REPORT
OF THE
ILLINOIS JUDICIAL CONFERENCE
1973

CHAIRMAN

RODNEY A. SCOTT
Judge, Sixth Judicial Circuit

VICE-CHAIRMAN

DANIEL J. McNAMARA
Judge, First Judicial District
Appellate Court

SECRETARIAT

ADMINISTRATIVE OFFICE OF THE
ILLINOIS COURTS

ROY O. GULLEY
DIRECTOR

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Illinois Judicial Conference

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30 North Michigan Avenue
Suite 2010
Chicago 60602

Hon. Robert C. Underwood
Chief Justice
Illinois Supreme Court
Supreme Court Building
Springfield, Illinois 62706

Dear Mr. Chief Justice:

I tender herewith, on behalf of the Executive Committee the Report of the Illinois Judicial Conference for the year 1973.

This report includes the proceedings of the Associate Judge Seminar held at the Lake Shore Club of Chicago on March 7, 8 and 9, 1973 and the Judicial Conference Seminar held at the Lake Shore Club on September 5, 6 and 7, 1973.

Respectfully submitted,

Rodney A. Scott

Rodney A. Scott
(Judge of the Sixth
Judicial Circuit)

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OF THE

1973 ASSOCIATE JUDGE SEMINAR

OF THE

ILLINOIS JUDICIAL CONFERENCE

Lake Shore Club of Chicago
March 7, 8, and 9, 1973

AGENDA

OF THE

1973 ASSOCIATE JUDGE SEMINAR

WEDNESDAY, MARCH 7, 1973

10:00 A.M. - 1:00 P.M.
SEMINAR REGISTRATION
Main Lounge - First Floor

1:00 P.M.
GENERAL SESSION
Grand Ballroom - First Floor
Presiding - Hon. Glenn K. Seidenfeld
Invocation - Rev. Robert E. Dovick
Opening Remarks - Hon. Rodney A. Scott
Hon. Roy O. Gulley

1:30 - 3:15 P.M.
FIRST SEMINAR SESSION
Grand Ballroom - First Floor
(Evidence Lecture)

3:30 - 4:45 P.M.
(Discussion of Lecture)

5:00 P.M.
SOCIAL HOUR
Main Lounge - First Floor

6:00 P.M.
DINNER
Grand Ballroom - First Floor
Presiding - Hon. Glenn K. Seidenfeld
Address - Hon. Daniel P. Ward, Justice
Illinois Supreme Court

THURSDAY, MARCH 8, 1973

7:00 - 9:00 A.M.
BREAKFAST
Mediterranean Room - Third Floor

9:30 A.M. - 11:15 A.M.
SECOND SEMINAR SESSION
Grand Ballroom - First Floor
(Search and Seizure Lecture)

11:30 A.M. - 12:30 P.M.
(Discussion of Lecture)

12:30 P.M.
LUNCHEON
Grand Ballroom - First Floor

2:30 P.M.
THIRD SEMINAR SESSION

5:00 P.M.
SOCIAL HOUR
Main Lounge - First Floor

6:00 P.M.
DINNER
Grand Ballroom - First Floor

FRIDAY, MARCH 9, 1973

7:00 - 9:00 A.M.
BREAKFAST
Mediterranean Room - Third Floor

9:00 A.M.
GENERAL SESSION
Grand Ballroom - First Floor

9:30 - 12:00 Noon
FOURTH SEMINAR SESSION

ILLINOIS SUPREME COURT

Robert C. Underwood
Chief Justice

Walter V. Schaefer
Thomas E. Kluczynski
Daniel P. Ward
Charles H. Davis
Joseph H. Goldenhersh
Howard C. Ryan

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Roy O. Gulley
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Hon. Guy R. Williams
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Reporter
Prof. John P. Heinz
Reporter
Hon. Kenneth E. Wilson
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IV
LECTURE ON INDIVIDUAL RIGHTS
UNDER THE 1970 CONSTITUTION

Prof. Vincent F. Vitullo
Lecturer

V
COMMITTEE ON
RECENT DEVELOPMENTS IN THE LAW

Hon. Ben Schwartz
Chairman

Hon. James O. Monroe
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Hon. Francis X. Poynton
Hon. Charles L. Quindry
Hon. Richard L. Samuels
Hon. Robert J. Saunders
Prof. Roy M. Adams
Reporter
Prof. Richard C. Groll
Reporter
Hon. Matthew A. Jurczak
Liaison Officer

VI
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SELECTED TOPICS OF EVIDENCE

Prof. Prentice H. Marshall
Lecturer

Prof. Robert G. Spector
Lecturer

VII
LECTURE ON
SEARCH AND SEIZURE

Prof. Charles H. Bowman
Lecturer

Prof. Wayne R. LaFave
Lecturer

REPORT OF PROCEEDINGS

The Illinois Judicial Conference held its annual Associate Judge Seminar on March 7, 8 and 9, 1973 at the Lake Shore Club of Chicago, 850 Lake Shore Drive.

Judge Glenn K. Seidenfeld, Chairman of the Associate Judge Seminar Coordinating Committee, called the seminar to order at the opening General Session and the Rev. Robert E. Dovick, Associate Pastor of St. Linus Roman Catholic Church, delivered the invocation.

WELCOMING REMARKS OF THE CHAIRMAN OF THE CONFERENCE

Hon. Rodney A. Scott

Mr. Chairman, Father Dovick, Judge Gulley, distinguished Judges at the speaker's table, and Fellow Members of the Judiciary, it is my great pleasure and privilege to welcome you, on behalf of the Executive Committee of the Judicial Conference, to the 1973 Associate Judge Seminar.

I had this honor last year also, and I remember the induction ceremonies for a distinguished group of new associate judges. I am sure that we have more new judges today. It is always good when new judges and more experienced judges from throughout the State of Illinois can join in fellowship, in discussion and in learning together.

I have looked over your agenda for this seminar. I know the planning and work required by the committees in advance of this meeting, and I know that benefits can be obtained by all who participate and join in the efforts for further education. It is necessary for all judicial officers to obtain the full benefits of the Conference seminars so that we can better serve in the responsible positions we share.

There has never been more change in the judicial system than there has been in the last decade, and this is especially true in the State of Illinois. With the adoption of the unified court system in Illinois in 1964, we had a revolution in the form of the judicial department of our government. It is necessary that we assemble each year in a seminar such as this to keep up and keep informed of the current developments in the judiciary and of the progress towards a more complete system of justice.

I can well remember the days before the Judicial Article of 1964, when each court was run somewhat independently by the judge. He was responsible only to the electorate of his political division. Those days are gone, fortunately. It has become increasingly apparent that there is a goal of uniformity; of professionalism free of politics; of established standards of justice; and of a high quality of performance within the judiciary. Along with the new Judicial Article, new codes of procedure and new rules of court have been provided. The judicial personnel has improved and must continue to improve in order to keep in step with the other improvements.

Since our meeting last year, there have been noted improvements that directly affect you. By Supreme Court rule, you are now tenured. By the grace of the General Assembly, your salaries have been substantially upgraded. The Supreme Court has given you virtually full assignability to hear every kind of litigation, except the trial of felony cases. Of course, your performance has warranted these positive changes. It is also encouraging to see that a number of persons appointed by the Supreme Court to positions as circuit court judges during the past year were associate judges. New members have joined our ranks, and I cannot tell you how impressed I was at the New Judge Seminar in December, when I saw the newly appointed judges, the former associate judges. Their quality and their high qualifications were indeed impressive.

I know your seminar committee has prepared well for this meeting, and anyone who participates can return to his court with a better foundation to perform his high responsibility well. The Executive Committee is always anxious to hear reports from this seminar. The reports in the past have always been most constructive. We are always interested in your discussions, your comments and your recommendations growing out of this seminar.

On behalf of the Executive Committee I wish you a most successful seminar.

Thank you very much.

REMARKS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Hon. Roy O. Gulley

On behalf of the Supreme Court, and particularly on behalf of the Administrative Office, I want to welcome you to the annual Associate Judge Seminar.

Chief Justice Underwood specifically asked me to convey his greetings to you. He took me to task at some length for having allowed the Executive Committee of the Judicial Conference to schedule this seminar, so that it comes just three or four days before the convening of the March Term of the Supreme Court. He does want me to explain the reason that there are not more members of the Supreme Court present here today. The Court does convene on Monday of next week for its March Term.

Justice Ward will be here tonight. Justice Kluczynski will be here. Justice Schaefer, we hope, will be here at some time. I do want to assure you that the Supreme Court is vitally interested in the work of the associate judges of the State.

I, of course, was always proud of you when you were called magistrates, and the change in title doesn't make me any more cognizant of the very important positions you hold and the extremely vital role you play in the judicial system in Illinois.

I have now held the position of Director of the Administrative Office of our unified court system for five and a half years of its nine year existence. One of the first priorities I assigned to myself when I took over the operation of the court system was to obtain better utilization of the talents of the former magistrates, the present associate judges in our State. I worked with the members of the Supreme Court to persuade the 1970 Constitutional Convention to omit all references to limitations on the assignability of associate judges and to leave the question of your use to the judgment of the Supreme Court and the chief judges. Under the new constitution, the legislature has no power to restrict your assignability and under Supreme Court rule the only restriction of assignability is in the actual trial of felony cases, as Judge Scott pointed out. I have continually urged and will continue to urge the Supreme Court to amend that rule in the near future and remove all restrictions on the use of associate judges in our judicial system.

As we say in southern Illinois, you have earned your spurs. The performance of the magistrates from 1964 to 1970 made it easy to persuade the 1970 Constitutional Convention to upgrade the position and to permit your assignment where you are needed the most. There has never been any doubt in my mind that the elimination of fee offi and the part-time judicial officers from our judiciary has been the most important ingredient in our unified court system, which is now the envy of the entire nation.

A year and a half ago, Chief Justice Underwood and I attended the National Conference on the Judiciary at Williamsburg, Virginia, where President Nixon and Chief Justice Burger spoke to us. The consensus at that conference describes what a good state judicial system

should be. It almost exactly describes the system that we now have in Illinois.

I have been asked to appear all over the United States to explain our system. The feature which has consistently drawn the most interest and which commands the most respect is our associate judge operation. This class of judicial officer in any court system is the one that sets the standard and gives the impressions that create the image of the judiciary in a state. I think that we have made great strides in improving that image in our State as evidenced by the interest from other states.

Next week I will be in New York City to talk with the Citizens Committee on the Reorganization of the New York Courts and to explain to them how we accomplished unification of the judicial system in Illinois. Today New York is where we were way back in 1963. It has been the success of the unified court system in Illinois which has caused concerned citizens in New York to conclude that they should consider unification of the court system. Since imitation is the sincerest form of flattery, I think that all of you should be gratified that your story is attracting such interest throughout the nation.

Now, the coordination of the seminar for 250 participants is a tremendous task. The staff of the Administrative Office has worked hard to carry out the dictates of the committees, including the coordinating committee which has planned the program for this seminar.

We hope that your time here will be pleasant and above all, even if you don't think it is pleasant, we hope it will be educational and worthwhile.

We are here to serve you. We want to serve you and if any of us can be of help to any of you, please do not hesitate to call upon us.

Thank you very much.

REMARKS OF THE CHAIRMAN OF THE ASSOCIATE JUDGE SEMINAR COORDINATING COMMITTEE

Hon. Glenn K. Seidenfeld

It is not necessary to add anything further to what has been said, but I too have been very proud of the way the associate judges, as a group, has evolved....not that they have evolved so much as the fact that the recognition that they have had has evolved. In other words, you have been getting more responsibilities and you have always been professionals. You have always been well motivated in these seminars.

I am sure you realize that this seminar is a meeting of professionals who are well motivated, who gather together annually and who, amongst themselves, exchange information and learning experiences, so that there is an educational process which brings together ideas and the most current case law.

But there is another factor that we probably have not emphasized as much as we should. That is, our constitutional duty is not only to convene these seminars and to improve the administration of justice, but also to specifically inform the legislature, through the appropriate channels, of the thoughts that we have to implement improvements in the administration of justice. If there are ideas you have which specifically relate to the improvement of justice in the way of new legislation, new court rules or in the methodology of the court system, please forward them to the professor-reporters.

With that I bid you a very fine seminar, and I will see you during the course of it. I am sure that it will be a beneficial seminar because the committees have worked very hard and very professionally to present a seminar of utmost interest.

INTRODUCTION OF JUSTICE WARD

Hon. Glenn K. Seidenfeld

Those of you who were here last year, which is most of you, remembered that a very unfunny thing happened on the way to the forum. But this year the weather is just beautiful. There is absolutely no excuse for the absence of our speaker, and he is not absent. He is here. For those of you who do not remember, he unfortunately fell on the ice last year.

Justice Daniel Ward received his law degree from DePaul University College of Law and was admitted to the bar in 1941. He was an assistant professor of law at Southern University in Washington, D.C. He was an assistant United States District Attorney for Northern Illinois and chief of the Criminal Division. He was Dean of the DePaul University College of Law from 1955 to 1960. In case you think he does not have a great memory, he pointed out to me that some of his former students who are now judges have put on weight. He was elected State's Attorney of Cook County in 1960 and reelected in 1964. He was voted the outstanding prosecutor in the nation in 1964. In 1966 he was elected to the Illinois Supreme Court. He is also chairman of the Illinois Courts Commission.

Now, those of you who know Justice Ward know that he is one of the great story-tellers of this community. In fact, when his name is mentioned, along with words like *integrity*, one immediately recalls

the judge's ability to tell a story. He is a very articulate person, and, of course, his Supreme Court opinions are highly regarded and respected. I am extremely happy that we are able to have Justice Ward with us tonight. I give you Justice Ward.

REMARKS OF THE HON. DANIEL P. WARD

Justice of the Illinois Supreme Court

Judge Seidenfeld, the distinguished at the dais, and the equally distinguished beyond the dais. The chairman's unduly gracious remarks prompts me to recall a story. The story is, I think, appropriate under the circumstances.

We are told by Boswell, the incomparable biographer of Dr. Johnson, that Johnson liked to walk about in English churchyards. He would always marvel at the inscriptions on the tombstones. Invariably they pointed out the virtues of the deceased, his devotion to his God, his love of wife and family, his unexcelled patriotism. On a particular occasion Johnson was struck by one particularly florid eulogy that had been deemed to the deceased. He looked at the tombstone again and remarked to Boswell: "It is obvious that writers of lapidary inscriptions are not under oath." Similarly, of course, our chairman tonight was not under oath.

I saw so many youthful judges here tonight that I became very selfconscious of the harsh tread of time. I thought that it might be appropriate at this convention of the associate judges of Illinois to comment briefly on the background to the associate judgeship and its evolution.

As the older judges are aware, prior to the 1964 Judicial Amendment, we had justices of the peace and we had police magistrates. It was the Judicial Article of '64 which created the magistrates. The jurisdiction of the police magistrates or justices of the peace was sharply and very locally defined. In general they could hear cases involving traffic regulation violations, misdemeanors and small claims under five hundred dollars. Their courts were not courts of record, and litigants had rights to appeals *de novo* from the judgment of the police magistrate or the justice of the peace.

With, however, the 1964 Judicial Article the police magistrates and the justices of the peace courts were abolished, and in their stead, as a happy development, came the office of magistrate. The magistrates' courts were courts of record. They had, however, limited assignments, which were provided for by the General Assembly. At the beginning the General Assembly limited magistrates to hear cases in

four areas: They could hear civil proceedings involving not more than five thousand dollars. Also they heard certain probate matters, such as proving wills and heirship claims against the estate under five thousand dollars. Thirdly, they could handle misdemeanor and quasi-criminal (whatever that may mean) actions where the maximum penalty authorized did not exceed one year in the county jail or in the penitentiary. And finally, they could hear preliminary hearings. Subsequently, with legislative authority, the Supreme Court enlarged the assignability of the magistrates.

The Constitution of 1970, however, created the office of associate judge. Unlike the status of magistrates, who sat at the pleasure of the appointing judges of the circuit, the associate judges are tenured under the new constitutional provision for four year terms. The Supreme Court rule provides that the chief judge of each circuit or any circuit judge designated by him may assign an associate judge to hear and determine any matter, except the trial of criminal cases where the punishment authorized is greater than one year. So we see there the happy evolutionary growth of the associate judgeship.

It is interesting to observe that as of December 31, 1963, on the eve of the effectiveness of the Judicial Article of 1964, there were one thousand one hundred and eleven judicial officers in Illinois, and those one thousand one hundred and eleven judicial officers had a case load in 1964 of two million, two hundred and fifty thousand cases. It is interesting to note also the development in the efficiency of the judicial system in that in 1971 the case load was over three million cases. Yet the number of judicial officers had been reduced from over 1100 to 625.

I think that the development of the associate judgeship in the judicial structure of our State has truly been one of the most significant developments in our judiciary in modern times. It would be a truism to point out to you that the greatest number of cases handled by judges in Illinois are handled by associate judges. And it is interesting to observe that it is estimated, considering the number of cases which were in the case load in 1971, that 98 percent of those matters were capable of assignment to and disposition by associate judges. The associate judges by and large are the ones whom the public knows in greater numbers.

