislative purpose?
(2) Does the statute have the primary effect of advancing religion?
(3) Does the statute result in excessive governmental entanglement with religion?

Secular Legislative Purpose

The legislative purpose of an income tax credit statute must be secular and not religious. The Supreme Court, in applying this test in Board of Education v. Allen, held that a New York statute which provided secular text books for parochial school children had a secular legislative purpose. Similarly in Everson v. Board of Education, the Supreme Court held that the New Jersey statute which authorized local boards of education to reimburse parents of parochial school children for fares paid for transportation to such schools was a safety measure, such as fire and police protection, and did not involve the use of taxes for the support of religious instruction. In other words, statutory provisions for school transportation and secular textbooks were held to have a secular legislative purpose.

In determining whether an income tax credit statute meets this test, an examination of the statute itself is appropriate. Such examination of both the Minnesota and Ohio statutes reveals that the language of these statutes reasonably indicates that the legislative purpose in both states is to provide support for the secular education provided by parochial schools. The statute of Ohio, for example,

refers to "a school for which the state board of education prescribes minimum standards" and to "an amount equal to the statewide average increase in expenditures per pupil in public schools" with respect to calculating the amount of the tax credit against the income tax. The Minnesota statute also indicates a secular purpose by the use of such language as "fulfill the requirements of the state's compulsory attendance laws" and "adheres with the Civil Rights Act of 1964" with respect to parochial schools that qualify the parent for income tax credit. In both statutes, there is acceptable indication that the purpose of the legislatures in enacting them was secular.

The Primary Effect

The primary effect of an income tax credit statute should not be such as to advance religion. The Supreme Court in applying this test in Allen held that the provision of secular textbooks did not advance religion. The Court pointed out that the books benefited the parents and the children and not the parochial school as such. This reasoning was also noted by the Court in Everson. In that case, the Court recognized that the furnishing of bus fare to parochial school students made it easier for parents to send them to those schools, but pointed out that the same could be said for a variety of other public services furnished to these schools, which unquestionably were constitutionally permissible.

In applying this standard of constitutionality to a state income tax credit statute, the question of the primary effect of such a statute should be determined only on the basis of whether or not the taxes used are for support of the secular educational programs provided by parochial schools. The question of primary effect should not be determined on the basis of arguments which emphasize that financial support for the secular educational programs of parochial schools would release funds for religious educational purposes and in that sense advance religion; that financial support for the secular educational programs of these schools is allowable so long as there is an incidental religious effect which is permissible; or that the "effect" standard is satisfied if the principal social contribution of these schools is the furnishing of an education to its students substantially comparable to the education which is afforded by the public school.
The first of the foregoing arguments fails to consider the possibility that financial support of secular educational programs may not make available funds for religious purposes or that such an argument may be made with respect to any kind of secular activity supported by taxes.

The second of the above arguments indicates that some financial support of secular education provided by parochial schools is permissible but too much is not. Such an argument does not provide an objective and dependable answer to what is "too much" or what is "just enough".

The last of these arguments suggests a need for a determination of the primary effect of the educational programs of parochial schools as well as the need for answers to the questions of who is to make such a determination and how it is to be made. It may be that even if a determination of this kind were made, the result would probably not be satisfactory to all concerned so as to be of no value in resolving the issue.

The position that the primary effect of an income tax credit statute should be based only on whether taxes are used for secular education finds support in the suggestion that grants limited to the cost of secular education provided by parochial schools would not violate the First Amendment. In addition, the position with regard to income tax credit statutes does not raise the "excessive entanglement" issue that would be raised by grants to parochial schools themselves because in the case of income tax credit, such credit is to the parent.

If secular education of an acceptable standard is being provided by parochial schools, then a credit for a portion of the costs of such education is consistent with the test that the primary effect of a statute should not be to advance religion.

**Excessive Entanglement**

The statute must not result in excessive entanglement between government and religion. This test was emphasized for the first time in Walz v. Tax Commission. It was also essentially the basis for the holding in Lemon v. Kurtzman where reimbursement for teachers' salaries, textbooks, and instructional materials in specific secular courses in parochial schools, and payment to nonpublic elementary school instructors of a supplement equal to 15 per cent of their annual salary were held unconstitutional.

In the Lemon decision, the Court indicated that the relevant considerations of the entanglement issue were the surveillance of the

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educational and fiscal operations of the parochial school by state authorities and the political divisions along religious lines as a consequence of the legislation.\textsuperscript{37} In particular, the entangling effects of combined secular and religious instruction by the teacher, periodic financial audits required under the legislation, and the potential for political division along religious lines as a consequence of annual appropriations to support church elementary and secondary schools were discussed in \emph{Lemon}.\textsuperscript{38}

In deciding the entanglement issue, again, the relevant consideration should be whether an accredited secular educational function is being performed by the parochial school. For if this is the situation, then the entanglement of the government with religion, that is, the relationship of the parent and the tax commissioner or department, may be said to be sufficiently similar in character to that which already exists between individuals and the government in many other areas of activity so as to be no more or less constitutional as are those other relationships of the individual with the government. For example, the tax commissioner or department relates with the individual in the case of deductions for contributions to religious institutions by individuals on their income tax forms by way of audits if necessary to verify such deductions.\textsuperscript{39}

With respect to the nature and extent of the government's relationships with the parochial schools, it may be likewise stated that such a relationship is sufficiently similar in character to that which exists in many other areas of activity so as to be no more or less constitutional than are those other relationships between religious organizations and the government. For example, the government must authorize tax exempt status for religious organizations with regard to property taxes and then assure itself that the religious organizations continue in that status for the duration of their existence.\textsuperscript{40}

The issue of excessive entanglement in the case of an income tax credit statute should be of constitutional insignificance as relationships of the kind considered under such statutes are sufficiently similar in nature to many other areas of relationships between government and individuals or religious organizations.

\textit{The Free Exercise Clause}

The free exercise clause of the United States Constitution proscribes conduct by government which prohibits the free exercise of religion.\textsuperscript{41}

\begin{footnotes}
\footnote{37. Id. at 619 and 622.}
\footnote{38. Id. at 620 and 623.}
\footnote{40. Id. at 272.}
\footnote{41. U.S. Const. amend. I.}
\end{footnotes}
The government should not, in other words, "inhibit" religion. This means, according to the dictionary definition of "inhibition", that government should not impede the free activity, expression or functioning of religion.

The constitutional prohibition against state action "inhibiting" religion appears in the Supreme Court's decisions in McGowan v. Maryland, Abington School District v. Schempp, and Board of Education v. Allen. This concept that state action whose "primary effect" is the "inhibition" of religion has been stated to refer to institutionalized religion and not to any infringement of the free exercise of a person's religion.

The state "inhibits" religion when laws create difficulties for church-related groups in their attempt to integrate the sacred and the secular in a system of education. The application of the meaning of the free exercise clause of the Constitution to an income tax credit statute reasonably indicates that to hold it otherwise than constitutional, when the parents may opt for the parochial school which is fully accredited and aided by state truancy laws, is to render an unconstitutional holding. The use of taxes paid by parents of parochial school children to support the cost of secular education provided by such a school enable the parent to exercise in a real sense the constitutional right to choose between a parochial and a public school for the education of their children. Whereas, for the parent to have the constitutional right to choose a parochial school but to be denied the use of taxes for secular educational purposes in those schools results in the placing of an economic burden which has in a real sense the effect of taking away the right to choose the parochial school over the public school for the purpose of secular education.

The free exercise issue, in particular the "inhibition" of religion in point, may well be the crucial issue of future cases in this area.

IV. THE FUTURE OF INCOME TAX CREDIT STATUTES

The arguments which have been presented for income tax credit statutes may very well be considered by the Supreme Court when it eventually rules on the constitutionality of such statutes. The principles of some of these arguments were in the decision of the Ramsey

43. Id.
44. 368 U.S. 420 (1961).
46. 392 U.S. 236 (1968).
48. Id.
49. Id. at 14.
County District Court in Minnesota.\textsuperscript{50} And, these principles may also be in the decision of the United States District Court in Columbus, Ohio, where the American Civil Liberties Union has initiated suit regarding the constitutionality of Ohio's income tax credit statute.\textsuperscript{51}

In addition, the arguments in support of the constitutionality of state income tax credit statutes will probably receive further attention with respect to their merits because of current indications of the value of parochial schools,\textsuperscript{52} the tremendously increased costs to taxpayers that would result from the demise of parochial schools,\textsuperscript{53} and the undesirability of the probable development of a monopoly on education by public schools.\textsuperscript{54}

The value of parochial schools in our society was strongly suggested in the Allen\textsuperscript{55} decision and was described as a vital national asset by Secretary of the Treasury, George P. Schultz, of the Nixon Administration at hearings on a bill before the House Ways and Means Committee\textsuperscript{56} proposing to allow parents of parochial school children to deduct up to $200 for each child's tuition from their federal income tax. There was also testimony at those hearings in favor of that bill by Elliot L. Richardson, Secretary of Health, Education and Welfare; and Caspar W. Weinberger, Director of the Office of Management and Budget.\textsuperscript{57}

The tremendous increase in taxes that would result from the demise of parochial schools has been reported in a recent law review article,\textsuperscript{58} and by Rep. Thaddeus J. Dulski, D-N.Y., before the aforementioned congressional hearings.\textsuperscript{59}

The growing concern regarding monopolization of elementary and secondary education by the public school system was aptly expressed by the concerned father of a son in a public school whose reading scores in the school had gone down for the fifth straight year, when he said, "What does it matter that somethings 'public' if we don't have a choice?"\textsuperscript{60}

Finally, consideration should be given the view that cooperation between church and state has traditionally been regarded as permissible under conditions that (a) such cooperation not infringe, but rather support the right to the free exercise of religion, and (b) such cooperation exists where governmental responsibility is well defined.\textsuperscript{61}

\textsuperscript{50} Catholic Telegraph (Cincinnati, Ohio), July 14, 1972 at 1.
\textsuperscript{51} Cincinnati Enquirer, June 27, 1972, at 9.
\textsuperscript{52} Catholic Telegraph (Cincinnati, Ohio), August 25, 1972, at 1.
\textsuperscript{53} Id.
\textsuperscript{54} Catholic Telegraph (Cincinnati, Ohio), August 25, 1972, at 1.
\textsuperscript{55} Id.
\textsuperscript{56} See Willett, supra note 39, at 256, 257.
\textsuperscript{57} See Catholic Telegraph, supra note 56.
\textsuperscript{58} See Cincinnati Enquirer, supra note 54.
\textsuperscript{59} J. Murray, WE HOLD THESE TRUTHS, 152 (1961).
The principle of this view is that a legitimate accommodation of the public service to the religious and spiritual needs of the people is constitutional. This principle appeared in the following statement of the Court in the *Zorach v. Clauson* case: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." The best of our traditions now need development to meet the problems which educational and religious-social changes have made acute.