Cardozo once spoke of judges dwelling on chill and distant heights. Well, certainly the associate judges of Illinois, as well as, of course, the circuit judges, do not dwell in any invidious sense on chill and distant heights. In a very real way the impression which is made upon the people of our communities is made by the judges in the trial courts. The associate judges are certainly the most important salesmen that the judiciary has in Illinois. More and more throughout the State we are seeing increasing numbers of assignments and differing assignments being given to the associate judges. And we can be confident that with each year more and more of the business of this State's judicial system is going to be handled by associate judges.

The Supreme Court has not been unaware, of course, of the splendid work that is being done throughout our State by the associate judges. In part this is reflected by the fact that eighteen associate judges have been the subject of appointments by the Supreme Court in the exercise of its appointment authority.

I suppose that most of us in college, in our political science courses, read or had some more limited exposure to Alexis De Tocqueville's *Democracy in America*. It certainly is a work that has become, as Lord Bryce put it, a classic, and as Harold Laski in our time described it, the greatest work, perhaps ever written on one country by the citizen of another.

Most of us remember it as the recorded experiences of a young French magistrate who came to the United States, met with many of the leading citizens of the United States, travelled extensively and then, after nine months of a visit here returned to France to write *Democracy in America*. He came here in May, 1831 and left in February, 1832, and he came on a very unexceptional assignment. He came to write a book or make a study, in conjunction with a colleague who was also a French magistrate, Gustave De Beaumont, on the American penal system. The revolutionary spirit or the spirit of the French Revolution was still fresh in France and France wanted to know what we were doing so far as a penal system was concerned.

Although De Tocqueville came here on that unexceptional assignment, the by-product of his visit was a masterpiece. He took a very interesting view of American lawyers in the early Republic. And I thought it might be of interest to you tonight to mention some of the observations he made of our early Republic.

The basic thesis of his book, you will recall, was that the advent of democracy in the world is at hand. Monarchies were falling and more were going to fall. It was going to be the age of the common man. He saw all of the nations of the world moving invincibly toward a new era of political and social equality. And it was, perhaps, the aristocrat in De Tocqueville that made him shrink a bit from that spectacle. He feared what he foresaw might be a course of equality among peoples.

In the United States, as he saw our country, there were three great forces which would mitigate this "despotism of the majority." One was the strength of our local governments. He observed that there was no great vertical central government, and, of course, when we read that comment we have to consider that he was writing of the United States in the 1830's, when state's rights were a bit different than they are today.

The second force that he saw, which would prevent this despotism was the existence of trial by jury. Rather interestingly he noted that all of the sovereigns who have chosen to govern by their own authority and direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury. The Tudor monarchs sent to prison jurors who refused to convict, and Napoleon caused jurors to be selected by his own agents. He made an interesting observation also about the juries, "I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them."

The third force that he considered to be a great and salutary force in America was the legal profession. He was a lawyer himself. But he was from a different background than that of the Anglo-American lawyer. Some of his observations on the American lawyer of the 1830's and before, I think, deserve comment, not only as somewhat quaint observations on our profession in America, but also because I think the remarks have a continuing vitality about them in many respects.

This statement of his concerning lawyers is known to most general readers. He wrote: "The government of a democracy is favorable to the political power of lawyers, for when the wealthy, the noble and the prince are excluded from the government, the lawyers take possession of it."

And elsewhere he remarked, "In America there are no nobles or literary men and the people are apt to mistrust the wealthy. Lawyers consequently form the highest political class and the most cultivated portion of society. They have therefore nothing to gain by innovation which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and bar."

And he commented: "Lawyers are attached to public order beyond every other consideration. And the best security of public order is authority. It must not be forgotten also that if they prize freedom much, they generally value legality more. They are less afraid of tyranny than arbitrary power."

He could speak of the American judges too with as much enthusiasm as any judge today who might appear before some constitutional convention or some legislative body. He noted: "Armed with the power of declaring the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs. He cannot force the people to make laws, but at least he can oblige them not to disobey their own enactments and not to be inconsistent with themselves."

And here he showed acumen: "I am aware that a secret tendency to diminish the judicial power exists in the United States, and by most

of the constitutions of the several states the government can, upon the demand of two houses of the legislature, remove judges from their station. Some other state constitutions make the members of the judiciary elective, and they are even subjected to frequent re-elections. I venture to predict that these innovations will sooner or later be attended with fatal consequences and that it will be found out at some future period that by thus lessening the independence of the judiciary, they have attacked not only the judicial power, but the democratic republic itself."

This is observation on *Marbury* v. *Madison,* although he doesn't comment on the case as such. He says: "The power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies."

I think that is an interesting observation, considering that it was many, many years after *Marbury* v. *Madison* before the Supreme Court of the United States again declared an act of Congress unconstitutional. It gives us some idea, apparently, of the ready and general acceptance of the notion that this was a firmly set part of the American Constitution and the powers of the American judiciary.

He was critical of our precedent system in part, I suppose, because his understanding of it was imperfect. He noted that: "The English and American lawyers investigate what has been done; the French advocate inquires what should have been done; the former produce precedents; the latter reasons. A French observer is surprised to hear how long an English or American lawyer quotes the opinions of others and how little he alludes to his own, while the reverse occurs in France."

And again speaking against his own background of Continental Law, he said: "The French codes are often difficult to comprehend, but they can be read by anyone. Nothing, on the other hand, can be more obscure and strange to the uninitiated than a legislation founded upon precedents. The French lawyer is simply a man extensively acquainted with the statutes of his country, but the English or American lawyer resembles the hierophants of Egypt, for like them he is the sole interpretor of an occult science."

He had a ready eye and a discerning mind and many of the observations he made on the role of the American lawyer, I think, continue in force today. Certainly some of our vices are not new. He referred to the habitual procrastination of the profession, and at another time he spoke of lawyers as being men of stationary ideas. The latter may not be applied to us, I think, in justice, but certainly the former seems to be one of the occupational hazards from the beginnings of the American Republic, as far as American lawyers are concerned.

Well, ladies and gentlemen, I want to say how greatly I appreciate the invitation to be with you tonight. I looked forward to it very

much more than really you know. Our chairman has referred to last year when I had a little problem, a little collision with the ice, which resulted in a broken wrist. As I came here tonight, I thought with a little trepidation, that it is going to be a pleasure to be here. I kept assuring myself that the fault is not in the stars, and that I would be able to attend.

I enjoyed it very much. I know, speaking in a serious vein, that while I am here as an individual, I am reflecting the feelings of our entire Court when I tell you of our sensitivity and awareness of the high accomplishments of the associate judges in our judiciary.

REPORT OF DISCUSSIONS

Topic I—FUNCTION OF THE TRIAL JUDGE

Hon. Joseph F. Cunningham
Chairman and Discussion Leader

Hon. Richard J. Fitzgerald
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Conner, Leslie L., *The Trial Judge, His Facial Expressions, Gestures And General Demeanor - Their Effect on the Administration of Justice,* 6 A C L Q 175 (1968)
2. *Standards Relating to the Function of The Trial Judge,* American Bar Association Project on Standards for Criminal Justice, Approved Draft (1972)
3. Illinois Supreme Court Rules 401 and 402 (Ill. Rev. Stat. 1971, ch. 110A, §§ 401 and 402)

B. Summary of Discussions

Report of Professors Robert E. Burns and Thomas D. Morgan

The committee on the Function of the Trial Judge used, for the first time, videotaped enactments of a model traffic court statement, statement to veniremen, plea and arraignment procedures, and a bail hearing. Professor-reporters used "stop-action" techniques for some of the scenarios, playing them through completely once and then breaking them into small segments for discussion questions.

Part I—Consensus of the discussions

1. *Judge Samuels - Traffic Court Statement*

   The tone, technical quality and presentation were excellent. Some of the judges felt, however, that they did not have time to make such a statement at traffic sessions. A lively discussion ensued whether it is more important that the traffic statement set out "trial rights" or whether it is better to emphasize the purposes and reasons behind traffic laws *vis-a-vis* safety and the public interest.

2. *Judge Fitzgerald - Statement to Veniremen*

   This was a fine tape. The general response of the judges was favorable. Most of the judges felt the statement was more

complete and covered more details by way of instruction to the veniremen than they were accustomed to give. This kind of statement would be most useful as an instruction tool for new judges assigned to criminal court.

3. *Judge Dunne - Misdemeanor Arraignment*

This particular tape was well done but was too short and left too many questions that were better handled in the plea procedure tape. The arraignment scenario was not used at the second session.

4. *Judge Dunne - Guilty Plea Procedures*

Three tapes were used to illustrate the mechanics of (1) a straight plea of guilty, (2) a plea marked by prior consultation between prosecutor, defense and the trial judge, after obtaining consent and permission for the same, and (3) a negotiated plea scenario, where the negotiation did not include participation by the trial judge. The stop-action technique was used to suggest various questions, such as: was something left out; should the judge explain what the rights were in greater detail; did the judge initiate or participate; how do you do it in your areas? It was interesting to learn that even in Cook County, few associate judges participate in plea negotiations between prosecutor and defense counsel. The collective experience with the associate judges once again validated the experience of the committee on criminal law which, under the direction of Judge Mills, conducted regional seminars around the State about Supreme Court Rule 402. There was very little uniformity in practice or procedure among the associate judges in applying "the spirit" of Rule 402 to guilty pleas in non-felony cases. The reporters had the definite impression that most of the associate judges were not familiar with the trial judges' duties or prerogatives under Rule 402(a). Stop-action freeze questions, therefore, were not always productive of informed responses.

5. *Judge Bakakos - Bond Hearing*

This was the most realistic single segment in the sense of a natural interplay between the judge, defendant and counsel. It illustrated that by spending considerable time in setting a bond, the judge is likely to find information that will better enable him to tailor the bond to the specific case. Much of the discussion, however, indicated that an extensive inquiry is not possible under the time pressures faced by many of the associate judges.

Part II—Recommendations

1. The judges in attendance were unanimous that videotape provided an excellent springboard for discussion and should be continued in future seminars. All members of the committee, including the professor-reporters completely agree. Some things were learned about the use of videotape that might be useful in planning future seminars.

a. Videotape is most useful in placing the seminar members in the context for the discussion. That is, it is far better than any written problem for giving judges a common sense of what the issues are and developing quite intense reactions to the presentations. With videotape, there is little disagreement over what facts were included or left out of the problem, or any of the other collateral issues that often come up in the typical discussion format. Issues are not abstract. They are concrete and judges like what they saw or don't like it. The discussion reflects their strong grasp of the situation.

b. One very important use of videotape, of course, is to present the "correct" way of handling a given procedure. This would be particularly true if one were trying to illustrate the operation of a new rule with which relatively few of the judges are experienced.

c. On the other hand, videotape alone seems to us not a particularly good vehicle for conveying substantive legal rules. That is, we found that stop action techniques did not particularly convey the substance of Rule 402. If one's purpose is to convey the content of a rule, it should be done by lecture first, followed by vidotape used to present problems under the rule after the initial factual presentation.

d. On the other hand, videotape is excellent for illustrating the way particular problems are handled or procedures are conducted in various courts by various judges. Perhaps rather than using scripts which reflect a committee consensus of how something *should* be done, experienced judges should be asked to "do what comes naturally". Then other judges would be able to contrast their own procedures.

e. It is important that the videotape segments not be so long that the judges forget what happened in the earlier portions. At the same time, they must be long enough that the judges can fully understand the situation being portrayed. It seems that the ideal format for use of videotape in a seminar would permit about 5-minute videotape sequences followed by approximately 20 to 25 minutes of group discussion. We found that the videotapes create such interest that the discussion takes at least that long. Indeed our greatest problem was in cutting off discussion

which could have gone on at great length. A typical committee's presentation at a seminar probably should consist of 4 or 5 5-minute videotape presentations followed by discussions.

As suggested above, vidotape has its limitations as well as its strengths. It should not be used by every committee at every seminar session. Some things are better conveyed by lecture, others by traditional discussion. However, the strengths of vidotape are so great and it is so unparalleled as a t ching device with respect to matters of practice that: *The committee respectfully recommends that the Judicial Conference annually budget sufficient funds to have a videotape program available for at least one committee at each meeting of the Associate Judge Seminar and the Annual Judicial Conference.*

2. A question was put to the judges after observing the televised staged guilty pleas whether they believed that the videotaping of actual guilty pleas would assist the Appellate Court in making the determination whether there was a "knowing waiver" of the defendant's constitutional rights. A majority of the judges believed that such a procedure should be considered carefully. They recognized that a cold paper record can reveal all the admonitions but convey nothing of the sense of the situation. By the same token, a single admonition may be missing which in context a videotape might indicate was harmless error. These judges recognized that the problems of witness nervousness or jury distraction are not present in the arraignment and plea situation, so the important practical barriers to videotaping might be considered to be significantly less than with respect to taping of actual trials.

Part III—Conclusion

The reporters wish to express their appreciation for the fine work of the committee chairman Judge Joseph F. Cunningham and his committee; Mr. Robert Roe, technical consultant; and especially the judges who allowed themselves to be taped—Judges Richard Samuels, Richard J. Fitzgerald, Peter Bakakos, Arthur Dunne and Burton H. Palmer.

Topic II—FAMILY LAW

Hon. Helen F. McGillicuddy
Chairman and Discussion Leader

Hon. William C. Calvin
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Kaufman, John, *Juvenile Court Act*, a pamphlet summarizing P.A. 77-2096, effective January 1, 1973
2. Ill. Rev. Stat., 1972 Supp., ch. 37, § 702-2 *et seq.*
3. *Stanley* v. *Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972)
4. *People ex rel. Slawek* v. *Covenant Children's Home*, 52 Ill.2d 20, 284 N.E.2d 291 (1972)
5. *Mogged* v. *Mogged*, 5 Ill.App.3d 581, 284 N.E.2d 663 (1972). (Petition for Leave to Appeal granted, Supreme Court of Illinois Docket # 45291)
6. *Gill* v. *Gill*, 8 Ill.App.3d 625, 290 N.E.2d 897 (1972)
7. *Dwyer* v. *Dwyer*, 366 Ill. 630, 10 N.E.2d 344 (1937)
8. *Sturdy* v. *Sturdy*, 67 Ill.App.2d 469, 214 N.E.2d 607 (1966)
9. *Tan* v. *Tan*, 3 Ill.App.3d 671, 279 N.E.2d 486 (1972)
10. *Volid* v. *Volid*, 6 Ill.App.3d 386, 286 N.E.2d 42 (1972)
11. *Patton* v. *Armstrong*, 6 Ill.App.3d 998, 286 N.E.2d 351 (1972)

B. Summary of Discussions

Report of Professors James M. Forkins and Richard A. Michael

The seminar discussions conducted by the committee on Family Law were generally concerned with three topics: The recent amendments to the Juvenile Court Act, the adoption and custody problems raised by the decision of the United States Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972), and the recent appellate decisions relating to divorce actions. Accordingly, this report will be divided into summaries of the discussions on each of these topics.

JUVENILE COURT PROCEEDINGS

As previously noted, the principal topic discussed during this portion of the seminar was recent amendments to the Juvenile Court Act. Each of the major changes was explained to the judges, and problem

areas were discussed. No attempt will be made in this report to recapitulate the discussion of the actual changes made in the Act in light of the excellent summary of those changes made by Judge John J. Kaufman of the Nineteenth Judicial Circuit, which report was included in the reading material. Rather the emphasis here will be on those changes which the judges believe created difficulties.

One such area of discussion arose from the change which removed from the grounds which constitute delinquency the violation of a court order entered pursuant to the Juvenile Court Act. Violation of such an order under the amendments warrants a finding that the minor is a "minor otherwise in need of supervision" but not a "delinquent". The practical effect of this change is that a minor cannot now be incarcerated for a violation of a court order. It was pointed out that this makes enforcement of court orders quite difficult in the case of certain classes of minors of which runaways would be a typical example. Some judges believe that a minor child could still be punished by the appropriate exercise of the contempt power if the minor violated such an order in an extreme case. A few judges, however, expressed the opinion that such action would be in conflict with the public policy expressed in the Act.

With respect to the changes which authorized the committment of a delinquent to the Department of Children and Family Services, (subject to section 5 of that Act), and the commitment of a minor in need of supervision to that Department after January 1, 1974, without regard to the limitations in that Act, it was noted that the Department of Children and Family Services is presently experiencing difficulty in finding placements for those minors now being referred to it. Thus, it was concluded that, absent substantial changes, this increased authority of the Juvenile Court judge to commit children to that Department is often unlikely to be beneficial.

The new provision that a delinquent is not be to committed to the Department of Corrections before a written report of a social investigation made within the previous sixty days is presented to and considered by the court, evoked considerable discussion about the use of reports of social agencies in Juvenile Courts and in other court proceedings where the custody of children is involved. A basic inconsistency was found to exist under present practices. It was noted that, because of their hearsay nature, such reports are not considered when the custody of children is in issue in a divorce case. In this regard the recent strong opinion of the Appellate Court in *Patton* v. *Armstrong*, 6 Ill.App.3d 998, 286 N.E.2d 351 (1972), condemning this practice was noted. On the contrary, in adoption cases an agency investigation of the adopting home is considered. Finally, in Juvenile Courts such reports are not considered at the adjudicatory hearing but are at the dispositional hearing. It was suggested that the Illinois Supreme Court adopt a rule governing the contents and conditions of admissability of reports of social agencies.

ADOPTION AND CUSTODY

In this portion of the seminar, the impact of the recent decision of the United States Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972), where the Court held an unwed father entitled to a hearing on his fitness before he is deprived of the custody of his illegitimate children, was discussed together with the decision of the Illinois Supreme Court in *People ex rel. Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, which interprets the *Stanley* case.

It was noted that to date, the major impact of *Stanley* and *Slawek* has been felt in the area of adoption of illegitimates. Prior to these cases, such a child was placed for adoption upon the consent of the mother. Now both the mother and the father must consent. To implement this change, the father is served in the adoption proceeding. If the mother refuses to identify the father or he is otherwise unknown, service is made by publication. If the mother names more than one individual, service is made upon all. Some questions were raised, however, as to the effectiveness of service by publication to foreclose the rights of the father. Questions were likewise raised with respect to the broadcast service of subpoena upon anyone named by the mother of the child. In general, the judges were in favor of a proposed change in the Adoption Act by which a father could be ruled unfit if he had not evidenced interest in the child within thirty days of its birth.

It was also suggested that the *Stanley* case may require some amendment of the Illinois statute governing descent and distribution.

DIVORCE

The third and final phase of the seminar was devoted to the area of divorce. Here the discussion centered around the recent decisions of the Illinois Appellate Court: *Mogged* v. *Mogged*, 5 Ill.App.3d 581, 284 N.E.2d 663 (1972); *Gill* v. *Gill*, 8 Ill. App.3d 625, 290 N.E.2d 897 (1972); *Tan* v. *Tan*, 3 Ill.App.3d 671, 279 N.E.2d 486 (1972); and *Volid* v. *Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

The *Mogged* case held that recrimination is not always a valid defense to a divorce action, and need not be applied by a judge in cases where its application would, in the exercise of sound judicial discretion, be unwarranted. It was noted that the case involved extreme and repeated mental cruelty by both of the parties to the marriage, and to deny both parties a divorce because of their own faults would inject a punitive element into the case. Discussion centered on the extent to which the case should be limited to its facts. It was reported that the Illinois Supreme Court has granted leave to appeal with respect to the case.

The *Gill* case involved a situation in which a wife had secured an *ex parte* divorce with service upon her husband by publication. Some

15 years later, the husband was personally served in Illinois and was ordered to pay $13,520.00 in back child support payments even though the child was by then emancipated, and adult, and married. The Appellate Court affirmed by a two to one majority on the basis that the divorce did not affect the duty of the husband to support his child. The majority of the judges believed the wife entitled to reimbursement for her expenses in raising the child, but some expressed the view that this right should be asserted by means of an independant action for restitution, rather than by a retroactive child support order in the divorce case itself. In such an action for restitution, the husband would be entitled to a jury trial and the judgment could not be enforced by the contempt powers of the court. There was divided opinion over whether the rational of the *Gill* case could be extended to retroactive alimony payments. It was agreed that the critical question in that regard was whether it could be said that there was an existing duty to support the wife after a divorce, absent an order so requiring, equivalent to the husband's duty to support his child.

The *Tan* case involved the affirmance of an order terminating alimony on the basis of changed circumstances where the changed circumstances amounted only to the payment of $7,000.00 since the divorce and the remarriage of the paying husband. It was noted that this case overrules *sub silencio* a number of prior holdings that continued payment of alimony and the remarriage of the paying party do not constitute changed circumstances. It was, however, emphasized that the Appellate Court stressed the trial court's discretion in the matter, and that the facts of the case, including the fact that it was the wife's fourth marriage, and that the marriage only lasted seven months, presented an appropriate situation for the exercise of that discretion. A growing tendency to limit or deny alimony in the circuit courts was mentioned by a number of judges in connection with this case.

In *Volid* the Appellate Court reversed a circuit court's disregard of an ante-nuptial agreement in fixing support payments. The payments set were in excess of amounts mentioned in the agreement. Prior to this case it was generally believed that such agreements were contrary to public policy and unenforceable. It was noted, however, that the Court did not hold such agreements automatically enforceable. It indicated that a contrary result would be reached if the parties attempted to avoid all duty of support. The judges were divided over the issue of whether such a contract should be enforced if it were fair when entered, but unforseen events made it inequitable at the time of the divorce. It was further noted that the Illinois Supreme Court denied leave to appeal in this case.

In conclusion, the reporters would like to express their gratitude for the opportunity to work with the committee consisting of the Hon-

orable Helen McGillicuddy (chairman), Honorable William Calvin (vice-chairman), Honorable John Crowley, Honorable Roland DeMarco, Honorable Thomas Doran, Honorable Arthur Hamilton, Honorable David Linn, and Honorable Arthur Dunne (liaison officer) and for the many kindnesses they received from the committee.

Topic III—SENTENCING, PROBATION AND CORRECTIONS

Hon. Richard Mills
Chairman and Discussion Leader

Hon. John F. Hechinger
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Haddad, James, *Sentencing Under The Code Of Corrections*, unpublished analysis of sentencing provisions of Ill. Rev. Stat., 1972 Supp., ch. 38, §1001-1-1 *et seq.* (1972)
2. Fact Sheet On Work Release Or Work Furlough Programs, John Howard Association (1969)
3. *Standards Relating To Probation*, American Bar Association Project On Standards For Criminal Justice, Approved Draft (1970)
4. *Probation In Illinois: A Politically Entrenched Overburdened "Non-System"*, John Howard Association (1972)
5. *Correctional Programs Of The State Of Illinois*, from *New Horizons in Corrections*, published by the State of Illinois, Department of Corrections

B. Reference Material

Illinois Unified Code of Corrections
Classification of Offenses
(As of January 1, 1973)

The following compilation has been prepared by the Administrative Office of the Illinois Courts for use by clerks of the circuit courts to assist them in their duties of recordkeeping and in reporting of statistical data.

OFFENSES IN CHAPTER 38—CRIMINAL LAW AND PROCEDURE

ILLINOIS REVISED STATUTES

\- - -

DIVISION I
(Criminal Code of 1961)

\- - -

DIVISION II
(Miscellaneous Penal Provisions)

\- - -

DIVISION V
(Supplementary Provisions)

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
DIVISION I						
Criminal Code of 1961						
8-1	Solicitation					X
8-2	Conspiracy					X
8-4	Attempt:					X
	to commit murder	1				
	to commit treason, or aggravated kidnaping	2				
	to commit armed violence	4				
	second or subsequent violation	1				
	to commit any other forcible felony	3				
	to commit any other felony	4				
	to commit any other offense - same class as the offense attempted					
9-1	Murder	Murder				
9-2	Voluntary Manslaughter	2				
9-3	Involuntary Manslaughter	3				
	Reckless Homicide	4				
9-3.1	Concealment of Homicidal Death	3				
9-4	Concealing Death of Bastard		A			
10-1	Kidnaping	3				
10-2	Aggravated Kidnaping	1				

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
10-3	Unlawful Restraint	4				
11-1	Rape	1				
11-3	Deviate Sexual Assault	1				
11-4	Indecent Liberties with a Child	1				
11-5	Contributing to the Sexual Delinquency of a Child		A			
11-6	Indecent Solicitation of a Child		A			
11-7	Adultery		A			
11-8	Fornication		B			
11-9	Public Indecency		A			
11-10	Aggravated Incest	2				
11-11	Incest	3				
11-12	Bigamy	4				
11-13	Marrying a Bigamist		A			
11-14	Prostitution		A			
11-15	Soliciting for a Prostitute		A			
11-16	Pandering	4				
11-17	Keeping a Place of Prostitution		A			
11-18	Patronizing a Prostitute		B			
11-19	Pimping		A			
11-20	Obscenity		A			
	second or subsequent offense	4				
11-21	Harmful Material:					
	Distribution of -		A			
	second or subsequent offense	4				
	False representation of age to purchase or view		B			
11-22	Tie-in Sales of Obscene Publications			X		
12-1	Assault		C			
12-2	Aggravated Assault		A			
12-3	Battery		A			
12-4	Aggravated Battery	3				
12-5	Reckless Conduct		A			
12-5.1	Criminal Housing Management		A			
12-6	Intimidation	3				
12-7	Compelling Confession or Information by Force or Threat	4				
12-8	Dueling		A			
12-10	Tattooing Body of Minor		C			
13-2	Violation of Civil Rights		B			
14-2	Eavesdropping		A			

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
16-1	Theft:					
	not from person and not exceeding $150 in value		A			
	a second or subsequent offense after conviction of any type of theft	4				
	from the person or exceeding $150	3				
16-2	Theft of Lost or Mislaid Property			X		
16-3	Theft of Labor or Services or Use of Property		A			
16-5	Theft from Coin-operated Machine		A			
	a second or subsequent conviction	4				
16-6	Coin-operated Machines - Possession of a Key or Device		A			
17-1	Deceptive Practices:					
	Subsections (a) through (j) except, when under subsections (e) or (f), the value, in a single transaction or in several transactions within 90 days, exceeds $150	3	A			
	and, a second or subsequent offense under subsections (g), (h), (i) or (j)	3				
17-2	Impersonating Member of Police, Fraternal or Veteran's Organization, or Representative of Charitable Organization		C			
17-3	Forgery	3				
17-4	Deceptive Altering or Sale of Coins		A			
18-1	Robbery	2				
18-2	Armed Robbery	1				
19-1	Burglary	2				
19-2	Possession of Burglary Tools	4				
20-1	Arson	2				
20-2	Possession of Explosives or Explosive or Incendiary Devices	2				
21-1	Criminal Damage to Property:		A			
	except, when an act enumerated in subsections (a) or (f) results in damage exceeding $150	4				

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
21-1.1	Criminal Damage of Fire Fighting Apparatus, Hydrants or Equipment		B			
21-2	Criminal Trespass to Vehicles		A			
21-3	Criminal Trespass to Land		C			
21-4	Criminal Damage to State Supported Property:					
	when damage is $500 or less		A			
	when damage exceeds $500	4				
21-5	Criminal Trespass to State Supported Land		A			
21-6	Unauthorized Possession or Storage of Weapons		A			
21.1-2	Residential Picketing		B			
21.2-2	Interference with Public Institution of Higher Education					
	second or subsequent offense		C			
20-50, 22-51, 22-52	Hypodermic Syringes and Needles Act		B			
	for a second or any succeeding offense		A			
23-1	Abortion	4				
23-2	Distributing Abortifacients	3				
23-3	Advertising Abortion		B			
24-1	Unlawful Use of Weapons:		B			
	Subsections (a) (1) through (a) (6), or (a) (8) or (a) (10)					
	Subsections (a) (7) or (a) (9)		A			
	Violation of any subsection, by a person convicted of a felony, within 5 years of conviction if penitentiary sentence has not been imposed	4				
24-3	Unlawful Sale of Firearms	3				
24-3.1	Unlawful Possession of Firearms and Firearm Ammunition		A			
24-4	Register of Sales by Dealer		A			
24-5	Defacing Identification Marks of Firearms		B			
			A			

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
25-1	Mob Action					
	if participant in mob action which, by violence, inflicts injury to person or property of another	4				
	if participant in mob action who does not withdraw on being commanded to do so by peace officer		A			
26-1	Disorderly Conduct					
	Subsection (a) (1) or (a) (2)		C			
	Subsection (a) (3)	4				
	Subsection (a) (4)		A			
	Subsection (a) (5) or (a) (6)		B			
26.1-2, 26.1-3, 26.1-4	Solicitation of Alcoholic and Nonalcoholic Beverages			X		
27-1	Criminal Defamation		A			
28-1	Gambling					
	Subsection (a) (1) or (a) (2)		A			
	Subsections (a) (3) through (a) (10)		A			
	Second or subsequent conviction under any of subsections (a) (3) through (a) (10)	4				
28-1.1	Syndicated Gambling	3				
28-3	Keeping a Gambling Place		A			
	second or subsequent offense	4				
28-4	Registration of Federal Gambling Stamps		B			
	Second or subsequent violation		A			
29-1	Offering a Bribe	4				
29-2	Accepting a Bribe	4				
29-3	Failure to Report Offer of Bribe		A			
29A-1	Commercial Bribery				X	
29A-2	Commercial Bribe Receiving				X	
30-1	Treason	1				
30-2	Misprision of Treason	4				
30-3	Advocating Overthrow of Government	3				

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
31-1	Resisting or Obstructing a Peace Officer		A			
31-3	Obstructing Service of Process		B			
31-4	Obstructing Justice	4				
31-5	Concealing or Aiding a Fugitive	4				
31-6	Escape					
	Subsection (a)	2				
	Subsection (b) or (c)		A			
	Subsection (d), or a violation of subsection (b) or (c) while armed with a dangerous weapon	4				
31-7	Aiding Escape					
	Subsection (a), (c), (d), (e) or (f)		A			
	Subsection (b)	2				
	Subsection (g), or a violation of subsection (c), (d) or (e) while armed with a dangerous weapon	2				
31-8	Refusing to Aid an Officer			X		
32-1	Compounding a Crime			X		
32-2	Perjury	3				
32-3	Subornation of Perjury	4				
32-4	Communicating with Jurors and Witnesses					
	Subsection (a)		A			
	Subsection (b)	4				
32-4a	Harassment of Jurors and Witness		A			
32-5	False Personatic of Judicial or Governmental Official		B			
32-6	Performance of Unauthorized Acts	4				
32-7	Simulating Legal Process		B			
32-8	Tampering with Public Records	4				
32-9	Tampering with Public Notice			X		
32-10	Violation of Bail Bond if bail was given in connection with a charge of felony, or pending appeal or certiorari after conviction of any offense	4				

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
	if bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness	4	A			
33-1	Bribery		A			
33-2	Failure to Report a Bribe	4				
33-3	Official Misconduct	4				
33A-2	Armed Violence					
	second or subsequent violation	1				
37-1	Maintaining Public Nuisance		A			
	Each subsequent offense	4				
39-1	Criminal Usury	4				
39A-1	Juice Racketeering Transaction	3				
40-2	Criminal Misrepresentation of Factoring	3				
42-1	Looting	4				
DIVISION II						
Miscellaneous Penal Provisions						
50-1 & 50-2	Aerial Exhibitions		A			X
50-31 & 50-32	Containers - Labeling					X
60-3	Antitrust Act					
65-1	Blind Persons - Exclusion of guide dogs		C			
65-11	Disclosure of Information Obtained in Business of Preparing Income Tax Returns		A			
65-23 thru 27	Unlawful Employment and Housing Practices		C			
70-1	Misuse of Official Stationery or Seal of Institution of Higher Learning				X	
70-51	Inducement to Sell or Purchase Realty by Reason of Race, Color, Religion or National Origin or Ancestry		A			
	Second or subsequent violation	4				
81-1 & 81-2	Use or Sale of Intoxicating Compounds		C			
82-2 & 82-3	Unlawful Sale, Possession or Use of Air Rifles				X	

Chapter 38 Section	Offense	Felony	Misdemeanor	Petty Offense	Business Offense	See Statute
83-	Firearms and Ammunition		A			
84-	Boarding Aircraft with Firearm, Explosive or Lethal Weapon		B			
85-	Public Demonstrations Law		A			
90-1	Legislative Misconduct	3				
90-11	Destruction or Mutilation of Draft Card	4				
	DIVISION V					
	Supplementary Provisions					
201-	Detectives and Investigators All violations of act, except section 201-12		B			
201-12	Employee Divulging Information		A			
202-	Detection of Deception Examiners		B			
206-7	Criminal Identification and Investigation Act		A			

OFFENSES IN CHAPTER 56-1/2—FOOD AND DRUGS

ILLINOIS REVISED STATUTES

- - -

CANNABIS CONTROL ACT

- - -

CONTROLLED SUBSTANCES ACT

Chapter 56-1/2 Section	Offense	Felony	Misdemeanor
	CANNABIS CONTROL ACT		
4	Possession of cannabis		
	Subsection 4 (a)		C
	Subsection 4 (b)		B
	Subsection 4 (c)		A
	Subsequent offense	4	
	Subsection 4 (d)	4	
	Subsequent offense	3	
	Subsection 4 (e)	3	
5	Manufacture or delivery of cannabis		
	Subsection 5 (a)		B
	Subsection 5 (b)		A
	Subsection 5 (c)	4	
	Subsection 5 (d)	3	
	Subsection 5 (e)	2	
8	Production of cannabis sativa plant		A
9	Calculated criminal cannabis conspiracy if after one or more prior convictions under this section, section 4 (d), section 5 (d), or any law relating to cannabis, or controlled substances	3 1	

Chapter 56-1/2 Section	Offense	Felony	Misdemeanor
CONTROLLED SUBSTANCE ACT			
401	Manufacture or Delivery		
	Subsection 401 (a)	1	
	Subsection 401 (b)	2	
	Subsection 401 (c)	3	
	Subsection 401 (d)	3	
	Subsection 401 (e)	4	
	Subsection 401 (f)	4	
402	Possession		
	Subsection 402 (a)	1	
	Subsection 402 (b)	3	
403	Counterfeit substances - Manufacture or Delivery		
	Subsection 403 (a)	2	
	Subsection 403 (b)	3	
	Subsection 403 (c)	4	
	Subsection 403 (d)		A
	Subsection 403 (e)		A
404	Substance represented as controlled substance		
	Delivery or Possession	3	
405	Calculated criminal drug conspiracy	1	
406	Miscellaneous violations		
	Subsection 406 (a)		A
	subsequent offense	4	
	Subsection 406 (b)		A
	subsequent offense	4	

C. Summary of Discussions

Part I—Probation and Corrections

Report of Professor John P. Heinz

Pursuant to the decision of the committee, under the chairmanship of the Hon. Richard Mills, circuit judge, our topic was divided into two sets of sessions, one set dealing with sentencing under the new Code of Corrections and the other dealing with probation and related dispositions (including "conditional discharge" or "work release"). The former was assigned to my colleague, James B. Haddad, and the latter was assigned to me. Accordingly, this report deals only with the discussions of probation and related dispositions, while Professor Haddad will submit a separate report on sentencing under the new Code.