V. SUMMARY AND CONCLUSIONS

An examination of the state income tax credit statutes of two states, Minnesota and Ohio, under the establishment and free exercise clauses of the First Amendment indicates that these statutes are probably constitutional. These statutes fulfill the three tests enumerated by the Supreme Court of legislative secular purpose, a primary effect which does not advance religion, and an absence of an excessive entanglement between government and religion.

With respect to the free exercise clause, these statutes enable parents to exercise, in a real sense, the right to choose a parochial school over a public school in which to educate their child. These statutes allow the use of a portion of the taxes paid by parents of parochial school children for expenses of secular education in a parochial school. In this way, the parents who exercise their right and choose a parochial school which provides accredited secular education would not experience the previous economic burden of being taxed for the cost of accredited secular education without benefiting from the payment of such taxes. Thus, state action which results in permitting such an economic burden would tend to constitute action that "inhibits" institutionalized religion so as to be unconstitutional.

A Minnesota lower court has upheld the constitutionality of that state's income tax credit statute. The rationale of that decision along with greater consideration of the other religion clause of the First Amendment, namely, the free exercise clause, by the Supreme Court when it eventually considers the issue, should result in an affirmation of the constitutionality of the state income tax credit statute method of supporting the cost of secular education in parochial schools.

Ultimately, the merits of the foregoing arguments in support of the constitutionality of the state income tax credit statutes should become clearer with greater recognition of the value of the parochial school system in our country and the undesirability of the monopolization of secular education by the public school system.

62. *Id.*
64. J. Murray, *We Hold These Truths*, 153 (1961).
ADDENDUM

The author learned after preparing this article that New York has a statute on tax credit too. This statute was declared to be constitutional by a federal district court in October, 1972. This decision is on appeal to the U. S. Supreme Court.

The Ohio tax credit statute was declared unconstitutional in December, 1972 by the U. S. District Court in Columbus, Ohio. This decision will be appealed.

The state legislatures in California, Hawaii, and Louisiana have approved tax credits for parents of nonpublic school children.

1. Catholic Telegraph (Cincinnati, Ohio), October 6, 1972, at 1.
3. Id.
4. Id.
5. Catholic Telegraph (Cincinnati, Ohio), December 15, 1972, at 1.
THE CASE OF ANDERSON v. UNITED REALTY CO.
AND THE
DOCTRINE OF IMPLIED GIFTS TO ISSUE IN OHIO

By Edward R. Goldman*

I. INTRODUCTION

While Ohio case law in respect of the creation of future interests in property is generally sparse when compared to that of other states, some rules can be deduced from Ohio decisions to guide us in creating such interests and in construing them after their creation.

It is the purpose of this paper to look at one aspect of the doctrine of implied gifts in Ohio: whether a gift to issue can be implied when the form of the express gift is “to X, and if X die without issue, to Y.”

In general, gifts are implied when it can be fairly said from the instrument being construed that the creator would have intended such results if he had foreseen the contingency which actually occurred. Although a gift need NEVER be implied if the draftsman has helped the creator foresee and provide for all contingencies, it is nevertheless necessary to know, with reasonable certainty, how the courts will tend to treat such omissions as are bound to occur periodically.

II. LIMITATION “TO X, AND IF X DIE WITHOUT ISSUE, TO Y” AND THE WILL OF HENRY ANDERSON

When Henry Anderson of Holly Springs, Miss., executed his last will and testament on February 28, 1846, he probably could not even imagine that his yet-to-be-born grandson, Peter, would have to travel to the United States Supreme Court twice in order to settle his interests thereunder.

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3. The facts given herein are taken from Anderson v. Messinger, 146 F. 929 (6th Cir. 1906). See also Anderson v. The United Realty Co., 9 Ohio C.C.R. (n.s.) 473 (1907), aff’d 79 Ohio St. 23, 86 N.E. 644 (1908).
5. That interest was eventually adjudicated to be “nothing.” See cases cited in note 4 supra.
Anderson's Title

In 1838, Edward Bissell, formerly of Toledo, gave a mortgage on property in Ohio to one Charles Butler of New York. Thereafter, in 1841, Butler assigned the mortgage to Henry Anderson (hereinafter referred to as the testator) as partial security for a $20,000 debt. Upon Butler's default in 1843, testator sought (and received) a foreclosure on Bissell's mortgage in the Lucas County Court of Common Pleas. At the resulting master's sale, testator bid off the property for $6,910. A master's deed to the premises was executed and delivered to testator on November 18, 1844.

Anderson's Will

Testator's will provided, in pertinent part:

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property . . . in trust . . . for the following purposes: . . .

"Item . . . [W]hen my son William arrives at the age of twenty-one years the trustees . . . shall put him in possession of one-half of my property, reserving thereout two-fifths parts . . . by valuation, which my said trustees shall hold . . . and pay over to him at the age of twenty-five years. . . .

"And . . . pay over the remaining moiety . . . to my son James at the respective periods of twenty-one and twenty-five . . . by the same rules . . . as are above laid down. . . .

"IF EITHER OF MY SONS DIE WITHOUT LINEAL DESCENDANTS, THE ONE SURVIVING SHALL TAKE HIS ESTATE . . . [here follow alternate gifts]. NOTHING IN THE FOREGOING WILL SHALL BE CONSTRUED AS TO DEPRIVE EITHER OF MY SONS DISPOSING OF THEIR PORTIONS BY WILL . . . THE ABOVE LIMITATIONS OVER SHALL GIVE WAY TO THE PROVISIONS OF SUCH WILLS." 7 (emphasis added)

The Litigant's Claims

The testator died slightly more than one month after he executed his will. He left surviving him no sons other than the two mentioned therein. William died in 1850 intestate and without issue. James died in 1902 leaving one son surviving him. That son, Peter Anderson, was the plaintiff in all the actions involving the will construction in the federal and state courts.

The defendants in all actions claimed title through Butler, who obtained quitclaim deeds in his favor from the devisees and trustees. 8

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7. Id.
Defendants contend, *inter alia*, that the testator intended to, and did, create fee simple estates in his sons, with the surviving son taking a fee in the whole estate upon the death of the other without lineal descendants surviving him. Such fee simple estate in the survivor, they maintain, would be defeated only upon his death without lineal descendants alive at that time. By such reasoning, the plaintiff's survival of his father, the surviving devisee, made the estate absolute in the devisee. Therefore, such absolute estate was effectively transferred by the quitclaim deeds.

The plaintiff, as the only lineal descendant of the testator's surviving son, based his claim to the premises upon the contention that the testator intended to create a mere life estate in his sons, with gifts over upon the deaths of one or both without lineal descendants alive. He contended, moreover, that his sole survivorship of his father, the testator's surviving son, vested a fee simple estate in him by implication. Therefore, plaintiff asserted, the quitclaim deeds to Butler conveyed a life estate and no more.

The Federal Cases

There were three trials and three writs of error in the federal cases. The substantive opinion of the Sixth Circuit court was that the plaintiff took a fee simple estate by necessary implication. By the time the third writ of error was decided, the Ohio Supreme Court had already construed the same will in favor of the defendant's contention of no implication. Nevertheless, the federal court adhered to its view of the "law," asserting that the Ohio court stated "no rule of property . . . which necessarily conflicts with" its view. Finally, the United States Supreme Court reversed, holding that the Sixth Circuit should have followed the Ohio decision.

9. A "definite" failure of issue was intended. Testator provided "The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son" (emphasis added) 146 F. 929, 937. This is the established Ohio rule. Parish's Heirs v. Ferris, 6 Ohio St. 563 (1856); Briggs v. Hopkins, Ex'r., 103 Ohio St. 321, 132 N.E. 843 (1921); Steinbrenner v. Dreher, 140 Ohio St. 305, 43 N.E. 2d 283 (1942).

10. Anderson v. Messinger, 146 F. 929, 937 (6th Cir. 1906).


12. The decisions on the three writs of error are reported, respectively, as Anderson v. Messinger, 146 F. 929 (6th Cir. 1906); Anderson v. Messinger, 158 F. 250 (6th Cir. 1907); and Messinger v. Anderson, 171 F. 785 (6th Cir. 1909), rev'd 225 U.S. 436 (1912).

13. Anderson v. Messinger, 146 F. 929, 941-46 (6th Cir. 1906). This opinion, by Circuit Judge Severens, contains a well-reasoned and detailed statement of the substantive law as decided in the federal court.


The State Cases

While the first writ of error was pending in the federal court, the plaintiff brought another action, this time in the Lucas County Court of Common Pleas. In the state court, the verdict and judgment went for the defendants. Plaintiff pursued the adverse decision on substantive grounds up to the Ohio Supreme Court, and on jurisdictional grounds up to the United States Supreme Court.

The Ohio Decision And Analysis

Having given some idea of the complexity injected into the adjudication of the case by the plaintiff, we can now look at the Ohio decision, its bases, its progeny and the prospects for the future of such implied gifts in Ohio.

The law of the case is contained in paragraph two of its syllabus:

"Where, in a will, there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease, then over, these words are not, by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes a fee defeasible upon his death without lineal descendants, living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease his fee becomes absolute and such descendants have no interest under the will as against his grantee."

The text of the court's opinion appears to state a rule more strongly against implication of a gift to issue than does the syllabus quoted above. Based upon the syllabus alone, "other parts of the will" may be relied upon to raise a presumption of intent sufficient to create a gift by implication in the devisee's issue. But the actual opinion, as will be shown below, points toward the view that a gift should never be implied to such issue.

19. Id.
21. Anderson v. The United Realty Co., 222 U.S. 164 (1911). The case of Barr v. Swartz, 19 Ohio C.C.R. (n.s.) 161 (1912), provides an interesting look at the kind of confusion which attended the complex Anderson cases. In Barr, supra, the plaintiff brought an action for specific performance of a contract to convey realty. Plaintiff's title was based on a conveyance to him by one James Porter and upon quitclaim deeds by Porter's brothers and sisters. Porter's title rested on a devise from his father upon the condition that "should [James] die without issue living, the said lands shall descend to [James' brothers and sisters]." Barr, supra, at 162. The Wood County court denied specific performance because plaintiff's title was of "doubtful character," Id., due to the fact that the federal Anderson cases, if sustained, would leave a potential title in one or more of James Porter's four children. The fact is that this Wood County decision was rendered on October 28, 1912, almost five full months after the U.S. Supreme Court upheld the state court decision in Anderson.
23. Id.
The Restatement of Property takes the position that a gift to issue should be implied, absent a “contrary intent of the conveyor,” when the form of the conveyance expressly limits the primary gift “to B for life.” On the surface, the Restatement rule seems contrary to that expressed by the Ohio court in Anderson. But the Restatement actually adopts the Ohio position with the following words:

If the limitation is, in terms, “to B, and if B dies without issue, then to C,” the lack of explicitness in the limitation makes it reasonable for a court to find that B has been given an estate in fee simple defeasible only in the event that he dies without issue.

If it is the “lack of explicitness” of such a devise which allows the fee simple defeasible construction, then it is similarly the failure of Henry Anderson’s devise to receive “assistance from other parts of the will” which allows, according to the syllabus, the same result. In fact, it is precisely because the federal court found such extra “assistance” in the will that it felt justified in adhering to its former decision even after the Ohio court had rendered its opinion.

The question which naturally arises at this point is, did the Ohio court fail to consider the whole will? The answer is NO, but the court could give no fortification to the plaintiff’s contention therefrom. First, the Ohio Court looked to that part of the will which saved to the devisees the power to dispose of the premises by will and decided that the passage was more than a mere gift of a power to dispose since “[i]n the contemplation of the testator that power they already had.” The court’s conclusion was drawn from its view of the testator’s language in saving the power. In the court’s view, the reasoning behind such a conclusion was not persuasive since it was at least as likely that one intending to create a mere life estate

24. §272 (1940).
25. Id.
26. Id.
27. Id. Comment c. Accord, L. Smies, supra note 2, at 287, to the effect that such a devise should “normally” grant the fee.
30. Id.
31. Messinger v. Anderson, 171 F. 785, 793-94 (6th Cir. 1909). The federal court felt, at 794, that it was empowered to reach a “... conclusion upon common-law principles in the exercise of... independent judgment...” That observation was probably justified since it was not until 1938 that the Supreme Court decided Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
33. Id.
34. Id. The language used was, “Nothing in the foregoing will shall be construed as to deprive... my sons disposing of their portions by will...." (Emphasis added.)
might, if he also desired to grant the life tenant a testamentary power to dispose of the land, phrase the grant in the same negative language which was used in Anderson. Second, the court said that it would be conjecture to suppose that the testator intended a gift to issue from his language creating a gift over on the devisees’ dying without issue surviving. Such reasoning was also not persuasive, since no gift could ever be implied if some degree of conjecture were not resorted to in order to ascertain what the testator would have done if faced with the unaccounted for occurrence.

The court also relied upon some old English cases to defeat the implied gift theory put forth by the plaintiff. While the tendency of earlier English cases to hold against implied gifts to issue cannot be disputed, little practical support is lent to the court’s position thereby since the more modern English authorities recognize the propriety of looking elsewhere in the will for signs of a contrary intention on the part of the testator which is sufficiently strong to carry the implied gift.

Very damaging to the plaintiff’s side was the court’s citation to Jarman on Wills. Jarman said:

“And even where the language of the will necessarily confines the interest of the parent to his life, the children will not generally be held to take by implication. It is extremely probable that the testator intended a benefit to them, but si voluit non dixit.”

35. I.e., the testator would, in effect, be saying “The fact that you are a mere life tenant should not be ‘construed as to deprive’ you of the power to dispose of the property in your will.” See Anderson v. Messinger, 146 F. 299, 945 (6th Cir. 1906), wherein the court cites Widows’ Home v. Lippard, 70 Ohio St. 261, 71 N.E. 770 (1904), as authority for the proposition that an estate limited in general terms and accompanied by a qualified power of disposal creates a life estate by implication. Actually, that case held in its syllabus that a devise of “all of one’s estate, “with power to sell or dispose of it as [devisee] may see fit,” is sufficient to give the devisee power to convey away a full fee. But cf. White, Life Estate Or Fee?, 1 U. Cm. L. Rev. 405, n.1 (1927), which recognizes a power of disposal by will; Construction of Ambiguous Devise-Fee Simple or Life Estate?, 9 O.S.L.J. 373 (1948); citing Ohio authorities for the proposition that a general devise along with a qualified power to dispose results in a life estate rather than a fee; Erman v. Erman, 101 Ohio App. 245, 136 N.E. 2d 385 (1956), wherein a bequest of $12,500. with “full use... and... with full power to consume or dispose” was held to grant a life estate in the money.


37. See L. Simms, note 2 supra and accompanying text.

38. L. Simms, supra note 2, at 236, n. 27.


40. Anderson v. The United Realty Co., 79 Ohio St. 23, 51, 86 N.E. 644, 648 (1908). The court’s reliance on such authority supports our earlier assertion that the court’s opinion, contrary to its syllabus, gives rise to the impression that the court dislikes an implied gift to issue in any case. As will be shown below, Jarman’s absolute position is not taken by Ohio authority.
In order to support its finding that a devise "to B" in general terms carried the fee, the court relied heavily upon a statute governing the construction of ambiguous devises of lands. As quoted by the court, the statute read:

"[I]n any will . . . made [after March 3, 1834], a devise of lands shall be construed to be a fee simple, 'and the devisee shall take, all the estate which the deviser had in the property or thing divested [sic], unless it appears by express words THE manifest intent that a lesser estate was intended." 41 (emphasis added)

The court found neither "express words" nor "manifest intent" to create an implied gift to issue from Anderson's will. 42 It is this finding, or lack thereof, which most seems to account for the essential difference between the state and federal holdings with respect to this will. 43 While either view is supportable *per se*, the Ohio position is weakened by the court's apparent misreading of the relevant case law, which is digested below.

The state court cited only one case, *Niles v. Gray*, 44 in support of its opinion, and the citation was only used to disparage the case of *Shaw & Campbell v. Hoard*, 45 which was cited by the plaintiff in support of his case.

In *Shaw*, a testator, Delonzo Hoard, devised real property to his wife and daughter, with the survivor to take the share of the one to die first, and subject to the further provision that if both should die without issue, then over to David Campbell, the wife's brother. Upon the deaths of the testator's widow, leaving issue of a second marriage (Carrie Brown), and of the testator's daughter, without issue, the court held that the widow's issue by the second marriage should take the estate by implication, and that the heirs of the testator and his widow should take nothing. 46

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41. Anderson v. The United Realty Co., 79 Ohio St. 23, 51, 86 N.E. 644, 648 (1908). The emphasized word "THE" is actually recorded as "OR" in the original statute books. 32 LAWS OF OHIO 41 (1834); 1 CURWEN'S REVISED STATUTES OF OHIO 145 (1853). The error would have been material, had the court relied upon the incorrect version, since such reading of the statute would require "express words" to defeat the rule of construction, thus making it virtually impossible to ever *imply* any gift. However, the error appears not to have been carried over into the opinion.

42. Anderson v. Messinger, 79 Ohio St. 23, 52, 86 N.E. 644, 648 (1908). See also the current statute *Ohio Rev. Code* §2107.51, which declares that "[e]very devise . . . shall convey all the estate . . . unless [an intention to convey less] . . . clearly appears. . . ." Quaere whether the tests of "manifest intent" and clear appearance are equivalent.

43. Case cited note 31 *supra*.

44. 12 Ohio St. 320 (1861).

45. 18 Ohio St. 227 (1868).

46. Id. at 232. The court states, "If [testator] preferred Campbell to [his own heirs at law], much more does his preference extend to the issue of his wife and daughter . . . ." And, 18 Ohio St. at 233, the court also states, "It would seem that he regarded it as not to be doubted but that the property would pass to the children of his wife and daughter. . . ."
In *Niles*, the plaintiffs claimed title to real property under a deed from Margaret Harper Gray, the youngest daughter of the testator, Robert Harper. The defendants, children of Margaret, claim title as statutory remaindermen in the same property under the testator’s will. The devise to Margaret was of the “remaining part” of the testator’s realty, but if she die “without any legitimate heirs,” then over to the testator’s eldest son. It was held that the devise was sufficient in Ohio law to give Margaret a fee simple estate, and that the limitation over on death without heirs must take effect, if at all, as an executory devise.

The majority in *Anderson* relied upon *Niles* as tacitly overruling *Shaw*. However, an examination of Judge Brinkerhoff’s opinion in *Niles* clearly shows that Margaret’s children claimed no estate by implication. Rather, they asserted that the testator intended the limitation to take effect only upon an indefinite failure of issue; that such indefinite failure of issue should, by the English common-law rule, be construed into a fee-tail in Margaret; and, that the fee-tail should, per Ohio statute, be converted into a life estate in the first taker and a remainder in fee to her issue. Therefore, the actual holding of *Niles* had nothing to do with implied gifts to issue, and the ambiguous devise to Margaret of all “the remaining . . . real property” was sufficient to transmit the fee.

*Shaw* and *Niles* were not argued to the court on the same point, and, thus, do not directly collide, as was stated by the *Anderson* majority incorrectly. Rather, the main thrust of *Niles* was to “approve and follow” Ohio’s long-standing definite failure of issue rule of construction.