The seminars began with a brief overview of the law and existing standards on the use of probation. It was noted that the A.B.A. Standards on "Sentencing Alternatives and Procedures," §2.3(c), creates a presumption in favor of a sentence of probation:

> "(c) A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary."

And the A.B.A. Standards on "Probation" (included in the materials distributed before the seminar) also provide in §1.3(a):

> "Probation should be the sentence unless the sentencing court finds that:
>
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
>
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
>
> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed."

Section 1005-6-1 of our Code of Corrections, however, turns this around:

> "The court shall impose a sentence of imprisonment upon an offender if, having regard to the nature and circumstance of the offense, and to the history, character, and condition of the offender, the court is of the opinion that:
>
> (1) his imprisonment is necessary for the protection of the public; or

(2) the offender is in need of correctional treatment that can most effectively be provided by a sentence of imprisonment; or

(3) probation or conditional discharge would deprecate seriousness of the offender's conduct and would be inconsistent with the ends of justice."

Thus, while it is by no means clear that our Code of Corrections creates the same sort of presumption in favor of probation as does the A.B.A. Standards, the Code would still seem to require an affirmative finding of one of the three enumerated conditions before a sentence of imprisonment would be proper. Moreover, though the A.B.A. Standards do not of course have the force of law, they may well be considered to be persuasive authority and have been so cited in several Illinois cases; see, *e.g., People v. Mc Clendon,* 130 Ill.App.2d 852, 265 N.E.2d 207, 209 (1970).

Considerable attention focused on the potential savings of tax dollars that might be achieved by an increased use of probation rather than incarceration (without any significant increase in recidivism, according to several research studies—more on this below). The American Correctional Association, the National Council on Crime and Delinquency, and the John Howard Association estimate that it costs from ten to fourteen times as much to imprison a man as it does to supervise him on probation. The cost of probation supervision averages 35 cents to 60 cents per probationer per day, or less than $200 per man per year on the average. By comparison, it costs $2,500 to $4,000 per year to maintain a man in prison. It was suggested that part of this difference in cost may be attributable to the fact that probation is currently being run "on the cheap"—but, then, so are the prisons. If we include in the cost of imprisonment the inmate's loss of earnings, the loss of the taxes he would pay, and the expense to taxpayers if his family has to go on welfare, the estimate then is that it costs an average of $11,000 per year to keep a married man in prison. Given this very substantial cost difference, it makes sense to ask what we are getting by using imprisonment rather than probation that is worth the much higher price.

A research project that may shed some light on this question was conducted a few years ago in Saginaw County, Michigan. During the period from 1957 to 1960, the percentage of convicted felons given probation in Saginaw was increased from 59.5% to 67.1%. At the same time, the rate of probation failures *decreased* from 32.2% to 17.4%. This result was achieved by increasing the size and quality of probation staff, thus permitting intensive supervision with small caseloads. These improvements in probation services of course cost money; even so, the net benefit to taxpayers during the three years in the one county was estimated to be nearly half a million dollars due to the saving

of funds that would otherwise have been expended on institutionalization and related costs. Thus, it appears to be possible to improve probation services, increase the percentage of offenders placed on probation while reducing the recidivism rate, and save money at the same time.

"Another innovative program in probation that was discussed is the California probation subsidy system. Under that program, the State of California computed the average rate at which each county had been sentencing persons to prison over a period of time. Then, for each person less than that expected number that the county sends to the state prisons in the future (the expected number being computed by adjusting the past rate for the present population of the county), the state rebates to the county a portion of the money that the state saves by not having to incarcerate that person, the rebate to be used for improving probation services. Under this system, California authorities computed that 5,266 fewer persons were sentenced to prison in 1971 than would have been expected under the projected rates. Prison populations have been greatly reduced in California since this system was adopted, and the state even has some institutions standing idle for want of customers. Since large numbers of offenders who would, apparently, have been sent to prison have been sentenced to probation instead, one might expect that the probation violation rate would increase significantly because of the more "serious" offenders being put on probation. The finding from California, however, is that the probation violation rate has not increased; in fact, it has decreased slightly. From 1966 to 1971, California computes that this system saved $186 million in avoided costs of institutionalization; of that amount, $60 million was rebated to the counties in the probation subsidies, for a net saving of $126 million. At the seminar, one judge observed that the effect of this system is to give the counties and their local judiciary a financial incentive to place offenders on probation rather than sentencing them to the penitentiary. That is, of course, correct, but one might note that without the subsidy there would be an incentive in the opposite direction—that is, the counties would have an incentive to commit offenders to the custody of the state rather than supervising them on probation under the county budget.

Given these successes in other states, how does our record in Illinois compare? According to the John Howard Association (which based its conclusions on figures supplied by the Administrative Office of the Illinois Courts), probation is used substantially less in Illinois than in such other states as California, Wisconsin, New Jersey, Massachusetts, and Washington. In the latest year for which the John Howard Association reported final figures, 1970, Illinois judges gave probation in 42.5% of all felony cases (the figure was somewhat higher downstate, 49.2%, and significantly lower in Cook County, 32.8%). Some of the other states mentioned apparently manage to increase

this average by twenty or more percentage points. This raises the question of whether there are good reasons for this difference between Illinois and these other states.

This question stimulated considerable discussion among the judges about both the quantity and the quality of probation in Illinois. Most judges appeared to agree that they would give a sentence of probation more often if they had more confidence in the quality of probation supervision. One judge put it: "As things are, we only put somebody on probation when we think he can make it *on his own.*" Another judge appeared to sum up the views of many when he said: "We don't have a probation system in Illinois."

There was a consensus that the most serious problem with probation at present is the excessive caseloads of probation officers—especially in Cook County. It was noted that these caseloads mean that the amount of supervision that can be given to the individual probationer is usually grossly insufficient—often no more than a few minutes per month. According to the John Howard Association, the average caseload of probation officers statewide during the period 1970-1972 was 110. This compares to a recommended standard of a caseload of no more than 40, and a caseload in the programs supported by the California subsidy system of 28.

Another problem noted by the judges present is the inadequate training of probation personnel.

There were also some brighter spots, however. The view was expressed that in some areas, notably the "North Shore" suburbs of Cook and Lake counties, the pre-sentence reports that are done are quite good. Some judges from downstate counties also reported that they have programs of "Volunteers in Probation," which are working quite well. In these programs, local citizens volunteer to devote some of their time to working with probationers under the supervision of a professional probation officer. One county was said to have more than 100 volunteers—the main thing the probation officer does in that county is supervise the volunteers. Many judges felt that this program was superior to the professional system, which they feel is more impersonal.

The view was generally expressed that juvenile probation services in Cook County are clearly superior to those in the adult department, but there was also some dissatisfaction voiced with the juvenile system.

As one approach toward the solution of some of these problems, there was discussion of the proposal to integrate probation services statewide under the supervision of the Administrative Office of the Illinois Courts. The proposal discussed is one whereby the chief judges of the circuits would appoint the probation officers pursuant to statewide standards established by the Administrative Office. The Administrative Office would conduct training programs, and the chief judges would have the responsibility for day-to-day administrative oversight. Though considerable diversity of view was expressed among the judges as to the particular manner in which the objective might best be accomplished, a straw poll indicated that 73 of the judges present and voting would favor some sort of a "statewide" system while 14 judges preferred a continuation of the present county system.

Finally, we distributed some hypothetical cases that the judges were not given in the advance materials. We then asked the judges to read the hypothetical facts about convicted offenders, to decide what they believed the appropriate sentence to be, and then to discuss their reasons for the sentence. The cases and some of the reactions of the judges follow:

Case # 1

A 29 year old male has pleaded guilty to the charge of theft of property valued at $750, Ill.Rev.Stat. 1971, ch. 38, §16-1(b). The theft occurred while defendant was employed as a case worker by the State Department of Public Aid at a salary of $600 per month. Defendant defrauded the State by using his position as a case worker to obtain disbursing orders for additional funds for public aid recipients for food, clothing, and emergency purposes, and then used various pretenses to induce the State and the recipients to turn the money over to him. He did this on thirty-five occasions, on which the disbursing orders issued at his request were not used for the person for whom they were supposedly issued.

The defendant is divorced, having been married for five years, and has custody of and is the sole support of three minor children, aged 7 through 10. He has no prior arrests or convictions. He is a college graduate, and at the time of the hearing is employed as a social worker by a private agency at a salary of $650 per month.

The Probation Office's presentence report states that the defendant is remorseful about the fraudulent acts, admitted his full responsibility, and offered to make restitution to the State for the full amount. It further notes that his employment appears to be secure, and that the defendant had problems arising from his unhappy marriage and from the burden of support of his three children.

Commentary

The decision of the great majority of judges present was that they would have sentenced to probation or to conditional discharge in this case, though some judges felt strongly that a sentence of time should be given because of "the breach of a public trust." The facts of this

hypothetical were adapted from those of *People v. Mc Clendon,* 130 Ill.App.2d 852, 265 N.E.2d 207 (1970), the major difference being that in the actual case the offender was a female. In that case, the actual sentence given by the trial judge was three to ten years. The Appellate Court reversed, in a decision by Presiding Justice George J. Moran, holding that "the best interest of society would be served by granting her probation without a condition of incarceration."*

Case # 2

A 33 year old male entered pleas of guilty to charges of burglary, Ill.Rev.Stat. 1971, ch. 38, § 19-1, and aggravated battery, Ill.Rev.Stat. 1971, ch. 38, § 12-4. Both charges arose from the same incident; the defendant one night entered the home of a woman with whom he had previously lived for about eighteen months (he last lived with her about six months before, in a different house), found a man in bed with her, and shot the man, wounding him in the leg. The complaining witnesses, both now living in another state, did not desire to prosecute and recommended a suspended sentence.

Defendant was previously convicted on a charge of "criminal trespass to a vehicle," Ill.Rev.Stat. 1971, ch. 38, § 21-2, fifteen years ago when he was eighteen years old. Eight years ago, he was arrested for public drunkenness, but the charge was dropped. At the time of the sentencing, the defendant is remarried to his former wife and they have two minor children. The presentence report indicates that the defendant has been employed as a skilled laborer for the past twelve years, and that his employer has a high opinion of defendant and will continue to employ him if defendant is placed on probation.

Commentary

In this case, many judges would have imposed a relatively short penitentiary sentence, but a majority would have sentenced to probation. The primary factor that concerned the judges who would impose a prison sentence was the use of a firearm. The judges noted that the stated previous criminal record of the defendant should have no bearing on the sentencing decision since one of the charges occurred too long ago and the other is merely an arrest, with no conviction. The facts of this hypothetical case are substantially identical to those of an Oklahoma case *Hamilton v. State,* _____Okla.Rep._____, 481 P.2d 471 (1971), except that in the actual case, the defendant had *no* prior criminal record. In the actual case, the trial judge sentenced to seven

*But see, *People ex rel. Ward* v. *Moran,* _____ Ill.2d _____ (1973), Docket No. 45197 where the Illinois Supreme Court noted *Mc Clendon* but held "that our Supreme Court Rule 615 was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation."

and five years, respectively, on the two charges. The Oklahoma Court of Criminal Appeals affirmed, but states:

> "Although the evidence before the trial court amply supports suspending the sentence, we decline to rule the trial court abused its discretion. We think it a sound policy under appropriate circumstances to place a first offender on probation where he can be supervised while employed and supporting his family if there is no compelling need to remove the defendant from the community. [Citing the ABA Standards.] Nevertheless, suspending execution of the sentence and placing defendant on probation is addressed to the trial court....
>
> "Defendant has been at liberty on bond pending appellate determination. Perhaps his conduct during that time would be persuasive to the trial court upon application for suspended sentence after appeal..."

A final case was considered in only one session—the other sessions ran out of time.

Case # 3

A twenty-four year old female pleads guilty to a charge of prostitution, Ill.Rev.Stat. 1971, ch. 38, §11-14. This was her fourth arrest for prostitution in the past year, but the previous three charges this year have been dropped. She was convicted of prostitution three years ago, when she was twenty-one years old, and was at that time fined $200 and sentenced to probation for a period of eighteen months. She satisfactorily completed that period of probation and was discharged. Prior to that conviction, she had several other arrests for prostitution where the charges were dropped.

The defendant, never married, has three children ages 1, 4 and 5. She is unemployed, but receives ADC payments from the Department of Public Aid. The pre-sentence report indicates that the defendant admits to a history of drug use "in the past," but she has no arrests for drug offenses.

Commentary

In the one session in which this case was discussed, most judges would have granted probation, though some would have given a sentence of approximately 30 days. Those who favored probation emphasized the fact that she had seemed to do well when previously placed on a period of probation. Again, the dropped charges should not be considered.

Given the differences of opinion among the judges present about the proper sentences in these hypothetical cases and about the weight

that should be given to particular factors in the background of the offender or in the circumstances of the crime, I would recommend that consideration be given to scheduling such discussions with greater frequency. While some divergence of view is no doubt inevitable, these sorts of exchanges of opinion among judges may well lead to a greater degree of shared perspective and thus to more uniformity in the administration of justice.

Part 2—Sentencing Under The Code Of Corrections

Report of James Haddad, Esq.

The Unified Code of Corrections, effective January 1, 1973, modifies pre-sentence procedures and substantially alters the range of dispositions available after a judgment of guilty. References are to Ill. Rev. Stat., 1972 Supp., ch. 38,_____.

I. PRE-SENTENCE PROCEDURES

A. *Pre-sentence Investigation and Reports.* Ill. Rev. Stat., 1972 Supp., ch. 38, §§ 1005-3-1; 5-3-2

In all felony cases a written pre-sentence report of investigation is mandatory unless waived by the defendant. Thus in negotiated plea felony cases or in other cases where the defense chooses to proceed with sentencing immediately after the judgment of guilty, the record must reflect a waiver of the pre-sentence report. § 5-3-1

In non-felony cases the defendant has no statutory right to a pre-sentence investigation and so no waiver problems exist. The trial judge, however, may order such an investigation in any case. § 5-3-1

Although the statute is silent on the subject, presumably the duty of preparing the report will fall upon the Probation Department. The statute is quite specific in setting forth what must be contained in the report, so that the trial court and the attorneys would do well to make sure that the written report conforms to the requirements of § 5-3-2(a).

The court may order a physical and mental examination of the defendant prior to sentencing in accord with § 5-3-2(b) but shall not revoke bond for the purpose of facilitating either the pre-sentence investigation or the pre-sentence examination. § 5-3-2(c)

B. *Pre-sentence Commitment for Diagnostic Evaluation.* § 5-3-3

In felony cases where the trial judge is contemplating a sentence of imprisonment but wishes more information, he may, after a judgment of guilty, commit the defendant for diagnostic evaluation for not more than 60 days. For the present time, such commitment must be to the court clinic. If and when the Department so certifies, such commitment may be made to the Illinois Department of Corrections. In either event, the defendant shall be returned to court with a written report of the results of the study, and then the trial court shall proceed with the sentencing hearing.

C. *Hearing in Aggravation and Mitigation.* § 5-4-1

After a determination of guilt, a hearing *shall* be held to impose the sentence. The committee comments state that the new statute "makes this hearing mandatory whether requested by the defendant or not." § 5-4-1(a)

The trial judge is to consider the evidence heard, any pre-sentence reports, and "evidence and information" offered in aggravation and mitigation. The court is also required to afford the defendant an opportunity to speak in his own behalf and to hear arguments as to sentencing alternatives. § 5-4-1(a)

II. THE LAW OF SENTENCING

Five basic dispositions following an adjudication of guilt are available under the Code. § 5-5-3

A. *Probation.* §§ 5-1-18; 5-6-1

Probation is considered a sentence under § 5-1-18. It may not be imposed for murder, armed robbery, rape, or certain violations of the Cannabis Control Act or the Controlled Substances Act. § 5-5-3(d) (1). It may not be imposed for any Class 1 felony (see *infra*, III A) committed while the defendant was serving a sentence of probation or conditional discharge (see *infra*, II B) for a prior felony. § 5-5-3(g). It should not be imposed where it would "deprecate seriousness of the offender's conduct and would be inconsistent with the ends of justice." § 5-6-1

The maximum period of probation in felony cases is 5 years; in misdemeanor cases, 2 years; in petty offense cases (see *infra*, III C) 1 year. The only statutory cause for extending probation beyond these limits, after December 31, 1972, relates to non-payment of court-ordered restitution. §5-6-3(b) (10)

Permissible conditions of probation are specified in § 5-6-3 with the general authorization to impose "other conditions" vested in the trial court. § 5-6-3(b). However a defendant may not be sentenced to imprisonment as a condition of probation. § 5-6-3 (c). This does away with the typical split sentence of 5 years' probation, first year in the county jail or 1 year's probation, first sixty days in the county jail. The only exception is that "periodic imprisonment", the statutory successor to work release, may be imposed as a condition of probation. (See *infra*, II C) A proposed amendment to restore the option of imprisonment as a condition of probation has been introduced in the current legislative session.

The probationer must be presented with a document which specifies the conditions of probation. § 5-6-3(c)

B. *Conditional Discharge.* §§ 5-1-4; 5-6-1

Everything stated above concerning probation is equally applicable to conditional discharge. The sole difference between probation and conditional discharge is that under conditional discharge there is no probation supervision. § 5-6-1(b). The defendant still must report to such person or agency as is directed by the court. § 5-6-3(a) (2)

C. *Periodic Imprisonment.* § 5-7-1

A sentence of periodic imprisonment requires that the defendant spend certain days or certain portions of days, or both, in confinement. § 5-7-1(a). Such confinement shall be in the custody of the sheriff or of the superintendent of the House of Corrections. § 5-7-3(a). Alternatively, in felony cases, if and when the Department certifies that it has facilities for this purpose, periodic imprisonment may be spent under commitment to the Illinois Department of Corrections. § 5-7-3(b)

Periodic imprisonment may be imposed for any offense subject to the general limitation that sanctions should be, *inter alia*, "proportionate to the seriousness of the offense." § 1-1-2

The maximum period of time during which a defendant may be periodically imprisoned is 2 years but not to exceed the longest sentence of imprisonment that could be imposed for the offense. § 5-7-1(d)

Periodic imprisonment can only be imposed for specified purposes (such as work or school) enumerated in the statute. § 5-7-1(b). The precise terms of periodic imprisonment must be specified in the court's order. Periodic imprisonment cannot be combined with regular imprisonment, § 5-7-1(c), but presumably it can be combined with probation or a fine. It is subject to revocation and re-sentencing under § 5-7-2 if the defendant violates the conditions of periodic imprisonment.

D. *Fines.* § 5-9-1

Fines of varying amounts, depending upon the grade of the offense, are authorized in addition to sentences of probation, conditional discharge, periodic imprisonment, or imprisonment. § 5-9-1. In felony cases, a fine may not be the sole disposition but rather must be combined with one of the other authorized dispositions unless the defendant is a corporation or an association. § 5-5-3(d) (4), (e). In "petty" offenses, unless the court chooses to use conditional discharge or probation, by definition fine is the only authorized disposition. § 5-1-17

The concept of working out a fine has been abandoned. Unless the defendant can show that his failure to pay a fine was not intentional

or in bad faith, the defendant may be sentenced for not to exceed 6 months if the offense was a felony or not to exceed 30 days if the offense was a misdemeanor or a petty offense. § 5-9-3(b). Imprisonment in this situation is for contempt, § 5-9-3-(b), which may be purged by payment of the fine. § 5-9-3(a), (b). No credit against the fine is given for time served before the fine is paid. § 5-9-3(b). Provision is made for installment payments and for extending the time within which a fine must be paid. §§ 5-9-1(d), 5-9-3(c)

E. *Supervision.*

The extra-legal disposition of "supervision" is neither recognized nor specifically disapproved by the Code. Presumably its legal status, which is not entirely clear, remains unchanged. The failure to include it as an authorized disposition is probably insignificant because a "disposition" occurs only after conviction. § 5-5-3. Supervision does not involve a conviction.

F. *Imprisonment.* § 5-8-1 and § 5-8-3

Imprisonment is a permissible penalty for the felonies and misdemeanors. By definition imprisonment is not a permissible penalty for a "petty offense."

Although in most instances imprisonment is only one among several possible dispositions, the length of imprisonment authorized is the key to the classification system which is a major component of the Code. (See *infra*, III)

G. *The Death Penalty.*

The Code of Corrections authorizes the sentence of death for murder or for Class 1 felonies where the legislature so provides. § 5-5-3(b). The legislature has so provided in cases of aggravated kidnaping and treason. The procedure outlined under the Code is identical to former law except that the jury's function is described as a "recommendation" which would seem to justify use of the word "recommend" in the verdict form. In Cook County, unlike some other counties, (for example, Winnebago) the jury generally has not been told, by the verdict form or otherwise, that its authority is simply to recommend rather than to fix the penalty at death.

The Illinois Supreme Court, however, has stated that in light of United States Supreme Court decisions, death may not be imposed under the Illinois murder statute. *People* v. *Clark*, 52 Ill.2d 374, 288 N.E.2d 363 (1972). In light of this decision, to avoid claims of a coerced plea, it would be better that the defendant *not* be admonished that death is a possible penalty for murder (nor for aggravated kidnaping nor treason).

A bill providing for a mandatory sentence of death in certain cases is pending in the current legislative session.

III. CLASSIFICATION OF OFFENSES

There are three main classes of offenses, felony, misdemeanor, and petty. The category of indictable misdemeanor (where the defendant could get jail time or penitentiary time) has been abolished. Each category in turn has sub-categories. Nothing in the Code of Correction specifies which offense falls into which category. Such specification was accomplished by separate legislation. West Publishing Company's *Illinois Unified Code of Corrections*, beginning at page 155, contains tables indicating which offense falls into which category.

A. *Murder*. § 5-8-1(b) (1)

Murder is a class unto itself under the Code. Assuming that death is a constitutionally impermissible sentence (see *supra*, II G), imprisonment for a term of years according to the following schedule is the appropriate punishment for murder.

MINIMUM	MAXIMUM
14 years unless circumstances warrant a higher minimum, in which case the minimum may be any term of years less than the maximum term actually imposed.	Any term of years in excess of 14 and additionally a fine not to exceed $10,000.

B. *Class 1 Felony*. § 5-8-1(b)(2), (c)(2)

Class 1 felonies include, among other offenses, attempt murder, aggravated kidnaping, rape, indecent liberties, deviate sexual assault, armed robbery, and certain Cannabis and Controlled Substance violations.

MINIMUM	MAXIMUM
4 years unless circumstances warrant a higher minimum, in which case the minimum may be any term of years less than the maximum term actually imposed.	Any term greater than 4 years and a fine not to exceed $10,000 or the amount specified in the statute, whichever is greater.

C. *Class 2 Felony*. § 5-8-1(b)(3), (c)(3)

Class 2 felonies include, among other offenses, burglary, robbery, arson, voluntary manslaughter, and certain Cannabis and Controlled Substance violations.

MINIMUM	MAXIMUM
1 year, unless circumstances warrant more. Any higher minimum cannot be more than 1/3rd the maximum sentence actually imposed. This means at least a one-to-three ratio is required if the minimum exceeds 1 year.	More than 1 year but not more than 20 years unless "extended term" provisions apply (see III F, *infra*), in which case the maximum may be not more than 40 years; additionally a fine up to $10,000 or the amount specified in the statute, whichever is greater.

D. *Class 3 Felony*. § 5-8-1(b)(4), (c)(4)

Class 3 felonies include aggravated battery, involuntary manslaughter, theft in excess of $150, attempt to commit a Class 2 felony, kidnapping, intimidation, forgery, incest, abortion, and certain Cannabis and Controlled Substance violations, among other offenses.

MINIMUM	MAXIMUM
1 year, unless circumstances warrant more. Any higher minimum cannot be more than 1/3rd the maximum sentence actually imposed. This means at least a one-to-three ratio is required if the minimum exceeds 1 year.	More than 1 year but not more than 20 years unless "extended term" provisions apply (see III F, *infra*), in which case the maximum may be not more than 20 years, additionally a fine up to $10,000 or the amount specified in the statute, whichever is greater.

E. *Class 4 Felony*. § 5-8-1(b)(5), (c)(5)

Class 4 felonies, among other offenses, include second-offense theft, reckless homicide, bribery, obstructing justice, usury, and certain Controlled Substance and Cannabis violations.

MINIMUM	MAXIMUM
Must be 1 year.	More than 1 year but not more than 3 years unless "extended term" provisions apply (see III F, *infra*), in which case the maximum may be up to 6 years; additionally a fine to $10,000 or the amount specified in the statute, whichever is greater.

F. *The Extended Term Concept.* § 5-8-2

The extended term concept has practical application in certain Class 2, 3, and 4 felony cases. A defendant's maximum term may be up to twice the maximum normally authorized for the class if:

1. The defendant is 17 years of age or older; and

2. In the course of the felony "he inflicted or attempted to inflict serious bodily injury" or used a firearm during the felony "or flight therefrom"; and

3. The court finds that the defendant "presents a continuing risk of physical harm to the public" and further that "such a period of confined correctional treatment or custody is required for the protection of the public"; and

4. Before sentencing the defendant has been committed for diagnostic evaluation under § 5-5-3 (see IB, *supra*); and

5. If the conviction is upon a plea of guilty, the record reflects that the defendant knew that an extended term was possible.

G. *Parole Term.* § 5-8-1

Written into every felony sentence, whether the trial judge so specifies or not, is a parole term: five years for murder and Class 1 felonies, 3 years for Class 2 and Class 3 felonies, 2 years for Class 4 felonies. The Parole and Pardon Board may shorten this term, in effect commuting the sentence and unconditionally releasing the prisoner, §3-3-8. Whether required or not, the safer practice would be to include mention of the parole term in a guilty plea admonishment unless and until the Illinois reviewing courts in a case where the plea was taken after December 31, 1972 hold that the parole term need not be mentioned.

H. *Indictable Misdemeanor.*

The class of offenses for which a jail term *or* a penitentiary term is possible, that is, the indictable misdemeanor, has been abolished by the new Code.

I. *Class A Misdemeanor.* § 5-8-3

Class A misdemeanors include aggravated assault, battery, contributing to the sexual delinquency of a child, criminal damage to property (under $150), theft (under $150, first theft), prostitution, and certain Cannabis Control, Controlled Substance, and gambling violations.

The penalty is a determinate sentence for "any term less than one year."

J. *Class B Misdemeanor.* § 5-8-3

Class B misdemeanors include patronizing a prostitute and certain disorderly conduct and Cannabis Control violations.

The penalty is a determinate sentence not to exceed six months.

K. *Class C Misdemeanor.* § 5-8-3

Class C misdemeanors include assault, criminal trespass to land, and mob action.

The penalty is a determinate sentence not to exceed 30 days.

L. *Petty Offense.* § 5-1-17; § 5-9-1(a) (4)

The term "petty offense" is used generically to include any offense for which a fine but not any imprisonment may be imposed. It is also used specifically to refer to that type of fine-only offense for which the maximum penalty is no more than $500.

The penalty for a petty offense, used in the narrow sense, is not more than $500 or the amount specified in the statute, whichever is less.

Petty offenses, in this narrow sense, include theft of lost or mislaid property and refusing to aid an officer.

M. *Business Offense.* § 5-1-2; § 5-9-1(a) (5)

A business offense is a fine-only offense for which the statute authorizes a fine in excess of $500. The penalty for a business offense is any amount not to exceed the amount specified in the statute.

Petty offenses include antitrust and commercial bribery violations.

N. *Finding the Appropriate Statutory Penalty.*

The Code of Corrections does not contain penalty provisions for particular offenses. To learn what class or category an offense falls into, the starting point may be the tables in West's *Illinois Unified Code of Corrections* beginning at p.155, which should be read in connection with page 189.

The ultimate authority, however, is the appropriate statute itself. Statutes which define crimes, in chapter 38 and elsewhere, were amended to include classifications. The statute as amended is set forth in the Illinois Legislative Service, supplementary Illinois Annotated Statutes. Chapter 38 offenses were amended in Public Act 77-2638, which is found in No. 4 of the 1972 Service. New penalties under the Illinois Vehicle Code are found in Public Act 77-2720, found in the same volume.

O. *Retroactive Application.* § 1008-2-4

"If the offense being prosecuted has not reached the sentencing stage or a final adjudication" on January 1, 1973, then "for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced." Where the new law changes both maximum and minimum sentences, it may be difficult to determine whether the new law provides a lesser or a greater penalty. The spirit of the statute might require that the defendant be permitted an election, which is roughly what was done following the adoption of the 1961 Criminal Code.

IV. ADDITIONAL SENTENCING PROBLEMS

A. *Multiple of Single Sentence; Consecutive Sentences.* § 5-8-4

The case law on imposing multiple sentences for closely related offenses has been a troublesome point in Illinois. One of the most recent decisions discussing that problem is *People* v. *Russo*, 52 Ill.2d 425, 288 N.E.2d 412 (1972). The Code deals only with the problem of multiple *consecutive* sentences. It states that the court shall not impose consecutive sentences for offenses which were "committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." Sentences still run concurrently unless otherwise specified.

The aggregate maximum of consecutive sentences shall not exceed twice the maximum authorized for the most serious offense involved. The Code also says that the "aggregate minimum period of consecutive sentences shall not exceed twice the lowest terms authorized for the most serious felony involved." It is not clear how that would be applied where, for instance, two murder convictions are involved. If the aggregate minimum can be no more than 28 years, this would mean that the minimum in each case, no matter how bad the crime, would have to be 14 years. It would further mean that one could not be sentenced to three consecutive terms.

Consecutive terms in serious cases may be a futile gesture. Under old law, a prisoner would serve the minimum sentence less time for good behavior, receive an institutional parole of 6 months, and then begin the second sentence. Thus a person sentenced to consecutive terms for murder would start serving the second sentence after 11 years and 9 months. Under the new law, the Department of Corrections adds up the minimums and the maximum to arrive at the sentence. In Speck's case, for instance, 400 to 1200. However this leaves the prisoner eligible for a parole hearing after 20 years less time for good behavior, that is 11 years and 3 months. The provision apparently affects even prisoners sentenced before January 1, 1973. § 5-8-4(e), (g).

B. *Concurrent Sentences, Multiple Jurisdictions.* § 5-8-5; § 5-8-6

When a defendant is already serving a sentence in a federal penitentiary, he may receive concurrent time *if* the proper procedure is followed. He must be committed to the custody of the United States Attorney General and returned to the federal penitentiary. Federal authorities will not count the time spent in the Illinois penitentiary if the prisoner is sent there by mistake.

There still is no lawful means of sentencing a prisoner to concurrent time where he is serving a prior sentence imposed in the courts of another state. The Department of Corrections considers such an order void. This creates substantial post-conviction problems. The best advice is not to attempt to impose such a setnence.

C. *Resentencing.*

1. *After Reversal.* § 5-5-4

Where a conviction or a sentence has been set aside on direct review or on collateral attack, the statutes says that any subsequent sentence for the same offense or for the same conduct shall not be greater than the original sentence unless "based upon conduct on the part of the defendant occurring after the original sentencing." The statute does not expressly provide an exception, but because the purpose of the statute is to implement United States Supreme Court decisions, footnote 2 of Chief Justice Burger's opinion in *Santobello v. New York*, 405 U.S. 257 (1972), it might be read to authorize a higher sentence after a defendant has successfully attacked a plea of guilty. Specifically *Santobello* states that other charges, dropped as a result of plea negotiation may be brought anew if the defendant is permitted to withdraw his plea.

2. *After Probation Revocation.* § 5-6-4

Where probation is revoked, another sentencing hearing *must* be held before the defendant is sentenced anew. This means the sentencing is to be done under article § 5-4. Specifically § 5-4-1 requires consideration of "any presentence reports." Some have construed this to mean that in felony cases a new pre-sentence investigation must be done and a written report filed unless the defendant waives these rights.

A very important change provides that "time served on probation or conditional discharge shall be credited against a sentence of imprisonment or periodic imprisonment." When the time stops running - the day of the violation, the day of the warrant or summons, or the day of revocation - is an open question.

3. *After Periodic Imprisonment Revocation.* § 5-7-2

"Where a sentence of periodic imprisonment is revoked, the court

may impose any other sentence that was available at the time of initial sentencing," with time credit for the full period already spent under a sentence of periodic imprisonment. Re-sentencing procedures are not specified in this case.

V. POST-SENTENCE PROCEDURES. § 5-4-1(c)

"The State's Attorney shall and counsel for the defendant may file a statement with the clerk of the court to be transmitted to the department, agency, or institution with facts and circumstances of the offense for which the person or persons is committed together with all other factual information accessible to them in regard to the person prior to his commitment" etc.

Thus the "penitentiary letter" or "statement of facts" becomes a part of the record and defense counsel can draft his or her own. Nothing in the statute seems to limit the State's duty to felony cases, which means that the provision, if obeyed, would be extremely burdensome in high-volume misdemeanor courts.

The clerk of the court is supposed to send this letter to the institution or agency, along with a computation of time credit for pre-trial credit. The clerk is also required to send presentence reports and "any statement by the court of the basis for imposing the sentence." The mechanics of satisfying these obligations may be difficult. However, the statute specifically says that the clerk's delay regarding the statements of fact shall not postpone conveyance of the prisoner to the institution.