Other Ohio cases, decided after *Niles* but before *Anderson*, were mentioned obliquely by the *Anderson* court to support its disparagement of *Shaw*. A short review of the major examples of such cases follows below. The review is helpful even though the cases were not

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47. *Niles v. Gray*, 12 Ohio St. 320, 321-22 (1861). The word “remaining” means, *inter alia*, that part left after a devise of 25 acres to a son and a life estate to the widow.
48. *Id.* at 322.
49. *Id.* at 329-30.
50. *Anderson v. The United Realty Co.*, 79 Ohio St. 23, 58, 86 N.E. 644, 650 (1908).
52. *Id.* at 329.
53. *Anderson v. The United Realty Co.*, 79 Ohio St. 23, 57, 86 N.E. 644, 650 (1908). Note that both *Niles* and *Shaw* were decided after *Anderson* wrote his will, “and so cannot be insisted upon as controlling the decision in [Anderson].” *Id.* The court in *Anderson* made that point with respect to *Shaw*, which it disapproved, but neglected to mention it with respect to *Niles*.
54. Note 11 *supra*, and authorities cited therein; *Niles v. Gray*, 12 Ohio St. 320, paragraph 2 of syllabus (1861).
55. *Anderson v. The United Realty Co.*, 79 Ohio St. 23, 59, 86 N.E. 644, 650 (1908).
specifically cited since the degree of applicability of such cases to the Anderson situation should give us an indication of the true weight of Shaw as an authority today.

In Taylor v. Foster's Adm'r, the testatrix gave all her estate to certain previously designated heirs, but subject to the provision that if any should die without issue, then the share of the one so dying should go to the surviving devisees equally. The court held that each devisee took an estate in fee simple subject to divestment only upon her (the devisee's) death without issue surviving.

In the important case of Carter v. Reddish, the children of one Stevenson Reddish brought suit to recover possession of a certain tract of land. The tract was devised to the said Stevenson by his late father, Thomas B. Reddish. When the action was brought, Stevenson was also deceased. The defendant, John Carter, claimed title under an inter vivos conveyance in fee by Stevenson. The basic form of the devise to Stevenson was made "in general terms, and... followed by a habendum 'during his natural life, and to his heirs,' together with a limitation over to certain nephews and nieces, in case (the devisee, Stevenson) shall die WITHIN AGE, AND WITHOUT LAWFUL ISSUE" (emphasis added). The trial court held, in accordance with the plaintiffs' contention, that Stevenson took only a life estate under the will of his father. The Ohio Supreme Court reversed the trial court, holding in paragraph three of the syllabus, inter alia:

"the words 'heirs' in the habendum will be construed as a word [sic] of limitation enlarging the life estate to a defeasible estate in fee simple, IF SUCH CONSTRUCTION BE CONFORMABLE TO THE GENERAL SCOPE OF THE WILL, ... AND CONSISTENT WITH ALL THE OTHER PROVISIONS OF THE WILL." (emphasis added)

The key to understanding Carter lies in the court's unhappiness at the contingencies made possible if it had accepted the contention of the plaintiffs as to Stevenson's title. The actual devise (as opposed to the sample devise used by the court in the syllabus) was to Stevenson and his sister, Sarah, subject to the gift over only should both die within age (i.e., under 21) and without issue. The court felt that a life estate construction could result in an anomaly, to wit:

56. 17 Ohio St. 166(1867).
57. Id. The actual words used by testatrix were, "I... give and bequeath to the said children... all my estate... to them, their heirs, and assigns, forever" (emphasis added). This constitutes a clear devise of the full fee.
58. 32 Ohio St. 1 (1877).
59. Id.
60. Id.
“If [testator] intended to give . . . a mere life estate . . . then he purposed, in case either of them should live till majority, and both should die without living issue, that the fee . . . should remain wholly undevised.” 61

The court could not accept a construction which would require a finding that the testator intended to create a potentially ineffective gift. 62

The case of Piatt v. Sinton 63 was decided a few years after Carter. The court held therein that a devise of all of the testator’s property is a devise of the fee in Ohio, with or without the aid of the Act of March 3, 1834, or any equivalent legislation. 64 With that basis, the court also held, paragraph 2 of syllabus, that after a devise in fee a gift over on the devisee’s death without legitimate heirs of the body must take effect, if at all, as an executory devise. 65 Therefore, the devisee’s fee simple estate is determinable upon that contingency.

Two years after Piatt, the court had occasion to consider the case of Collins v. Collins, 66 wherein the testator devised the family farm to his wife for life, remainder over to two sons “and their heirs,” but if either son dies leaving no “children” 67 then to the surviving son, and if both sons die leaving no “heirs” 68 then over to testator’s heirs. The court held that the express devise to sons and their heirs created a fee simple estate. Further, the court held that the gifts over cut the fee simple down to a fee simple defeasible.

Finally, a few years before the Anderson cases went to court, the court decided Durfee v. MacNeil. 69 Although not directly in point with the other cases, Durfee provides an interesting look at one ramification of a fee simple defeasible construction. In Durfee, the testator devised property to both of his children, Alice Durfee MacNeil, the plaintiff’s decedent, and Elisha B. Durfee the defendant. There was a gift over to the survivor should either devisee die without heirs. Pursuant to a power of attorney given him by plaintiff’s decedent, the devisee sold certain portions of the premises and kept the proceeds. The plaintiff brought this action, inter alia, to recover

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61. Id. at 13-14. See also dissent of Davis, J., in Anderson v. The United Realty Co., 79 Ohio St. 23, 58, 86 N.E. 644, 650 (1908).
62. Carter v. Reddish, 32 Ohio St. 1 (1877).
63. 37 Ohio St. 353 (1881).
64. Id. The Act of March 3, 1834, has previously been set forth in the text accompanying note 41 supra.
65. Id. The court asserted, at 355, that the holding of Niles v. Gray, 12 Ohio St. 320 (1861), “. . . has become a rule of property in this state. . . .” The rule is that a devise of the “remaining part” (or, as here, “all”) of the testator’s property passes the testator’s entire estate (i.e., the fee) to devisee.
66. 40 Ohio St. 353 (1883).
67. Id. at 361.
68. Id.
69. 58 Ohio St. 238, 50 N.E. 721 (1898).
the proceeds of the sale. After finding a fee simple defeasible estate in the two devisees, the court rejected the plaintiff's assertion and held that the money from the sale was subject to the same provisions of testator as were applicable to the land, itself, and, therefore, upon the death of the plaintiff's decedent without heirs (held by the court to mean children), the land passed to the defendant. He was exonerated from payment.°

The foregoing cases show that, at least until the Anderson decision, the Ohio court indicated its willingness to imply gifts to issue if an examination of the will disclosed such an intention on the part of the testator. The court has also shown, however, that a fee simple construction will be made wherever it is possible to do so without negating the testator's intent. In all five cases digested, the court found that either the testator's express words or his presumed intention to make an effective gift necessitated a fee simple defeasible construction rather than a life estate with implied remainders to issue construction. No case given above, however, gave unqualified support to the assertion in Anderson that Shaw was "contrary to the current of authorities."" Having now seen what the prevailing Ohio view was before Anderson, we now turn to some cases decided after Anderson to see what practical effect, if any, that decision had upon Ohio law.

In Avery v. Avery,72 an ejectment action was instituted which involved the construction of Alfred Lapish's will. He died leaving five children. One of them, Jennie, was the plaintiff, and another, John, was the defendant's decedent. Testator devised a life estate to his wife, with a remainder to John and Jennie, subject to the provision that "[if] ... either ... should die leaving no issue, then the property devised shall be divided equally between the brothers and sisters then living."73 When John died without issue, the plaintiff was the only one of the testator's children still alive.74 The main thrust of the court's opinion discussed jurisdictional issues, but it did give effect to the gift over by saying that the will created a "contingent devise" which would be divested upon proof of the devisees' deaths without

70. Id. at 245, 50 N.E. at 722. Cf. St. Marks Lodge v. Darrow, 16 Ohio Dec. 120 (C.P. 1905); and Woodlief v. Duckwall, 19 Ohio C.C.B. (n.s.) 564, 10 Ohio C. Dec. 686 (1900), wherein the court held that a gift to A "during her natural life," and, if she dies without living issue, then over, vested a fee simple in a defeasible only her death without living issue. The court reasoned that the fee was undevised by the testator's will, and, at his death, passed to A by descent "so that by the will and by descent she (A) thus became the owner of the absolute estate ... subject to be divested if she died leaving no issue." The court cited no authorities.
73. Id. at 205, 157 N.E. 2d at 922.
74. Id.
issue. Since there was no claim by any devisee’s issue, indeed there were no issue, the case is not directly in point.

In Fetterman v. Bingham,\textsuperscript{76} the testator devised “all of [his] estate”\textsuperscript{77} to his daughter, Electa, provided she paid $300 to one Vernon Fetterman (a child residing with the testator’s family) at his twenty-first birthday. If she died leaving “no natural heirs,”\textsuperscript{78} then over to her husband and Fetterman jointly (when Fetterman reached twenty-one), but subject to the same payment. There were other gifts over. The court held that the testator intended to vest the fee in his daughter immediately upon his death, subject to divestment only upon her death without natural heirs before Fetterman attained his majority. Whenever Fetterman reached twenty-one years of age and the payment to him was duly made, Electa’s estate became absolute.\textsuperscript{79}

In O’Malley v. O’Malley,\textsuperscript{80} the testator devised an estate to his son “to be his absolutely and in fee simple”\textsuperscript{81} with a gift over on the son’s death without issue. The court held that the express gift of the fee and the gift over were inconsistent, but that both should be given effect, if possible, in order to carry out the intention of the testator. The result was a fee simple in the son, subject to divestment upon the happening of the contingency.