Topic IV—LECTURE ON INDIVIDUAL RIGHTS UNDER THE 1970 CONSTITUTION

Professor Vincent F. Vitullo

Note: The text of this lecture was published in the 1972 Report of the Illinois Judicial Conference

Topic V—RECENT DEVELOPMENTS IN THE LAW

Hon. Ben Schwartz
Chairman and Discussion Leader

Hon. James O. Monroe, Jr.
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Ill.Rev.Stat., 1972 Supp., ch. 95-1/2, § 11-501.1 *et seq.*
2. General Order No. 72-10(M), Circuit Court of Cook County, 1st Municipal District (1972)
3. *Fuentes et al.* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972)
4. Poynton, Francis X., *What Does Fuentes v. Shevin Stand For?*, an unpublished analysis of *Fuentes*.
5. Fins, Harry, *1972 Legal Developments Affecting the Practice of Law*, address delivered on October 6, 1972 at the Chicago Bar Association
6. Ruberry, Edward F., *Creditors' Rights*, 3 Loyola University Law Journal 451 (1972)
7. *Argersinger* v. *Florida*, 407 U.S. 25 (1972)
8. General Order No. 72-3(M), Circuit Court of Cook County, 1st Municipal District (1972)

B. Problems For Discussion

1. Myrtle Munche was stopped at 10:00 p.m. while driving North on Lake Shore Drive. She was clocked at 70 m.p.h. by Officers Abel and Harris, who pursued her for three to four minutes before she responded to the siren and lights of the squad car by stopping dead in the West traffic lane. The police car pulled up immediately behind Ms. Munche. Officer Harris

jumped out to direct traffic around the stopped vehicles, while Officer Abel approached Ms. Munche. Myrtle asked him pointedly "by what authority" he had stopped her, and then passed out. There was an open bottle of bourbon plainly visible on the front seat under the arm rest right next to Myrtle, and her few words seemed blurred to Officer Abel. She was only unconscious one to two minutes.

Meanwhile, one car had collided into the rear of another on the Drive. Officer Abel left Myrtle to attend to that accident and call for another squad car. By the time Abel returned to Ms. Munche, 30 minutes had elapsed. Officer Abel told Ms. Munche she was under arrest for driving while intoxicated, and requested she submit to a "chemical test." She refused seconds after the question was posed to her.

At the implied consent hearing, Ms. Munche moved for an order of "no suspension." What result? Why?

2. Officer Groark is noted for being conscientious and fair. Having stopped Wobbley Wrong, he finds he cannot understand Wrong's speech. The language sounded like Chinese to him, but he proceeded anyway to read the nine warnings, word for word, in English. Wrong did not respond, so Officer Groark told Wrong the second time, "he had to take a chemical breath analysis to determine the alcohol content of his blood," and proceeded again to read the nine warnings verbatim, in English. Wrong did not respond, except to demonstrate his impatience with Officer Groark by pointing to the road ahead and shouting in the same language, as if to demand immediate release. Officer Groark interpreted these actions as a refusal to take the test.

   At the implied consent hearing, Wobbley Wrong testified that when drunk or angered, he speaks only Japanese and can understand only Japanese, although under normal conditions he can speak and understand English. Suspension? No Suspension? Why?

3. Officer O'Hara stopped Pedro Pival after observing his car swerve South on Clark Street for six blocks. The officer told Pival "he better take a blood test and clear things up," and then handed Mr. Pival a card on which the nine warnings were printed in English and Spanish. Unfortunately, warning nine, "that upon his request full information concerning the results of such test he took at the request of the police officer will be made available to him or his attorney," had been worn through handling of the card and was not readable. Suspension, or no suspension?

   (a) Suppose all the written warnings were readable, but O'Hara had read out loud the warnings one through seven to Pival, and then said, "you read the rest." Suspension? No Suspension? Why?

   (b) Suppose Officer O'Hara had assumed Pedro spoke Spanish only, gestured toward the card to indicate that it should be read, and handed Pedro the Spanish-only card. Pedro looks like a native of Mexico, but speaks *only* English. Suspension? No Suspension? Why?

   (c) Suppose Officer O'Hara simply said, "Here!", and placed an English card with a complete set of warnings in Pedro's hand. Suspension? No Suspension? Why?

4. John Change has a terrible time making up his mind about anything. He agonizes over the simplest decisions. Five minutes after being properly warned by Officer Smith, he musters his courage and refuses the breath test, but then starts worrying about whether he has done "what is right." An hour and twenty minutes after his refusal, Change tells Officer Smith he now consents, having voluntarily remained at the station all this time. Officer Smith tells Change he refused earlier and the matter is closed. Suspension? No Suspension? Why?

5. Alphonse Sick had a mini-stroke just seconds before Officer Dacey approached his car. The officer properly warned Sick who consented to take the test saying, "anything but get me to the station, I'm sick." The first test was administered and another exactly twelve minutes from the first with Sick's consent and cooperation. Sick telephoned his doctor when Officer Dacey said he could "call anybody, including his attorney." Dacey gave Sick that permission several minutes after the first test and at the same time he asked Sick to sign the card which authorized both tests. Suspension? No Suspension? Why?

   (a) Suppose Sick was not a victim of minor heart trouble, but a drug user and can prove he had a "fix" only 30 minutes before the arrest. Breath tests were administered 2 minutes apart, but the consent card, in this instance, was signed 10 minutes before the first test. Sick telephoned no one, notwithstanding he was advised he could "consult with an attorney or other person by phone or in person." Later an attorney and friend of Sick says he would have advised against the tests. Suspension? No Suspension? Why?

6. Myron Lark refused to take the breath test, after being properly warned. Officer Jones files the required statement with the clerk of the circuit court on January 3, 1973, advising the

clerk of the circuit court that Jones had reasonable cause to believe Lark was driving his car while under the influence of intoxicating liquor, that Lark was stopped and properly warned, but refused the breath tests. The clerk mailed notice on January 10, 1973, advising Lark his privilege to operate a motor vehicle would be suspended automatically, unless he filed written notice to request a hearing by February 7, 1973. Lark filed a petition for hearing on February 9. Petition was granted, and hearing scheduled for February 13, 1973. State objects. Hearing? No Hearing? Why?

(a) Suppose the scheduled hearing is held without objections by the State, and there is a finding of no probably cause for the arrest?

7. Simon Smirk was arrested on January 2, 1972, and charged with D.W.I. He was "warned" on the same occasion, and asked to take breath tests. He refused. On January 5, 1972, Smirk pleaded "Not Guilty" to the D.W.I. charge in criminal court and was acquitted. At the hearing for purposes of the implied consent statute, Smirk confidently moves for "no suspension." He argues acquittal from the D.W.I. charge to mean no reasonable cause for purposes of the implied consent statute. What result? Why?

(a) Suppose subsequent to being found guilty of D.W.I., Smirk is sentenced to a license suspension of one year. At the implied consent hearing, Smirk receives an additional 90 day suspension to run consecutively to his 12 month suspension. Smirk objects, demanding the 90 day suspension be concurrent instead of consecutive to his 12 month suspension for a maximum suspension period of 12 months. What result? Why?

8. Horace Hocum consented to the breath tests, after being properly warned. They were administered 14 minutes apart, and both showed an excess of alcohol in Hocum's blood. Horace was not detained by the police after the second test, but nonetheless remained in the station and insisted upon a fluid test from the same machine only 5 minutes after the second test was completed. To keep him quiet, the officers administered a third test within 10 minutes from the second and found the alcohol content in Hocum's blood to be under .10%. At suspension hearing, what result? Why?

(a) Suppose the third test was not administered at the station on the same machine, but at a local hospital within the county of arrest which was licensed to conduct such tests? The results show blood alcohol under .10%. At suspension hearing, what result? Why?

(b) Suppose the third test was not administered because the officer refused to take Hocum to the hospital of his choice in the county of the arrest? At suspension hearing, what result? Why?

C. Questions For Discussion

1. In an implied consent hearing, the driver argues that his driver's license was issued to him before the effective date of the law, and he moves for an order of "no suspension." Ruling?

2. Subsection (a) provides that the arresting officer must "make an oral statement and concurrently deliver" to the arrestee a printed notice containing nine admonitions. If the "oral statement" includes reading aloud the admonitions, does the omission of any of the oral admonitions constitute a "formal" or "fatal" defect?

3. A driver is found not guilty of D.W.I. Thereafter, a hearing is held on the implied consent issues, under subsection (d) of section 11-501.1; and the driver moves for an order of "no suspension" on the theory that there were no "reasonable grounds" for the arrest, as evidenced by acquittal in the D.W.I. trial. Ruling?

4. Although validly arrested and properly warned, a driver refuses to submit to the breath tests. On the trial for D.W.I., he pleads guilty. Thereafter, a hearing under implied consent is had. Should the court enter an order of "suspension" or "no suspension"?

5. A driver is validly arrested for D.W.I., and is properly warned. Five minutes after being requested to submit to the breath tests he says, "no." Eighty-five minutes after being requested to submit, he decides to take the breath tests and demands that they be given to him. On the implied consent hearing, he moves for an order of "no suspension" on the ground that he had the right to a full 90 minutes in which to consent to the tests. Ruling? (Cf. In *re Brooks*, Ohio 1971, 271 N.E.2d 812; *Krueger v. Fulton*, Iowa 1969, 169 N.W.2d 875)

6. Assuming valid arrest, requisite warning, and request, which of the following would constitute "refusal" under the implied consent law (*Note*: See paragraph 3 of subsec. (a), and paragraph 3 of subsec. (e), of section 11-501.1):

a. The driver is "too drunk" to understand what he is being requested to do or what is transpiring? (Cf. *State* v. *Normandin*, Minn. 1969, 169 N.W.2d 222)

b. The driver says he does not know, and will not decide un-

til he talks to his spouse waiting outside. The police deny him such opportunity, and 90 minutes elapse?

c. The driver says he does not know, because he is taking medication, and he is not sure if that will affect the test, and 90 minutes elapse? (Cf. *Doran* v. *Johns*, Neb. 1971, 182 N.W.2d 900)

d. The driver has an ill-fitting set of false teeth which keep getting in the way of his blowing into the breathalyzer mouthpiece? (Cf. *Scott* v. *Kelly*, App. Div. 1958, 177 NYS 2d 210)

7. Subsection (d), paragraph 3, provides that if the driver desires a hearing "he shall petition the Circuit Court." What must he allege in such petition?

8. If the driver requests leave to file a petition for hearing, under 11-501.1 (d), more than 28 days after notice has been mailed to him, should he be granted leave to file?

9. Does the Civil Practice Act apply to implied consent hearings?

a. If so, are both sides entitled to discovery?

b. What sanctions may be imposed for failure or refusal to give discovery?

c. May a jury fee be charged?

10. Does the State have the right to a jury trial in an implied consent hearing?

11. At an implied consent hearing, the driver moves for postponement thereof until after the D.W.I. trial has been disposed of, on grounds that it would violate his privilege against self-incrimination to compel him to testify at the implied consent hearing. Ruling? (Cf. *Funke v. Dept. of Motor Vehicles*, Cal. App. 1969, 81 Cal. Rptr. 662).

D. Summary Of Discussions

Report of Professors Roy M. Adams and Richard C. Groll

At the sessions on Thursday, March 8, and Friday, March 9, the following comments were made by the judges with regard to the implied consent statute:

Imposition of Suspension: 11.501 versus 11.501.1

Notwithstanding the committee's view to the contrary, both sessions indicated the 90 day suspension for violation of the Implied

Consent Act can run concurrently or consecutively to the criminal 12 month penalty depending exclusively upon a decision by the Secretary of State. The judges did not feel it was their responsibility to make any recommendation to the Secretary on any ruling. It was their conclusion the matter is simply an administrative determination by the Secretary.

Oral Nine Point Warning is Mandatory

With regard to section 11-501.1(a), of the House Bill 4461, where it is stated that the officer shall make "an oral statement and concurrently deliver to the arrested person a printed notice supplied by the Secretary of State in the English and Spanish languages...", the judges concluded the oral statement *must* consist of a reading line by line of the warnings set out in subparagraphs (1) through subparagraphs (9) of subsection(a) of the Act. Although the committee had concluded a step-by-step warning *may* not be necessary, the judges felt to the contrary, primarily because of section (d) of 11-501.1. The officer is required to file a statement with the clerk of the circuit court naming the person who refused to take and complete the test. In addition, the statement must specify the refusal of that person to take the requested test and certain other facts, and at lines 16 through 18 of House Bill 4461 in this section (d) the officer must recite the arrested person "refused to submit to and complete a test as requested orally and in writing as provided in paragraph (a) of this Section." Section (a), of course, sets forth the warnings (1) through (9). The judges concluded from this reference that the officer is required to give all the warnings orally and in writing, not simply to make any oral statement, like "here is the card," and rely upon the arrested person's personal reading of the warnings.

Secretary of State Must Provide Warnings in Language of Arrested Person

Although the judges were advised that the nine warnings were available only in English or Spanish but a person speaking neither of these languages was taken to the police station where a person familiar with the native tongue of the arrested person gives the warnings orally, at least four judges concluded the procedure was admirable, but inadequate. Anyone is entitled to a written statement of the nine warnings or the suspension cannot be entered. If the Secretary of State has not provided sufficiently varied written translations, this is an administrative problem for his office to resolve.

The 90 Minute Period: An Absolute Right?

There was considerable disagreement as to whether or not an initial refusal within the 90 minutes, which is allowed for the arrested person to consider whether or not he or she will consent to the breath test, can be revoked within that same 90 minute period and the test

then taken. Also, many of the judges concluded that an initial agreement to take the test could also be withdrawn sometime within the 90 minutes period before the test was actually administered. The judges simply concluded a refusal to take the test did not stop the 90 minutes running on the right to consent or the right to refuse. For example, a refusal five minutes after the warnings were given does not block the right to consent to taking the test, and the right therefore to receive it, for the next 85 minutes. The committee had reached a different conclusion, namely, a refusal stopped the running of the 90 minute period and the arrested person was not allowed to take the test after this first refusal. Some judges indicated their decision would rest upon whether or not the person was still in the station, and the breath equipment still available for the test.

Definition of Warnings Within a Reasonable Time After Arrest

Although the statute requires the police officer "within a reasonable time following any such arrests" request the arrested person to submit to the breath analysis, the judges noted this must be read in association with other lines of House Bill 4461, which indicates the breath test for implied consent purposes cannot be admitted into evidence in an 11-501 proceeding unless the test was administered within 150 minutes following lawful arrest. Since the arrested person also has 90 minutes within which to consent, these combined factors mean the police officer, to be absolutely safe, must request the arrested person to take the test within 30 to 45 minutes following the lawful arrest.

Mechanical Requirements of the Act as Possible Defenses at the Suspension Hearing

The judges noted, in accordance with the provisions of 11-501.1(b) that the assistant state's attorney, or whatever State officer appears at the implied consent hearing, must be prepared to demonstrate the breath test was administered by a licensed operator and that the machine had been certified as operationally effective within 30 days of the test. The judges anticipate defense attorneys will be familiar with either of these means to challenge loss of license at the suspension hearing.

Issues Permitted at Hearing

Extensive discussion concerned important section 11-501.1(d). It was the feeling of the judges that section (d) is one of the most important sections of the Act. Part of section (d) lists the exclusive issues which may be heard at the implied consent hearing: (1) whether the person was placed under arrest for 11-501 or a similar provision of a municipal ordinance, (2) whether the arresting officer had reasonable grounds, (3) whether the person was informed orally and in writing, (4) whether the person, after being advised, refused to take the test. It is noteworthy that issue (3) raises again the necessity of informing the arrested person orally *and* in writing of each of the nine warnings. It is the intention of the judges to abide very strictly by the issues which are set forth so that no other matter may be raised at the hearing.

Recommendation for Hardship Permit

At House Bill 4461 lines 19 through 35 of page 6, the judge is given the opportunity to recommend to the Secretary of State after he finds suspension, that the person be given a "restricted driving permit for undue hardship." There was discussion as to the possible request by any attorney, who finds his client's license suspended, that the judge enter a recommendation for the restricted driving permit. There was no consensus on this point. The judges did not say they would refuse to enter such a recommendation, but they indicated clearly such a recommendation might not be entered because of the person's ability to bring the matter of restricted driving to the attention of the Secretary of State himself, per express provisions of the Act.

Latent Constitutional Issues and the Act's Escape Clause

The highly controversial "any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed to have withdrawn the consent provided by this Section" was discussed very little in the session. Although the judges noted this statutory language might swallow the whole purpose of 11-501.1, they were more concerned with its practical application on the assumption that drunkenness or unconsciousness would rarely permit the withdrawal of the consent.

Collateral Estoppel

The judges discussed at great length whether finding of "no probable cause" in one hearing (e.g., the criminal case) would act as collateral estoppel in a second hearing (e.g., a suspension hearing). It appears that the Illinois cases would hold that since one hearing is criminal in nature and the other is civil in nature that the doctrine of collateral estoppel would not apply.

Recent Developments in the Law

Judge Monroe uniformly reviewed the remaining materials under the category of recent developments in the law. There was some strong reaction among the judges about Mr. Fins' conclusions in his article, "1972 Legal Developments Affecting the Practice of Law." The judges were not willing to accept Fins' conclusions that *Fuentes v. Shevin*, 407 U.S. 67, applied to attachment or distress for rent proceedings in Illinois. The feeling was that the property under chapter 11 (Ill.Rev.Stat. 1971, ch. 11) was being seized to prevent its removal from the State only under extraordinary circumstances, and that these types of circumstances would justify the action taken by the creditor notwithstanding *Fuentes*. The same argument followed to permit the distress for rent action.

Most of the time was spent on the issues of implied consent previously noted. There is an article by Daniel L. Furrh in the January, 1973, issue of the Illinois Bar Journal entitled, "Illinois' New Implied Consent Law." The article is a review of the high points of the statute and raises many of the issues which conern the judges. If there is interest in additional reading material for post conference study, our recommendation is that reprints of this article be provided.

Topic VI—EVIDENCE LECTURE
EXAMINATION OF WITNESSES

Professor Prentice H. Marshall

Note: The text of this lecture was published in the 1972 Report of the Illinois Judicial Conference. After this lecture, the associate judges divided into nine groups to discuss six prepared problems concerning examination of witnesses. Each discussion group was moderated by one professor.