The most interesting of the later cases discovered was Tiedtke v. Tiedtke.\textsuperscript{82} The action was originally brought by the executor of Harry Tiedtke’s will. As amended by codicils, testator devised the residue of his estate to his brothers, Ernest and Charles, to hold in trust for his daughter, Justina. She was to receive the net income during her life, and, if she died “leaving no children,”\textsuperscript{83} then the portion of the corpus remaining was to go to the testator’s “heirs at law.”\textsuperscript{84} Justina died without issue of her body, but she left surviving her one Robert Millis, a child adopted some years after the death of the testator. The court held that the adopted son could share in the remainder. The actual holding was that when the testator limits

\textsuperscript{75.} Id. See generally authorities cited in note 10 supra, and Van Tilburg v. Martin, 120 Ohio St. 28, 165 N.E. 539 (1929).
\textsuperscript{76.} 115 Ohio St. 35, 152 N.E. 10 (1926).
\textsuperscript{77.} Id.
\textsuperscript{78.} Id.
\textsuperscript{79.} See also, Jones v. Jones, 48 Ohio App. 138, 192 N.E. 811 (1933). In that case, the testator fixed various times for distribution to the devisees, two sons and a daughter. It was held that a gift to the daughter “and to her heirs” vested a fee simple absolute in her, and a later will provision, giving the share of any devisee who dies without issue to the survivors, did not cut down the fee granted unless an intent to do so clearly appeared in the will. The “dies without issue” provision was held to relate to deaths before periods fixed for distribution only.
\textsuperscript{80.} 20 Ohio App. 279, 151 N.E. 796 (1925).
\textsuperscript{81.} Id. at 280, 151 N.E. at 796.
\textsuperscript{82.} 157 Ohio St. 554, 106 N.E. 2d 637 (1952).
\textsuperscript{83.} Id. at 555, 106 N.E. 2d at 638.
\textsuperscript{84.} Id.
a remainder interest to his "heirs at law" after an intervening life estate, such heirs are to be determined as of the date of death of the life tenant, and may include a child adopted by the testator's daughter (the life tenant) after the testator's death.\textsuperscript{85} It is the court's dictum, and not its holding, which is interesting in our context. In looking at possible bases for a claim by the adopted son, the court said:

"It is arguable that, by the provisions of the will, the testator intended that the 'children' of his daughter should take in the event that any survived her . . . However, no serious contention is made that the son, adopted by the testator's daughter long after the testator's death, is described by the word 'children' in the . . . will."\textsuperscript{86}

By that statement, the court has reasserted the same position which was generally taken at the time of\textit{ Shaw & Campbell}\textsuperscript{87} long before the\textit{ Anderson} decision.\textit{Tiedtke} was one of the few cases found wherein the estate was expressly limited to the first taker for life, and the court conceded it to be "arguable" that any child surviving should take by necessary implication. In\textit{Tiedtke}, of course, the child was adopted and a stranger to the testator. He made no contention that he was meant to take under the clause.

III. Conclusion

As can clearly be seen from the cases digested throughout this paper, the cases decided before and after\textit{ Anderson} show no noticeable differences with respect to the rules of construction resorted to.

Indeed, if, as has been often said, the testator's intention is the "polestar" of will construction, then surely a court has the power to imply a gift to issue wherever the testator has shown his intent to save the property for the direct descendants of his devisee. To defeat the implication, it has been argued that the testator need not have necessarily intended the implied gift since he might have guessed that his devisee, as a holder of the fee (by the other construction), would have "taken care of" his issue by gift or descent.\textsuperscript{88} But, experience tells us that the power to convey is a powerful temptation, and has been often used—giving rise to many of the cases digested above. In fact, the power to convey has been used so often to defeat the interests of the devisee's issue, that it seems manifestly incorrect to presume that a testator who took the time to provide for

\textsuperscript{85} Id. at 554, 106 N.E. 2d at 637.
\textsuperscript{87} See notes 47-57 supra, and accompanying text.
\textsuperscript{88} See, e.g., Anderson v. The United Realty Co., 79 Ohio St. 23, 52, 86 N.E. 644, 649 (1908).
the divestment of his first taker upon such taker's death without issue would hang the future fortunes of such issue upon so precarious a peg. If it is conjecture which we are to avoid, then it is far less conjectural to presume that the testator wished to benefit the devisee's issue by remainder than it is to guess that he thought they would be "taken care of" by gift or descent. Moreover, testators who phrase their testamentary gifts in the language under consideration here clearly seem to be attempting to keep their land in their families. The fee simple defeasible construction seems to make this a difficult thing to do, indeed.

Where the gift is expressly in fee, the cases digested teach that the gift over must take effect, if at all, as an executory devise, and no remainder can be implied. There is nothing new here. In fact, no valid remainder interest can ever follow a gift in fee simple. Note, however, that in one case wherein the gift was expressly in the form "to A and his heirs," the court said that it would have no trouble implying a gift to issue, after A's death leaving issue, if A's death without issue were the only contingency the happening of which would cause divestment of A's estate.89

Where the gift to the first taker is made in ambiguous language, the cases teach us that the court will look at the entire will, and will reach a construction consistent with the entire document and our statutory rule of construction, Ohio Rev. Code §2107.51. Such a course of action clearly comports with the requirements of Anderson's syllabus,90 and has been the rule in Ohio since at least 1868, the opinion of the Anderson court notwithstanding.

Where the devise is expressly limited to the life of the first taker, the Tiedtke court leaves open a powerful line of argument on behalf of the life tenant's issue.

Notwithstanding all of the above, the real, practical "rule" to be learned from all of the above is that in order to serve the client's interests in the best possible manner a will draftsman MUST ascertain exactly what estate the first taker is to receive, and what future estate the issue of such taker are to take, if any. Once received, that information MUST clearly be reflected in the clauses of the will. If that is NOT done, then there will surely come a time when the omission will have to be paid for—out of the estate.

89. Carter v. Reddish, 32 Ohio St. 1, 13-14 (1877).
90. Note 29 supra, and accompanying text.
THE EXCLUSIONARY RULE:
IS IT "THE" REMEDY OR JUST A REMEDY?

By Douglas R. Murray *

I. INTRODUCTION

Once again the exclusionary rule is under attack. Although application of the rule has been steadily broadened, this has only happened over strong dissents and some contrary decisions. With the recent additions to the Supreme Court, it may be only a matter of time before the Court sharply restricts, or even overrules, the Suppression Doctrine prohibiting the use of evidence obtained by an illegal search and seizure.

The argument against having a Suppression Doctrine is perhaps best expressed by Judge Cardozo's classic statement that "The criminal is to go free because the constable has blundered." ¹

A similar argument for not having an exclusionary rule was advanced by Justice Jackson when he stated that "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant." ²

A very recent judicial indictment of the Suppression Doctrine was Chief Justice Burger's comparison of the use of the rule to the use of narcotics, whereby the courts have become hooked on this single remedy for unlawful official conduct.³ In writing the opinion Chief Justice Burger suggested that a better remedy would be for Congress to enact a federal statute providing some meaningful and effective remedy against unlawful conduct by government officials.⁴ With such a federal statute available, there would then be no insuperable obstacle to the elimination of the Suppression Doctrine.⁵

All the current ferment over the exclusionary rule tacitly assumes that some alternative remedy can be substituted for the Suppression Doctrine. However in the development and expansion of the rule, language was sometimes used which implied that the rule was an essential part of the Fourth Amendment.

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4. Id. at 422.
5. Id. at 421.
Obviously, if the Suppression Doctrine is specifically required by the Fourth Amendment then other remedies for illegal police conduct can supplement but not displace the rule. However, if the exclusionary rule is viewed as just a remedy with which to implement the Fourth Amendment then comparable or more effective remedies can be substituted for it. Thus, the fine but important distinction is whether the exclusionary rule is an explicit requirement of the Fourth Amendment or just one of several alternative ways of enforcing the Fourth Amendment.

In order to determine whether the Suppression Doctrine is "the" remedy or just a remedy, the Supreme Court decisions in which the rule was developed will be critically examined in the chronological sequence in which the decisions were rendered. The viewpoints of those who favored and those who disliked the rule will be presented. Particular emphasis will be given to the opinions of those Justices who favored the rule, for if they did not feel the Suppression Doctrine is a constitutional mandate then it can be said that the rule is not as yet a constitutional requirement.

II. EVALUATION

A great deal has been written about the exclusionary rule. Most commentators begin a discussion of the exclusionary rule with the case of Boyd v. United States. In Boyd, the Court held unconstitutional a section of a revenue act requiring a party either to produce documents allegedly containing incriminating evidence or have the allegations be taken as confessed. The defendant, under protest, produced a document in obedience to a court order and the document was admitted into evidence against him. The Supreme Court held that inspection by the district attorney of the document, when produced in obedience to a court order founded on the revenue act, and admission of the document as evidence were erroneous and unconstitutional proceedings.

Although there is some dispute whether this case truly involved a search and seizure, the majority opinion held there was a violation of the Fourth and Fifth Amendments. In the opinion, the Court quoted extensively from Lord Camden's opinion in Entick v. Carrington and Three Other King's Messengers. The cited passages dealt

7. The concurring opinion held the Fourth Amendment was not applicable since there was neither a search nor a seizure. Nothing in the way of a search was undertaken since the sole action of the authorities was to serve an order on the defendant. Nor was there any seizure, because the party was not required at any time to part with the custody of the papers. However, the concurring opinion held there was a violation of the Fifth Amendment since the effect of the act of Congress was to compel the party on whom the order of the court was served to be a witness against himself. Id. at 638.
8. Id.
primarily with the illegality of general warrants, with one excerpt dealing indirectly with the rationale behind excluding evidence which is illegally obtained by a general warrant. In the cited passage, Lord Camden held evidence obtained through such general warrants was not admissible but he was unable to say "whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public." 10

In addition to citing Lord Camden, the majority opinion also referred to the Fifth Amendment restriction that no man need accuse himself and found itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." 11

The majority then reasoned that, "Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [Lord Camden's] judgment. In this regard the Fourth and Fifth Amendments run into each other." 12

These rather general comments by the Court are the foundation upon which later Courts have built an exclusionary rule. They indicate a constitutional basis for the Suppression Doctrine can be found in either the Fourth Amendment, the Fifth Amendment, or the Fourth and Fifth Amendments interacting together. These comments by the Court in Boyd however do not answer the question as to whether the exclusionary rule is required by the Fourth Amendment or is just one way of enforcing the Fourth Amendment. Therefore, later decisions must be examined to determine if the Suppression Doctrine has become a mandatory requirement of the Fourth Amendment.

In Adams v. New York, 13 the Court was called upon to deal with the admissibility of papers which may have been illegally taken from the possession of the party against whom they were offered as evidence. The Court did not follow the implication in Boyd that such evidence would be inadmissible under the Fourth or Fifth Amendments. Instead, Justice Day, in the opinion of the Court, held that where the evidence was clearly competent, the weight of authority as well as reason limited the inquiry to the competency of the proffered testimony. He then held that the courts do not stop to inquire as to the means by which evidence is obtained. 14

10. 116 U.S. 616, 629 (1886).
11. Id. at 633.
12. Id. at 630.
14. Id. at 594.
Thus in *Adams* the Court specifically rejected even a judicially imposed Suppression Doctrine. Clearly, the exclusionary rule was not considered to be a requirement of the Fourth Amendment or of any other Amendment at the time of the *Adams* decision.