Topic VII—CRIMINAL LAW LECTURE ON SEARCH AND SEIZURE

Professors Charles H. Bowman and Wayne R. LaFave

Note: The text of this lecture and an accompanying outline was published in the 1972 Report of the Illinois Judicial Conference. After this lecture, the associate judges divided into nine groups to discuss eight prepared problems concerning search and seizure. Each discussion group was moderated by one professor.

Problems For Discussion And Commentary On Discussions

Problem #1:

Barry Leavitt, 20 years old, lived on the second floor of an apartment house in Chicago. On the morning of February 8, 12-year-old Michael Pono, who lived on the first floor, came home from school because he had forgotten his lunch money, and was stabbed to death. Shortly thereafter, Leavitt called the police from a telephone in his mother-in-law's nearby house and reported that, attracted by screams, he had come down the stairs in the apartment house and that an assailant had cut him and escaped. After taking him to a hospital for treatment, the police invited Leavitt to the station to give assistance, but after a short questioning concluded, and told him, that he was a suspect. (In the meantime, they had towed his wife's car, which he had driven to his mother-in-law's, to police headquarters.) The police told Leavitt to empty his pockets. He did so, placing his car keys and other items on the table in front of him. One of the police officers said, "I would like to look at your car," and held out his hand. Leavitt replied, "Sure; go ahead," and picked up the keys and tossed them into the officer's outstretched hand. The officer then used the keys to look

in the trunk of Leavitt's car, where a knife was lying in plain view. A laboratory analysis of the knife, which appeared clean to the officer who picked it up, revealed minute specks of blood matching that of Pono. In addition, a small washer found under Pono's body was determined to be from the handle of the knife. Leavitt, now charged with murder, has moved to suppress the knife. What result? Consider:

(a) Is it relevant whether the police had grounds for the arrest of Leavitt at the time they sought his consent? What result if there were not such grounds?

(b) Of what significance is it that Leavitt was not specifically told that he had a constitutional right to refuse to submit to a search? Assuming he was "deprived of his freedom of action in a significant way," of what significance is it that he was not given the *Miranda* warnings? How would you rule if: (i) he had been given Fourth Amendment warnings but not *Miranda* warnings; or (ii) he had been given *Miranda* warnings but not Fourth Amendment warnings?

(c) Do you agree with the notion, as expressed by some courts, that "no one would voluntarily consent to a procedure which would lead him into trouble"? If it is valid, how would you apply it in this case?

(d) What if Leavitt had initially indicated some reluctance to allow the search of his car, but had later acquiesced after a police officer said, "If you don't let us search, we'll go for a search warrant"?

(e) What if Leavitt had consented only after a police officer had stated, "We noticed some clothes in your car, and thus we would like to look in your car to see if any of the clothing there belongs to Pono"?

Commentary:

The facts in this problem are essentially those involved in *Leavitt v. Howard*, 462 F.2d 992 (1st Cir. 1972), holding that where the state court, following a full and fair hearing, had found consent to search, the *habeas corpus* petitioner had the burden of disproof, and that the state court record supported the state court's finding that petitioner had consented to a search of the automobile.

(a) The first question is whether it is relevant whether the police had grounds for Leavitt's arrest, or, more specifically, whether—assuming no such grounds—the consent is for that reason invalid. At the outset, we must decide what kind of issue we are talking about; it is of the "fruit of the poisonous tree" variety, that is, the question is whether the alleged consent is "tainted" by a prior illegal arrest. This problem was not considered by the court in *Leavitt*.

Of course, there is no need to be concerned with an illegal arrest if there was no arrest at all. It might be contended that there was no arrest here, in that Leavitt was invited to the station as a witness to a crime. However, it would seem that once the police told Leavitt that he had become a suspect, and particularly once he was told to empty his pockets, it must have become apparent to him that he was not free to leave. Thus, notwithstanding the current uncertainty as to how one decides when one is in custody (e.g., whether it is the state of mind of the officer or the state of mind of the suspect), it would seem that Leavitt had been "seized" for Fourth Amendment purposes.

Assuming a seizure and also a lack of grounds for same (a matter we cannot conclusively determine from the facts given), does it taint the subsequent consent? If we were using a "but for" test, we would probably answer in the affirmative, but *Wong Sun* tells us that this is not the test. Rather, the question is whether the taint of initial illegality was purged by an "intervening independent act by the defendant or third party which breaks the causal chain linking the illegality and the evidence in such a way that the evidence is not in fact obtained by 'exploitation of that illegality'." That is, we use an exploitation test, not a but for test. Under that approach, some cases are relatively easy. In *McGurn*, for example, it makes sense to say that an illegal arrest taints an alleged consent to search of the person immediately thereafter, for a person arrested would expect to be searched in any event and thus is merely submitting to a claim of lawful authority. Likewise, in *Clark Memorial Home*, where the police had conducted a fruitful but illegal search of part of the premises, an alleged consent to a search of the balance of the premises is tainted, as the defendant would doubtless conclude that the police already had the goods on him and that nothing could be gained by not permitting the search. The instant case is not quite so easy, and the cases go both ways. See *United States v. Bazinet*, 462 F.2d 982 (8th Cir. 1972), noting that consent after an illegal arrest is not per se invalid, but that the government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and that it was not the fruit of the illegal arrest. The court in *Bazinet* went on to say that various factors should be considered, such as the elapsed time between the arrest and the consent and the occurrences intervening, such as consultation with counsel, warning of rights, etc. That would suggest that the consent here was the fruit of an illegal arrest, as there was little elapsed time, no warnings, and the car keys themselves were uncovered by an act directly related to the arrest.

(b) As to the significance of the failure to advise Leavitt of his Fourth Amendment rights, we know what the answer is as far as Illinois is concerned. *Rhodes* and *Ledferd* tell us that there is no absolute requirement that such warnings be given in order to find a valid consent. However, we are told in *Haskell* that the failure to give such warnings is a factor to be taken into account. We have already noted one way in which this might be done, namely, the absence of such

warnings makes it easier to conclude that the consent was a fruit of an illegal arrest.

Of course, one might question whether *Rhodes* and *Ledferd* are correct. If we are talking about the waiver of a constitutional right (and recall that there is a difference of opinion on that point), then it can rightly be asked why less is needed here to show a knowing and intelligent waiver than, say, for a waiver of Fifth Amendment rights under *Miranda* or waiver of various rights at time of guilty plea under *Boykin v. Alabama*. The trend seems to be in that direction, although (in contrast to *Miranda*) the courts sometimes say that it will suffice to show that the defendant was otherwise aware of his rights. Some cases also contend that a request to search of necessity carries with it a message that there is a right to refuse. This is a questionable proposition, although it does suggest that sometimes it is necessary to look closely at how the question was put to the suspect. The *Leavitt* case at the district court level contains the observation that telling the suspect you want to look in a particular place (as here) is different than asking whether he has any objection to a search of a particular place.

As to the significance of the failure to advise the defendant of his *Miranda* warnings, there do not appear to be any Illinois case directly in point. One line of cases, such as *Williams*, *Pelensky*, and *Fisher*, take the position that the *Miranda* warnings are required, in that a request to search is a request that the defendant be a witness against himself, which he is privileged to refuse under the Fifth Amendment. The contrary view, represented by *Thomas*, is that the *Miranda* warnings are not needed because obtaining consent does not violate a value which *Miranda* is intended to protect, as a consent to search is neither testimonial or communicative in nature. It is less than apparent that this is correct.

As to the significance of the giving of one kind of warning without the other, there are cases, such as *Noa* and *Harris*, holding that no warning of Fourth Amendment rights is needed if the *Miranda* warnings are given because a warning to a defendant that he has a right to remain silent carries with it the notion that he has the right not to consent to a search. That seems a dubious assumption; more convincing would be a contention that if the Fourth Amendment warnings are given then the *Miranda* warnings need not be given, as the former tell the defendant, in effect, that he can remain silent (or say no) on this particular point.

(c) First is the question of whether this notion makes sense. It has seldom been accepted by the state courts, but is found with some frequency in the federal cases. Stated another way, the notion is that, except where the suspect has confessed or not denied his guilt, it is incredulous to say that he actually consented to a search of a place where he knows the incriminating evidence to be. That is, coercion is assumed, for any intelligent person making a free and intelligent

choice would not have allowed the police to search a place where they were bound to find incriminating evidence. The leading case supporting this proposition is *Higgins v. United States,* 209 F.2d 819 (D.C. Cir. 1954).

This notion was rejected by the *Leavitt* court, noting it had disapproved of *Higgins* in an earlier case: "We pointed out that 'the pressure exerted on a criminal by the realization that the jig is up is far different from the deliberate or ignorant violation of personal right that renders apparent consent ineffective.' The soundness of that principle is dramatically revealed in *North Carolina v. Alford*, 400 U.S. 25 (1970), where the Court held that a defendant might voluntarily plead guilty even though he claimed to believe he was innocent. If at the time that a particular question is asked there is no agreeable answer, the fact that the answer chosen is not a pleasant one does not mean necessarily that it was not voluntarily selected. The alternative might have seemed worse. The application of that principle to consent to a search is particularly apt. A defendant may believe that search is ultimately inevitable whether he consents or not. In such circumstances a suspect might well feel he is better off to consent than to oppose." The court in *Leavitt* goes on to say that a rule which after-the-fact determines a consent to be ineffective because highly incriminating evidence is found where the defendant permitted a search is too harsh, as the police ought to be able to proceed on the basis of the facts they have when the alleged consent is given. There is something to the above argument, except that one wonders how it ties in with the earlier discussion concerning warning of rights. If a defendant consents because he thinks search is inevitable without regard to consent, then do we not have to concern ourselves with whether the defendant knows just what his Fourth Amendment rights are?

Even if the *Higgins* rule is accepted, there is good reason for not applying it in this case to support a finding of no consent. This is because the rule assumes a situation in which the defendant knows that highly incriminating evidence is sure to be found by the police at the place searched. Just as *Higgins* has not been followed where the incriminating evidence was carefully concealed, indicating the defendant was proceeding on the assumption that a search would not result in its discovery (see the *Grice* case), it need not be followed where the defendant does not believe the items to be found in the search will incriminate him. In this case the weapon had been wiped clean, and the defendant apparently was unaware that a washer had come loose from the handle. Thus, this case is unlike *Higgins*, which involved items which were obviously contraband.

(d) Here we have the question of whether a threat to obtain a search warrant is coercive. An Illinois case, *Magby*, responds in the negative, but some cases elsewhere, such as *Boutaker* and *Bomar*, take

the position that there is coercion if there is a threat to do what cannot lawfully be done, that is, that if there is a threat to obtain a warrant (as opposed to a threat to seek a warrant), then it must be shown that the police could have obtained one. Whether there was probable cause here is doubtful on the facts we have; even assuming grounds for Leavitt's arrest, it does not follow that there were grounds to obtain a search warrant for his car. But, query whether the statement that the police would "go for a search warrant" is a threat to obtain or only to seek a search warrant. Query also whether that distinction is not too subtle to be meaningful to the person who is confronted with the threat.

(e) One question raised by this variation in the facts is whether the police exceeded the scope of the consent given. *Dichiarinte* tells us that when consent is given to search for particular items, then the police may only look where those items might be, though *Bretti* says that other incriminating items found in a search of such a scope may be seized. That is, if the police were properly looking into the trunk for clothes, then seizure of the knife would be permissible. But, were they properly looking in the trunk? Although the statement of the officer is somewhat ambiguous, especially when reference is made to "any of the clothing there," it is certainly arguable that the earlier reference to clothing observed through the windows meant that the police were going to search only that part of the car and not the trunk (except that, if the car were not locked, then the acquiring of the keys would have no meaning).

In addition, the defendant may raise a consent by deception claim. Relevant here is the *Alexander* case. There, postal inspectors informed the defendant mail carrier that they were investigating a theft of jewelry from the mails, when in fact they were investigating the disappearance of three test letters containing marked money. The court held that this statement was designed to mislead the defendant into giving his consent to a search which unearthed the marked money and thus the consent could not be considered voluntary; that is, the defendant consented because he knew he did not have the jewelry which the postal inspectors claimed to be looking for. Query if the instant case requires the same result. Here there was no deception as to what crime was being investigated, which may make some difference. But, assuming for purposes of argument that the police falsely stated a desire to look for clothing when they in fact were seeking the murder weapon, can the defendant claim that he gave consent only because he knew he did not have the clothing the police claimed to be looking for?

Problem #2:

Lee Nunn, age 19, lived with his mother. (His parents were divorced, and his father lived elsewhere.) Lee paid no rent, but he gave

Mrs. Nunn five to ten dollars a week intermittently. Her only activity in Lee's room was to clean it, make his bed and change the linen. Mrs. Nunn became concerned about the activity in her home during her absence when she returned once and found a marble table top broken. She discussed her concern with her former husband, Lee's father. About this time, Lee moved out, locked the door to his room and told his mother to allow no one to enter. Mr. Nunn unofficially tried to effect a search of Lee's room by the police, but the police declined to do so unless Mrs. Nunn gave written consent. She went to the police station and gave written consent. She accompanied police officers to her home and was present during the search thereof. Police utilized their pass key to facilitate entry into Lee's room. The police looked around in Lee's room and then entered a kitchen area which was accessible only from Lee's room. In a waste basket and a cabinet over the sink in the kitchen, the police found narcotics. This search occurred ten to fourteen days following Lee's departure. Lee was later arrested and charged with possession of narcotics, which he has now moved to suppress. What result? Why?

Commentary:

The facts in this problem are essentially those involved in *People v. Nunn*, 288 N.E.2d 88 (1972), Ill.App., 4th Dist., where the court held, per Craven, J., that the mother's consent was not effective:

"In discussing the scope of the Fourth Amendment protection against unreasonable search and seizure in *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed.2d 576, while not there concerned with third party consent, the court clearly indicates that the Fourth Amendment protects people—not places or areas—and that which is sought to be protected is an individual's entitlement to know that he is free from unreasonable search and seizure or governmental intrusion.

"In *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154, the Fourth Amendment right was equated to 'a reasonable expectation of freedom from governmental intrusion.' In *Combs v. United States*, 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed.2d 308, the court again discusses, in the language of *Mancusi* the defendant's reasonable expectation of freedom from governmental intrusion upon the searched premises.

"Thus, it appears to us that the cases relating to nature and extent of the interest in the property of the consenter, the relationship of the consenter and the defendant, and the issue of agency or apparent authority are of historical, rather than determinative, significance in considering the validity of a third party consent to an otherwise clearly invalid search. See 20 Journal of Public Law 313 (Emory Law School), and Washington University Law Quarterly (Vol. 1967), pp. 12-28, and cases there cited.

"It is readily apparent here that the area searched had been set aside for the defendant's exclusive use in his mother's home. Everything in the stipulated facts and in the transcript of evidence before us points to the conclusion that the seized material was in an area where the defendant could reasonably expect freedom from governmental intrusion with or without his mother's consent. The facts clearly negate the existence of authority in the mother, expressed or implied, to make a valid consent to the search. The facts likewise negate any possessory interest in the mother sufficient to authorize a search. The fact of minority does not deprive the defendant of his rights under the constitution of this State or of the United States. There is no suggestion that the Fourth Amendment protection of people, not places, is limited to 'adult' people.

"In the case of *People v. Thomas,* 120 Ill.App.2d 219, 256 N.E.2d 870, the appellate court for the Fifth District held that a mother who produced a weapon of the defendant at the request of two police officers had a sufficient possessory interest in the house where the defendant lived as to authorize a search. The court cited two Illinois Supreme Court cases in support of its conclusion, both of which related to consent by a wife of a defendant to a search of jointly occupied premises. The holding in *Thomas,* although the factual details are not recited, may well be consistent with the reasonable expectation of privacy concept.

"Thus, we conclude that under the test of reasonable expectation of privacy, this search was invalid. If the test is possessory interest, the search was invalid. If the test is implied or apparent authority, the search was invalid. The judgment of the circuit court of Champaign County was correct in its allowance of the motion to suppress and that judgment is affirmed."

Trapp, P.J., dissented, noting that there are "a substantial number of cases which have determined that one entitled to the use and occupancy may give a valid consent to a search of the premises":

"In *United States v. Stone*, 7 Cir., 401 F.2d 32, a step-mother gave consent to search the home, including a specific area in the basement where defendant stored personal belongings. The consent was held valid as she had immediate control and occupancy of the premises. In *Bumper* v. *North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797, it was determined that a grandmother's consent was coerced by the apparent authority of a search warrant, but the opinion supports the inference that but for such fact the consent would otherwise be valid. In *People* v. *Koshiol*, 45 Ill.2d 573, 262 N.E.2d 446, a husband's consent to search was authorized by his right to possession of the premises. There was also involved, as is perhaps the case here, a right to protect himself from his wife's poisonous actions. See also *People* v. *Haskell*, 41 Ill.2d 25, 241 N.E.2d 430.

"In *State v. Kinderman,* 271 Minn. 405, 136 N.W.2d 577, defendant resided in the home of his father. The latter consented to a search by police, which included defendant's bedroom closet and other parts of the house. It was held that the parental consent to the search was valid. In *Mears* v. *State*, 52 Wis.2d 435, 190 N.W.2d 184, the mother found stolen furs in her son's closet. Her consent to a police search was held to be valid upon her right to use and occupancy. In *State* v. *Vidor*, 75 Wash.2d 607, 452 P. 961, the son was visiting at his mother's home. The mother's consent to a police search was upheld upon the basis of her control and possession of the premises. This rule had been followed in Illinois. *People* v. *Thomas,* 120 Ill.App.2d 219, 256 N.E.2d 870.