The first case in which the exclusionary rule was specifically formulated was *Weeks v. United States*,¹⁵ in which it was held that in a federal prosecution the use of evidence secured through an illegal search and seizure was barred. In *Weeks*, Justice Day used some legal gymnastics to distinguish his earlier view in *Adams v. United States*¹⁶ that the Courts do not look at the means by which evidence has been obtained. He then held that if evidence was obtained through an illegal search and seizure, it violated the Fourth Amendment to use such evidence in a federal court. Justice Day, in the opinion of the Court, reasoned that if documents can be illegally seized and used in evidence against a citizen, the protection of the Fourth Amendment was of no value, and might as well be stricken from the Constitution.¹⁷

The decision in *Weeks* was founded on the belief that the Fourth Amendment was of no value unless some way could be found to enforce the prohibition against unreasonable searches and seizures. The decision does not state that the exclusionary rule was required by the Fourth, but instead holds that the Suppression Doctrine was the only effective method the Court found to enforce the Fourth. The *Weeks* opinion would therefore support the proposition that the exclusionary rule was not a requirement of the Fourth Amendment, if some equally effective alternative method of enforcing the Fourth could be found.

In *Silverthorne Lumber Co. v. United States*,¹⁸ a corporation as well as a person was held entitled to protection from an unlawful search and seizure. In the majority opinion, Justice Holmes reiterated the rationale of *Weeks* that the exclusionary rule was invoked to enforce the Fourth Amendment and that without such a rule the Fourth would be reduced to a mere form of words.¹⁹ Thus in *Silverthorne* the Suppression Doctrine was again presented as a way to enforce the Fourth rather than being a constitutional mandate of the Fourth.

In *Wolf v. Colorado*,²⁰ the Supreme Court declined to apply the Suppression Doctrine to state as well as federal courts. Justice Frankfurter in the majority opinion discussed specifically the distinction between the prohibitions of the Fourth Amendment and the

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18. 251 U.S. 385 (1920).
19. Id. at 392.
differing methods which could be used to enforce those prohibitions. He commented that while the basic rights guaranteed by the Fourth Amendment through the Fourteenth Amendment were unquestioned, the ways of enforcing such a basic right raised questions of a different order. He felt the states should be free to use various remedies to enforce the Fourth Amendment and should not be restricted to the Suppression Doctrine.

Justice Frankfurter emphasized that the Weeks decision barring the use in a federal prosecution of evidence secured through an illegal search and seizure “was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.” He then analyzed various jurisdictions in the English speaking world and found that a majority of the states and several jurisdictions within the United Kingdom did not exclude illegally obtained evidence.

In a concurring opinion, Justice Black held that while the Fourth Amendment prohibits unreasonable searches and seizures, it did not, of itself, bar the use of evidence so unlawfully obtained. Justice Black also held, in dictum, that “the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.”

In a dissenting opinion, Justice Douglas wanted to apply the exclusionary rule to the states, “since in absence of that rule of evidence the Amendment would have no effective sanction.” In another dissenting opinion, Justice Murphy discussed in some detail the remedies he felt were available to enforce the search and seizure clause, and determined that remedies other than the exclusionary rule would be ineffective. He finished by saying that “The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence.”

In still another dissenting opinion, Justice Rutledge held that the exclusionary rule was “the one sanction—exclusion of evidence taken in violation of the Amendment’s terms—failure to observe which means that ‘the protection of the Fourth . . . might as well be stricken from the Constitution.’” He stated that “the Amendment without

21. Id. at 28.
22. Id.
23. Id. at 29, 30.
24. Id. at 39.
25. Id. at 40.
26. Id. at 41.
27. Id. at 42.
28. Id. at 44.
29. Id. at 47.
the sanction is a dead letter." 30 Justice Rutledge also said, in dictum, that he rejected any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment. 31 He thought that issue settled by Boyd v. United States, 32 where the Court held a statute to be obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth. 33 He also said that a respect for precedent required the Court to continue to support the view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained. 34 Thus, in Wolf, Justice Rutledge regarded the Suppression Doctrine as a remedy or sanction necessary to enforce the Fourth Amendment, and he also felt that Congress could not abolish this remedy.

An analysis of the Wolf decision thus shows all the Justices, with the possible exception of Justice Rutledge, regarded the exclusionary rule as a remedy which could be replaced by other remedies, if those substitute remedies adequately protected the citizen against an unlawful search and seizure. Some of the Justices felt that no appropriate alternative remedies were available, but they did not rule out substitution if an appropriate alternative could be found.

Three years after Wolf, the question arose in Rochin v. California 35 as to whether state courts were permitted to admit all unconstitutionally seized evidence, even if the evidence was obtained by shocking or outrageous police methods. In the instant case, the police had illegally broken into Rochin's home, tried to forcibly extract evidence from his mouth, and finally obtained the evidence by forcing an emetic into his stomach against his will.

Speaking for the majority, Justice Frankfurter held that Wolf had established that the evidence was not barred by the Fourth Amendment through the Fourteenth Amendment in a state prosecution. However, he then went on to hold that the evidence was inadmissible because it violated the Due Process Clause of the Fourteenth Amendment. Although admitting that the contours of the Due Process Clause were indefinite and vague, Justice Frankfurter felt that the Court could on a case-by-case basis decide if police conduct was so extreme that the evidence illegally obtained should be excluded. In Rochin, the Court held the police activities were so excessive that they resulted in conduct that shocked the conscience. 36 The Court went on to state that "It has long since ceased to be true that due

30. Id.
31. Id. at 48.
32. 116 U.S. 616 (1886).
33. Id. at 632.
35. 342 U.S. 165 (1952).
36. Id. at 172.
process of law is heedless of the means by which otherwise relevant and credible evidence is obtained.”  

In establishing a standard for state courts to follow in future cases, Justice Frankfurter held that due process of law precludes defining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that “offend a 'sense of justice'” or that “offend the community's sense of fair play and decency.”

In a concurring opinion, Justice Black held that the evidence should be excluded under the Fifth Amendment, since he felt that “a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science.”

Justice Black then specifically attacked the reasoning behind the majority opinion. He felt strongly that the majority's ruling was not based on the Constitution since there was no express constitutional language granting judicial power to invalidate every state law of every kind deemed unreasonable or contrary to the Court’s notion of civilized decencies. As a result, he could not accept what he felt was the holding of the majority that the Due Process Clause empowered the Court to nullify any state law if its application shocked the conscience, offended a sense of justice or ran counter to the decencies of civilized conduct.

Justice Douglas in a concurring opinion felt, like Justice Black, that the evidence should be inadmissible under the Fifth Amendment. Justice Douglas thought that “words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.”

Justice Douglas also rejected the view that the illegally obtained evidence could be excluded under an interpretation of the Due Process Clause since that was making “the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here.”

Thus in *Rochin* there are expressed two constitutional bases for an exclusionary rule: the majority view that the Due Process Clause requires exclusion of illegally obtained evidence only in those extreme cases which shock the conscience, and the minority view that illegally obtained evidence taken from a person’s body should be

37. Id.
38. Id. at 173.
39. Id.
40. Id. at 175.
41. Id. at 176.
42. Id. at 175.
43. Id. at 179.
44. Id.
excluded under the Fifth Amendment. These two bases for an exclusionary rule are in addition to the view expressed in earlier cases that the Suppression Doctrine is a remedy to enforce the Fourth Amendment prohibition against unreasonable searches and seizures.

In *Irvine v. California,* a majority of the court restricted *Rochin* to those illegal searches and seizures which involved coercion, violence, or brutality to the person. In *Irvine,* the police made several unauthorized entries into the defendant’s home to plant illegal microphones. Justice Jackson in the majority opinion felt that the exclusionary rule was not applicable even though the Fourth Amendment was flagrantly, deliberately, and persistently violated. He emphasized the holding of *Wolf* that in a prosecution in a state court for a state crime the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. Justice Jackson added that “other remedies are available for official lawlessness, although too often those remedies are of no practical avail.”

In a dissenting opinion, Justice Frankfurter wanted to exclude the evidence under the Due Process Clause of the Fourteenth Amendment, thus expanding on the rule in *Rochin.* He felt that “while there is in the case before us, as there was in *Rochin,* an element of unreasonable search and seizure, what is decisive here, as in *Rochin,* is additional aggravating conduct which the Court finds repulsive.” So Justice Frankfurter felt that while all evidence obtained by an illegal search and seizure was not automatically inadmissible, the evidence in *Irvine* should be inadmissible.

Justice Douglas in a dissenting opinion wanted to apply the federal exclusionary rule to the states. He repeated the argument that “Exclusion of evidence is indeed the only effective sanction. If the evidence can be used, no matter how lawless the search, the protection of the Fourth Amendment . . . ‘might as well be stricken from the Constitution.’”

Thus in *Irvine,* the majority restricted *Rochin* in holding that there is a constitutional basis under the Due Process Clause for exclusion of illegally obtained evidence only if it is obtained by physical violence practiced upon the accused. Frankfurter in his dissent wanted to expand *Rochin* by excluding evidence under the Due Process Clause whenever there was an illegal search and additional aggravating conduct which the Court found repulsive. Douglas in his dissent wanted to apply the federal exclusionary rule to the states since he felt that was the only effective remedy available to enforce the Fourth Amendment.

46. Id. at 132.
47. Id. at 137.
48. Id. at 144.
49. Id. at 151.
In Breithaupt v. Abram, a majority of the Court restricted the Rochin test still further in holding that state police could take a blood sample without permission from an unconscious automobile driver as evidence of intoxication. The Court held, per Justice Clark, that a routine blood test taken by a physician does not involve the coercion or brutality prohibited by Rochin. Justice Clark concluded that "a blood test taken by a skilled technician is not such 'conduct that shocks the conscience'... nor such a method of obtaining evidence that it offends 'a sense of justice.'" He also held that if there were an indiscriminate taking of blood under different conditions or by those not competent to do so then this could amount to such brutality as would come under the Rochin rule.

In a strong dissent, Chief Justice Warren thought Rochin should be controlling and that the Due Process Clause prohibits the use of evidence taken through an invasion of the suspect's body, whether or not force was used to obtain the evidence.

Thus in Breithaupt, the majority restricted still further the exclusion of evidence under the Due Process Clause to those situations involving brutal physical violence upon a person. Chief Justice Warren in his dissent wanted to exclude all evidence obtained by any form, however slight, of physical violence upon a person.

As a result of the Rochin, Irvine, and Breithaupt cases, the Supreme Court held that there were certain circumstances in state court prosecutions where the Suppression Doctrine was a mandatory remedy, rather than just one of several alternative remedies. By the majority view, the exclusionary rule was a constitutional requirement of the Due Process Clause in those few cases where evidence was illegally obtained by brutal physical violence upon a person.

Since the Rochin, Irvine, and Breithaupt decisions dealt only briefly with the Fourth Amendment, they left undisturbed the prior holding that the exclusionary rule was one remedy available to implement the Fourth Amendment in federal prosecutions.

A later case involving the exclusionary rule was Elkins v. United States, which overturned the silver platter doctrine that evidence of a federal crime which state police find in the course of an illegal search may be turned over to and used by federal agents in a federal prosecution so long as the federal agents did not participate in the illegal search but were just handed the evidence on a silver platter.

In Elkins, Justice Stewart for the majority spoke of the exclusionary rule as a remedy, saying, "its purpose is to deter—to compel respect

51. Id. at 437.
52. Id.
53. Id. at 442.
for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” 55

Justice Stewart then quoted from a California Supreme Court case, *People v. Cahan*, 56 in which that court held they had adopted the Suppression Doctrine because other remedies had failed to secure compliance with the constitutional provisions against unlawful searches and seizures. 57

Thus in *Elkins*, the exclusionary rule was again presented as a remedy rather than a constitutional mandate.

In *Mapp v. Ohio*, 58 the Court took the significant step of making the Suppression Doctrine applicable in state as well as federal courts. In discussing the expansion of the rule, Justice Clark traced the historical development of the exclusionary rule and held that henceforth the rule would be controlling in both state and federal courts because it was the only effective remedy available to enforce the Fourth Amendment. 59 Justice Clark felt the exclusionary rule should be extended to state courts for “To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.” 60

Justice Clark also discussed the relationship between the Fourth and Fifth Amendments saying that since a coerced confession was automatically excluded, “Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc?” 61

In a concurring opinion, Justice Black was not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence of papers and effects seized in an illegal search and seizure. He doubted that an exclusionary rule could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. However, he felt “that when the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.” 62

Justice Black then quoted the statement from *Boyd v. United States* 63 that the seizure of a man’s books and papers was not substantially different from compelling a man to be a witness against himself. He felt that while the *Boyd* doctrine might not be required by the express language of the Constitution, it was entirely consistent

55. Id. at 217.
59. Id. at 656.
60. Id.
61. Id.
62. Id. at 662.
63. 116 U.S. 616 (1886).
with what he regarded to be the proper approach to interpretation of our Bill of Rights. 64

In a concurring opinion, Justice Douglas discussed the exclusionary rule as a remedy, saying that without this remedy we “rob the Fourth Amendment of much meaningful force.” 65 He discussed other remedies but held they were ineffective. 66

In a dissenting opinion, Justice Harlan disliked the majority’s decision to apply federal substantive standards to state violations of the Fourth Amendment. He felt it was “entirely clear that the Weeks exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.” 67 Justice Harlan wanted the states to be free to experiment with various remedies, including the exclusionary rule, to be used in enforcing the prohibition against unreasonable searches and seizures.

Thus in Mapp, a majority of the Justices continued to view the Suppression Doctrine as a remedy to enforce the Fourth Amendment. Justice Black, and to a degree Justice Clark, viewed the exclusionary rule as being a constitutional requirement of the Fourth and Fifth Amendments acting together.

Since the Mapp decision, the exclusionary rule has been followed in both federal and state courts, and it is still the rule today. However, in two relatively recent cases, Bivens v. Six Unknown Named Agents 68 and Coolidge v. New Hampshire, 69 there were expressions of discontent with the Suppression Doctrine which suggest that in the future the rule may be restricted or even overruled.

In Bivens v. Six Unknown Named Agents 70 the Court held that a federal agent who violates the Fourth Amendment can be sued for damages. Chief Justice Burger in his dissenting opinion, in dictum, expressed disenchantment with the Suppression Doctrine. He stated that the exclusionary rule was only a remedy and “if an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule.” 71

He rejected the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment required the suppression of evidence seized in violation of the latter. He said that “even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to ‘testimonial’ disclosures . . . it seems clear that the Self-Incrimina-
tion Clause does not protect a person from seizure of evidence that is incriminating." 72

Chief Justice Burger went on to say that the primary rationale for the exclusionary rule had been the theory that it would deter law enforcement officials from illegal conduct. He then introduced information to demonstrate that in practice the Suppression Doctrine had been ineffective in accomplishing its objective.73 He felt that alternative remedies should be developed so that it would no longer be necessary to exclude all evidence obtained by an unreasonable search and seizure, regardless of the degree of illegality. He expressed the view that only if the violation was substantial, as in Rochin or Irvine, should the evidence be excluded.74 Thus, in Bivens, Chief Justice Burger felt that the Suppression Doctrine was a remedy, rather than a constitutional requirement, which should only be used when there was a substantial violation by law enforcement officials.

In Coolidge v. New Hampshire,75 the exclusionary rule was held to prohibit the introduction of evidence obtained by use of an invalid search warrant.

Chief Justice Burger in a dissenting opinion rejected "the proposition that the Fifth Amendment requires the exclusion of evidence seized in violation of the Fourth Amendment." 76

Concurring and dissenting, Justice Black stated that the Fourth Amendment properly construed contained no such exclusionary rule77 and was a judicially created exclusionary rule.78 "The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence." 79 Justice Black went on to hold that if evidence was to be excluded, it would have to be under the Fifth Amendment, not the Fourth.80

Thus in Coolidge, Chief Justice Burger specifically rejected the argument that the Fifth Amendment requires exclusion of evidence acquired through an illegal search and seizure, while Justice Black stated that the exclusionary rule is not required by the Fourth Amendment but may be required by the Fifth Amendment. The majority view developed in previous cases that the exclusionary rule was but one remedy available to enforce the Fourth Amendment remained unchanged.

72. Id.
73. Id. at 416.
74. Id. at 418.
75. 403 U.S. 443 (1971).
76. Id. at 492.
77. Id. at 496.
78. Id.
79. Id. at 497.
80. Id. at 498.
III. SUMMARY

It was the purpose of this paper to analyze significant Supreme Court decisions to determine whether the exclusionary rule is an explicit requirement of the Fourth Amendment or is just one of several remedies available to enforce the Fourth Amendment. If the Suppression Doctrine is only a remedy, as opposed to "the" remedy, then other remedies could be substituted for it.

An analysis of the decisions shows that even those most in favor of the rule never spoke of the Suppression Doctrine as a mandate of the Fourth Amendment. Instead even the rule's staunchest proponents spoke of it as a remedy necessary to enforce effectively the Fourth Amendment prohibition against unreasonable searches and seizures. While many who supported the rule felt it was the only effective remedy, there is nothing in the decisions and their interpretation of the Fourth Amendment which would bar the Supreme Court from restricting or even eliminating the Suppression Doctrine, if an effective alternative remedy were available to replace the exclusionary rule. Thus the Fourth Amendment standing alone does not dictate an exclusionary rule.

In making this statement it should be noted that Justice Rutledge, in dictum, in *Wolf* stated that Congress could not by statute void the exclusionary rule. He based this dictum in part on *stare decisis*. Justice Rutledge did not of course say that the Court, as opposed to Congress, could not overrule *stare decisis* and the Suppression Doctrine.

Justice Rutledge based his dictum in *Wolf* not only on *stare decisis* but also on the statements in *Boyd* that the Fourth and Fifth Amendments together prohibit the use of illegally seized evidence. In this view, Justice Rutledge is supported by Justice Black who stated in *Mapp* that the Fourth and Fifth Amendments together, but not the Fourth alone, require an exclusionary rule. This view that the Fourth and Fifth Amendments necessitate a Suppression Doctrine has never been specifically overruled. It has been challenged however by Chief Justice Burger's dictum in *Bivens* that the Fifth Amendment protects only testimonial disclosures and does not protect an accused from the seizure of incriminating evidence. Chief Justice Burger's views or similar reasoning would have to be accepted by the Supreme Court before it could dismiss the argument that the Fourth and Fifth Amendments together require an exclusionary rule.

There is one final line of reasoning which would have to be overruled before the Supreme Court, if it wished to, could completely discard the Suppression Doctrine. This is the argument first advanced by Justice Frankfurter in *Rochin* that the Due Process Clause of the Fourteenth Amendment requires the exclusion of evidence...
when there is an unreasonable search and seizure and additional aggravating conduct, the so-called Shock-the-Conscience test. Although *Breithaupt* restricted this test to situations involving brutal physical violence, it has never been overruled.

In summary, the Fourth Amendment does not and never has mandated an exclusionary rule, if an equally effective remedy can be found for illegal searches and seizures. Thus with respect to the Fourth Amendment, the exclusionary rule is clearly a remedy and not "the" remedy. The Fifth Amendment has been held by some Justices to require the Suppression Doctrine but it appears that the Fifth Amendment, when strictly interpreted, would require the exclusion only of testimonial disclosures and not of physical evidence. The Due Process Clause of the Fourteenth Amendment has been held to necessitate an exclusionary rule only in those few instances where evidence was obtained through brutality to the person. Thus there is no severe constitutional obstruction to the Supreme Court sharply restricting or even overruling the exclusionary rule.
BOOK REVIEWS


To a serious student of business or public administration, an understanding of decision-making, individual and group, is prerequisite to his competence in management. Just so, to a serious student of the law, an understanding of the process of settling disputes is prerequisite to his competence in serving clients. Without doubt, an insightful knowledge of procedure is of paramount importance to the professional today. Dean Pound said long ago, "Our system of courts is archaic and our procedure behind the times." The techniques, therefore, that underlie decision-making and dispute-settling are worthy of serious study—Langdellian pedants to the contrary notwithstanding.

Experience should have taught us all that effective mediation in the making of decisions and in the resolution of conflict is built upon sound techniques of negotiation, and effective negotiation is built upon sound techniques of counseling. Competence in one function usually leads to competence in the others. In Dewey's words, "As an individual passes from one situation to another . . . what he has learned in the way of knowledge and skill in one situation becomes an instrument of understanding and one for dealing effectively with the situations which follow." Fortunately, indeed, competence in interpersonal relations is gained from a willingness to learn from experience of others, as well as from our own. "Fools," observed Bismarck, "learn by experience; I prefer to learn from the experience of others."

The study today of the subject of this handbook, although limited ostensibly to an examination of techniques of mediation in labor disputes, yields much more than its title suggests. It yields the practical principles of counseling, negotiation, collective bargaining, arbitration, fact-finding, conciliation and mediation, and it identifies the principal techniques for avoiding "traps" and "crises" in the process. Here are sound techniques to encourage agreement among opposing interests, techniques based upon persuasion and conditioning. Necessarily, these techniques require the creation of a sense of urgency, as well as grounds for doubt, aversion to adverse publicity, expectation of approval, commitment through participation, and mutual problem-solving.
Tactically, we are taught that, in dealing with specific issues in dispute, evaluation must be continuous. Priorities are to be changed, and arguments are to be reconstructed by artfully "coupling," "packaging," and "stipulating" issues.

We are, in effect, taught to understand the decision-making and dispute-settling process, and then we are taught to cope with the inherent risks, to persuade for specific goals, to condition for acceptance, and to evaluate issues for acceptability. Finally, we are taught to understand the politics—and personality—of conflict. We are taught to deal with fence-straddlers, the alienated and the recalcitrant in order to achieve their binding acceptance of the terms of a fair and openly bargained-for agreement.

In this study we learn to anticipate the critical problems of conflict and to become familiar with tested prescriptions for their resolution. In the main, we gain practical insights into practical behavior, which often is proof of theory.

The study of this book is a rewarding experience, one that demonstrates the successful application of good faith and prudence in labor relations. Students, craftsmen, and critics will, therefore, find this book useful. It deserves to be read by practitioners, initially for its analysis, perspective, and insight, and periodically for its practical guidance.

The author's personal contributions are, of course, based upon a pragmatic philosophy and extensive professional experience. His views are expressed in language that is exceptionally incisive and apt. The heart of his philosophy is that, as Shakespeare said, "A peace is of the nature of a conquest. For then both parties nobly are subdued, and neither party loses."

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American rules of criminal procedure are designed to guarantee an accused a fair trial with the right of appeal and the right to certain post-conviction remedies. Jewish rules of criminal procedure were designed for this same purpose, yet the failure of the Jewish jurists to follow these rules during the trial of Jesus resulted in a trial of errors from which he had no appeal.

The opinion of the author concerning the trial of Jesus is reflected in this statement: “A careful analysis of the New Testament narratives, respecting the so-called ‘trials’ of Jesus, coupled with a thorough reference to and examination of the existing Jewish laws relating to criminal proceedings should convince anyone, with an open mind, that the entire proceedings, from the moment of His arrest to the actual crucifixion, were wholly void and unlawful.”

Both the American and Jewish rules are similar with the following exceptions: (1) it was not the practice to have a lawyer appear for the accused; (2) it was not the practice to have trial by jury; (3) witnesses were prosecutors; (4) witnesses were examined by the judges; and (5) the judges presented arguments either for or against the conviction of the accused.

The author as both a Christian and a lawyer examined the trial of Jesus subjectively as well as objectively. Those of us who are followers of Jesus can view his trial with the same insight.

In order to understand the trial of Jesus, it is necessary to know of the conspiracy against him. Annas, a former high priest of the Sanhedrin at Jerusalem, Judas Iscariot, a disciple of Jesus, and Caiaphas, son-in-law of Annas and high priest of the Sanhedrin, conspired to kill Jesus. Annas, a member of the devout Jewish sect called Sadducees, had two things against Jesus. First, being a Sadducee he did not believe in life after death—the essence of the teachings of Jesus. He was greatly irritated when Jesus resurrected Lazarus, thus proving the doctrine Jesus advocated. Secondly, Annas was outraged at Jesus for driving out his money changers in the Temple of Jerusalem.

Judas had become disappointed that Jesus was not going to establish an earthly kingdom and his greed for money caused him to betray Jesus for thirty pieces of silver.

Caiaphas was the presiding judge of the Jewish Sanhedrin. He was worried that Jesus would set up an earthly kingdom and that he would be removed from his high office. He participated in the conspiracy by going out in search of false witnesses and by illegally convening the Sanhedrin Court.
The arrest of Jesus was made without a warrant or its equivalent shortly after midnight on a Friday. In order for an arrest to be lawful one had to first obtain authority and commission from the high priest after some criminal charge had been brought before the Sanhedrin Court. The author describes the arrest as follows "... it was more of a capture than an arrest. It was a matter of seizing one in the nighttime for the sole purpose of doing away with him."

After His arrest, Jesus was first taken before Annas for a private examination. At the time of this examination, Annas held no office judicial or political and therefore had no jurisdiction over nor authority to examine Jesus. Even if Annas had had authority to examine Jesus he could not do so in violation of Hebrew law which forbade private examinations of anyone charged with crime.

"An accused man shall never be subjected to private or secret examination, lest, in his perplexity, he furnish testimony against himself."

Since Annas was one of the conspirators, the author concludes that the only reason Jesus was taken before Annas was so that Annas would have knowledge of His arrest and could start the second phase of the conspiracy.

The trial of Jesus was one continuous procedure, yet it can be divided into several distinct segments. The first segment begins with the arraignment of Jesus before the Sanhedrin Court. After His examination before Annas, Jesus was led to the palace of Caiaphas, high priest and presiding judge of the Sanhedrin Court. Caiaphas assembled the Sanhedrin at approximately 2:00 A.M. on that Friday morning.

The Sanhedrin was convened in violation of Hebrew law which specified in detail when a criminal capital case could not be tried.

"In no event could such a trial be heard upon either of the following:
(1) Upon a day before the Sabbath (Saturday)
(2) During the Feast of the Passover, or any festival day
(3) Never in the night."

All subsections of this Hebrew law were violated when Caiaphas convened the Sanhedrin with the twenty-three members necessary for a quorum. Caiaphas further biased the proceedings by leaving off his list members of the Sanhedrin who were friends of Jesus such as Nicodemus and Joseph of Aramathea.

The author has an apt description of this session of the Sanhedrin Court:

"What a sordid and vile group of law-violators! There they were, supposedly members of a court of justice and impartiality, deliberately resorting to deceit, slyness and trickery to take human life—under the guise of legal procedure!"
When brought before Caiaphas, there was no charge or complaint filed against Jesus. The trial began with Caiaphas sending for his two false witnesses. Ultimately, these two witnesses were dismissed because they failed to agree on the same testimony, that Jesus planned to destroy the temple in Jerusalem.

In his zeal to destroy Jesus, Caiaphas himself charged Jesus with blasphemy or cursing God when Jesus answered affirmatively that He was the Son of God. After thus charging Jesus, Caiaphas, without calling further witnesses, secured a unanimous verdict of guilty with penalty of death. The use of the statement of Jesus to convict Him was illegal. Hebrew law required that a confession of an accused must be corroborated by competent witnesses.

"A voluntary confession on his part is not admitted in evidence and therefore not competent to convict, unless a legal number of witnesses minutely corroborate his self-accusation."

During this segment of His trial, the fact that Jesus had a right to offer a defense was ignored. He was not given the opportunity to obtain witnesses to speak in his own behalf.

The Sanhedrin had no authority to decree the death penalty. All such convictions had to be approved by the Roman Governor, Pontius Pilate. In addition, a unanimous verdict of guilty under Hebrew law had the effect of an acquittal. Caiaphas should have acquitted Jesus but didn't.

"The unanimous verdict of guilty in a capital case, has the effect of an acquittal."

The right to a speedy trial was modified by Hebrew law in cases where the death penalty might be decreed. Under Hebrew law, no death trial was to be concluded on the same day.

"A criminal case, where a death sentence is to be pronounced, cannot be concluded before the following day."

The author explains the reasoning of this law in this manner:

"It was regarded as a serious matter to be called upon, in a judicial proceeding, to take human life. It was thought best to give more time for sober reflection and prayer before imposing such a verdict in a capital trial."

In addition to the errors apparent in this segment of the trial of Jesus, the individual judges were disqualified according to the Hebrew law setting forth their qualifications. The Sanhedrin was composed of seventy-one members with the high priest as the presiding judge. A quorum of twenty-three was necessary to convene the Court. Hebrew law placed a high value on the impartiality of a judge.
“Nor must there be on the judicial bench either a relation, or a particular friend, or an enemy of either the accused or the accuser.”

“Nor under any circumstances, was a man known to be at enmity with the accused person permitted to occupy a position among the judges.”

By application of this Hebrew law, at least six of the judges that composed the Sanhedrin at this time were disqualified, thus failing to meet the quorum requirement.

Caiaphas, the presiding judge, and the five sons of Annas were disqualified. Caiaphas had enmity against Jesus and had conspired to kill him. Caiaphas was also the son-in-law of Annas, the other known conspirator.

Reflecting on the characteristics of these judges, the author is reminded of an ancient Jewish maxim which states:

“The robe of a prejudiced judge is to be no more respected than the sweat from the blanket of a jack-ass!”

The next segment of the trial of Jesus is His examination before Pontius Pilate. After His conviction by the Sanhedrin, Jesus was taken before the Roman Governor, Pontius Pilate, for confirmation of His conviction. At this time, Caiaphas changed the charge against Jesus from blasphemy to sedition and treason. Instead of the original charge of admitting that He was the Son of God, Jesus was then accused of perverting the people and forbidding others to give tribute to Caesar.

During His trial before Pilate, Jesus was acquitted four times, once before Pilate sent Him to Herod and three times after being returned from Herod. Pilate could find no fault in Jesus and agreed to chastise Him and release Him, but His accusers called for crucifixion. Pilate by his disapproval of the conviction rendered the death penalty void. Yet he delivered Jesus unto the mob to be crucified.

The Jewish rules of criminal procedure afforded an accused a fair trial but such a trial could only be obtained if the Jewish jurists dispensed justice fairly and impartially. Their conduct during the trial of Jesus caused the conviction and crucifixion of the innocent Jesus.

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