"In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, the wife produced her husband's guns and clothes from a closet and turned them over to the police. The issue was whether the conduct of the police was such as to subject the items to the exclusionary rule. The court pointed out that the wife could have taken the items to the police and that such would not have been subject to the Fourth Amendment policy of exclusion. We suggest that such statement is equally applicable to this case.

"In *People v. Stanbeary,* 126 Ill.App.2d 244, 261 N.E.2d 765, the police were invited into the home by the mother. The tennis shoes which became items of evidence were in plain view upon the floor. Here, the items were in a waste basket and upon a shelf. There is substantial basis for saying that nothing stipulated suggests that the mother was excluded from her use and occupancy of the entire house.

"Finally, in *Abel v. United States,* 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668, it was held that the matters found in the waste basket of a hotel room after the defendant had moved out were considered in the light of abandoned property and not subject to exclusion. Such view is applicable here."

Problem #3:

Royal Blue, a patrolman with the Champaign police department, upon completion of his midnight to 8 a.m. shift, took his own car to the service department of University Ford for an engine tuneup. While waiting in the service area for the service manager to get to him, Blue observed a Ford employee painting over repairs made to the left front fender of a green 1971 Ford Torino. This called to mind a police bulletin issued about ten days earlier stating that the Rantoul Farmers and Merchants State Bank had been robbed by two men who escaped in a blue or green late model Ford with a damaged front fender. Blue then approached the service manager, identified himself as a police officer, and stated that he wanted to "inspect" the aforementioned vehicle. The service manager said, "Go ahead," after which

Blue made a thorough search of the car. Beneath the front seat he found a few strips of paper of the kind used to wrap stacks of bills, marked with the name of the bank and with identification numbers which were later matched with the numbers of the packages of bills taken in the robbery. Upon removing the spare tire from its moorings in the trunk, Blue found hidden thereunder several cloth bags marked with the name of the bank. Later, after further investigation, Michael Wasson, the owner of the car, was arrested and charged with the robbery. He has now moved to suppress the items found in his car. What result? Why?

Commentary:

Here again we have a third-party consent situation. Although the Supreme Court has sometimes dealt with these situations in terms of agency (see *Stoner v. Calif.*) or property (see *Bumper v. N. Car.*) concepts, the current approach is reflected in *Frazier v. Cupp,* which fits most comfortably with the *Katz* expectation of privacy concept.

In *Frazier*, the Court, per Marshall, J., concluded that one of petitioner's contentions, namely, that the police illegally searched and seized clothing from his duffel bag, could "be dismissed rather quickly": "This duffel bag was being used jointly by petitioner and his cousin Rawls and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it....Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside."

Thus, the question in the instant case may be said to be whether, by leaving his car at University Ford for repair of the fender, Wasson assumed the risk that the Ford people would allow someone to look under the seat and in the trunk. Some of the cases finding such an assumption of risk seem to be distinguishable from the instant case. For example, in *Howe*, a manager of a cleaning establishment permitted police to examine certain clothing that defendant had brought in for cleaning, and upon examination it was determined that the clothing had been stolen; the court rejected defendant's contention that the

consent by the manager of the cleaning establishment infringed upon his reasonable expectation of privacy, noting that the manager had authority to admit the police and allow them to search the premises and that the defendant knew that the suits would be handled and examined by many persons and he made no effort to conceal the suits or to restrict the number of persons who would handle them. Similarly, in *People v. Wasson*, 31 Mich.App. 638, 188 N.W.2d 55 (1971), where defendant left a stolen motorcycle at a repair shop for repairs, after which it was observed by the true owner, resulting in the police checking it and finding the serial number altered, the court upheld the seizure. But in these cases, the police saw no more than the bailee could be expected to see, and thus they are not exactly like the instant case.

Another case discussed in the lecture, *Clarke*, must also be considered. There the police went to the cleaning establishment where the defendant had left his jacket and obtained the jacket and took it to the crime laboratory for microscopic examination which uncovered some minute fibers on the jacket matching those in the murder victim's clothing. The majority of the court rejected the argument of the defendant, again saying that since he knew the suit would be subject to public view and handled by many persons, he had assumed the risk. That is a very questionable result, as the police did something with the jacket which far exceeded any expectation of the defendant as to how the jacket would be handled at the cleaners. So too in the instant case. So far as the facts indicate, Wasson left the car at University Ford for the sole purpose of having the fender repaired, and this would only require entry of the car for the purpose of moving it about; the repairmen would have no occasion to look under the seat or to open the trunk. Compare the *Potman* case, holding that a repairman could permit the police to look in the trunk of a car left for repairs because the repairs requested by the owner necessitated removal of the spare tire from the trunk.

Problem # 4:

Elwood Dooley, a deputy assessor in the county assessor's office, was arrested and charged with violating § 33-3 of the Illinois Criminal Code, the official misconduct statute. It was alleged that he reduced the assessment on several properties in exchange for payoffs from the owners of these properties. A significant portion of the evidence against him consists of papers removed from the wastebasket by Dooley's desk in the assessor's office. Upon receiving a tip from an anonymous source concerning Dooley's activities, Ron Able, an investigator in the state's attorney's office, approached Dooley's immediate supervisor, Lester Trout, and received a promise of cooperation from him. With Trout's consent, Able came to the assessor's office every day at about 5:30 p.m. (after Dooley and his fellow workers had left for the day) and carried off and inspected the contents of Dooley's wastebas-

ket, which was always beside or under Dooley's desk and which was used exclusively by him. Dooley's desk was in a large office with five other desks, used by the five other deputy assessors. Trout, the supervisor, operated out of an enclosed cubicle at the far end of that room. The incriminating papers were found by Able from time to time as he continued this practice over a period of almost three months. Dooley has moved to suppress the papers. What result? Why?

Commentary:

The facts in this problem are very similar to those involved in *United States v. Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), although there the defendant was an employee of the Immigration and Naturalization Service charged with certain offenses relating to submission and adjudication of applications to INS on behalf of nonimmigrant aliens. The court, Motley, J., granted the motion to suppress.

The first issue which must be confronted here is whether Dooley has standing to object to the warrantless search of the wastebasket. Relevant on this point is *Mancusi v. DeForte*, 392 U.S. 364 (1968), where the Court held that a union official who spent "a considerable amount of time" in an office he shared with other union officials, and who had custody of the records at the moment of their seizure, had "standing" to object to an alleged unreasonable search and seizure of union records from the office. The Court, per Harlan, J., noted that *Katz* "makes it clear that capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." The Court then observed that the defendant there would have had standing had he occupied a private office, and concluded that "the situation was not fundamentally changed because [respondent] shared an office with other union officers. [Respondent] still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups."

Mancusi would appear to govern on the standing issue unless the fact that this is a government office somehow changes things, an issue considered by the *Kahan* court: "This court can see no distinction between a search of a government office specifically for the purpose of uncovering incriminating evidence and a similar search of a private office. Certainly, government employees have as much reason as private employees to expect that their desks and their wastebaskets will be free from the invasion of *criminal* investigators of the government." The court then cited several cases concerning the Fifth Amendment rights of governmental employees and concluded: "At the least, these cases make clear that the fact that defendant was employed in a government office does not distinguish his case from *Mancusi v. DeForte* for the purpose of Fourth Amendment standing."

The next question is whether it is relevant that the investigator merely took items from the wastebasket. This might be considered of significance for one of two reasons. Most courts would deal with this aspect of the case in terms of whether there was a "search" (as defined in *Katz*) within the meaning of the Fourth Amendment. Or, it might be considered, as it was in *Kahan*, as another aspect of the standing issue, in that standing is itself defined in *Mancusi* in terms of a reasonable expectation of privacy.

On this point, the *Kahan* court said that "the question is not whether there has been abandonment in the property law sense..., but rather whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized. Thus, the Supreme Court has distinguished a situation where a person dropped a package on the floor of a taxicab from which he then alighted from situations involving property left in a vacated hotel room or in an open field....Likewise, it has been held that a person does not give up his expectation of privacy with respect to letters and sealed packages when he deposits them in the mail. [citing *United States v. VanLeeuwen*, 397 U.S. 249 (1970).] From this perspective, the flaw in the government's argument becomes immediately apparent. When Mr. Kahan threw papers in his wastebasket, he did 'abandon' them in the sense that he demonstrated an unequivocal intention to part with them forever. However, the undisputed expectation of an employee who discards items in his own wastebasket is that they subsequently will be disposed of and destroyed without prior inspection by others. In this respect, a wastebasket serves a similar function as the mails—the wastebasket is a vehicle for destroying objects; a mailed package is a vehicle for sending them to someone else. In each case, the objects leave the possession of the person, but his expectation that the vehicle in which they have been placed will be free from *unreasonable* governmental searches remains the same."

Assuming now that there is standing and that the investigator's actions constitute a search, the question then becomes whether Dooley's supervisor could give consent which would be effective against Dooley. On this point, the *Kahan* court relied upon *Blok* where the court held that a government employee's supervisors could not give consent to a search of the employee's desk because of the employee's "exclusive right to use the desk." The *Kahan* court then observed: "The approach in *Blok* presaged the post-*Katz* emphasis on a defendant's reasonable expectation of privacy in evaluating the standing issue. Where an area in a government office is reserved for the exclusive use of a particular employee, that employee necessarily has a sufficient expectation of privacy in that area, whether it be a desk or

wastebasket, so that a third-party consent to search by a criminal investigator of the government will be ineffective to bar the employee's Fourth Amendment claim in a subsequent prosecution....It is worth reiterating that this holding does not affect the ability of supervisors in government offices to search the desk or wastebasket of an employee for official documents or papers which are lost, missing, or needed for the business of the office or for evidence of a crime related to the employee's work where there is probable cause and circumstances necessitate an immediate search or seizure." The court then concluded that, assuming probable cause, there was no need for a seizure without a warrant, as the contents of the wastebasket could have been "detained" (as was the package in *VanLeeuwen*) until a warrant was obtained.

Problem # 5:

Two police officers were patrolling a high crime business area about 9:45 p.m. Armed robberies of business establishments in the area were usually committed right after opening time in the mornings or just before closing at night. The officers were on their way to a drug store to sign a log, which they were required to do regularly in certain establishments. As they neared the drug store, they observed four black youths running down the street away from the drug store. They continued to run when the officers started in pursuit. The officers apprehended the defendant in an alley. The other three youths got away. The defendant immediately denied any wrongdoing and questioned the officers as to why he was stopped. The officer did not reply but frisked the youth for weapons. He found a gun holster and a cartridge under his coat. Almost immediately thereafter a woman came up with a gun which she said one of the youths had dropped. The defendant was charged with armed robbery of the drug store from which the four were fleeing. On motion to suppress the holster and cartridge found in the frisk, what decision?

Commentary:

There are two major issues in this problem which frequently confront officers on patrol (one or more persons running and who continue to run when they see the officer (s), and even after the officer (s) start in pursuit).

The first issue is: Is the mere fact of running by a citizen (even in a high crime area) sufficient to warrant the officer's pursuit and stopping of the citizen (which the Court in *Terry v. Ohio* said constituted a "seizure" within the meaning of the Fourth Amendment)? Note here, that the officers were *not* responding to a report of a crime in progress, or of one having been committed in a particular establishment (the drug store, in this situation, from which the youths were running). The suspects were carrying nothing which might arouse the

officers' suspicions. It is true that the officers were required to regularly check certain high-risk business establishments in the area, and to sign a log indicating the time they did so, and they were on their way to the drug store to inspect and sign the log when they observed the youths running from the drug store. Should the officers have permitted the youths to continue running while they proceeded to the drug store to ascertain if it had been robbed, after which the youths might have disappeared and be difficult to find and apprehend? In other words, within the limitations of the Fourth Amendment, as interpreted by the Court in *Terry v. Ohio*, were the officers justified in making the initial "stop?"

The second major issue involved here is: After making the initial stop, were the officers justified in making an immediate frisk without first making some inquiry of the suspect as to his identity (as was done in *Terry*), and giving the suspect a reasonable opportunity to explain his actions (running)? Note that, here, the officer said nothing at all to the suspect before he frisked him, although the youth asked why he was being stopped.

In *Richardson v. Rundle*, 325 F.Supp. 1262 (1971), on petition for a writ of habeas corpus, the court granted the writ on the ground that while the initial stop, under all the circumstances, might have been justified, the officer should have given the suspect a chance to explain his actions before making the frisk, and, therefore, the gun holster and cartridge were the fruit of an illegal search under *Terry v. Ohio*, and should have been suppressed.

The U.S. Court of Appeals for the Third Circuit thought otherwise, and reversed, 11 Crim.L.Rptr. 1326 (1972). The court, as had the District Court, concluded that there was ample justification for the officers to believe that criminal activity might be afoot, and that such criminal activity was probably robbery. And since robbers in Philadelphia usually used weapons, instead of blandishments, to accomplish their object, the officers were justified in conducting the frisk. The court also relied upon *Sibron v. N.Y.*

Problem # 6:

Defendant was under surveillance for suspected auto theft. While following the defendant the officers observed that the license plates on the car he was driving had expired. They stopped him and made a request to see his driver's license. He said it was in his wallet in the trunk. Defendant then opened the trunk of his car and lifted out an attache case which he attempted to open. Before he did so the officers took the attache case from him, opened it, and handed defendant his wallet, which was in view in the case. The officers then observed, in plain view, what appeared to be fictitious driver's licenses. They seized the three apparent licenses and then asked defendant for evidence of

ownership of the car. He had none. They then placed under arrest and he was subsequently charged with auto theft. On motion to suppress the three fictitious driver's licenses seized by the officers, what decision? What would be the result if the officers had opened the trunk without defendant's permission?

Commentary:

This problem would seem to be simple enough, since the suspect was committing a violation in the officers presence (driving a vehicle with expired license plates), were it not for *People v. Watkins*, 19 Ill.2d 11 (1960). *Watkins* held that an *arrest* for a traffic violation would not justify a search unless additional circumstances suggesting a more serious criminal offense were present. Our Supreme Court has also suggested that trial courts should be alert to the prior (before *Watkins* in 1960) practice of police officers stopping and arresting for a traffic violation, and then searching because they were in fact looking for evidence of a more serious crime (policy tickets in *Watkins*; policy slips in *People v. Mayo*, 19 Ill.2d 136 (1960)).

In our problem, the officers were sufficiently suspicious of auto theft by the suspect that they were keeping him under surveillance. (In *Watkins* and *Mayo* both suspects were known "policy runners" to the officers of the gambling detail who arrested them.) Similarly, in our problem, the officers were suspicious but evidently did not have sufficient probable cause to make an arrest for auto theft. While the officers might have had sufficient probable cause to arrest the suspect for driving with expired license plates when they stopped him, they did not do so, and gave no indication that they would probably do more than give him a ticket, or take him in on the specific charge, if he showed them a proper driver's license, which is all they asked him to do initially. Evidently there was nothing unusual in the suspect's answer to their question (that it was in his wallet in the trunk) or in his demeanor to indicate that he might be armed, or that a serious crime might be involved. He offered to open the trunk, get his driver's license from his wallet and show it to them. So far there would seem to be nothing in the situation which would justify a frisk for weapons, under *Terry v. Ohio*, or a search under *Watkins* and *Mayo*. The suspect opened the trunk, lifted out an attache case and started to open it. Did the officers *then* have sufficient justification under *Terry* to take the case from him and open it themselves? *If* they did, then all that happened thereafter would seem to be proper because the officers would be looking in a place (the attache case) where they had a right to look, and any seizable objects (fictitious driver's licenses) which were in plain view could be seized.

The Court of Appeals of the Eighth Circuit in *U.S. v. Mahanna*, 11 Crim.L.Rptr. 2346 (1972), held that under all the circumstances the officers did have the right to open the case themselves, and to seize the objects in plain view. The court said that "The seizure of the exhibits was incidental to the arrest of the appellant." Query whether the Illinois Supreme Court would so hold.

Problem # 7:

A police officer in uniform was patrolling a downtown shopping area at about 4 p.m. As he approached a group of people waiting at a bus stop he observed defendant nervously remove his hand from his coat pocket and begin rubbing his face while watching the officer. The officer walked on down to the end of the block, periodically looking back at defendant, who was still nervously watching him. The officer then turned around and started walking back toward the bus stop. When he was about twenty-five feet from the group of people at the stop the defendant left the group, crossed the street and walked down to the end of the block, crossed the street back to the bus stop side and continued walking back toward the bus stop. The officer had followed him, and when he was about half way down the block back to the bus stop he approached defendant from the rear, touched him lightly on the elbow and said, "Hold it, sir, could I speak with you for a second?" The defendant immediately replied, "It's registered, it's registered." When asked what was registered, he answered that his pistol was registered. The officer then frisked him and found the gun, which he recovered. Defendant was subsequently charged with a firearms violation. On motion to suppress, the trial court granted the motion to suppress the gun. On appeal, what decision? Would it change your decision if the defendant had said nothing when approached by the officer and the officer had frisked him without further inquiry or investigation?

Commentary:

This situation illustrates the worrisome problem created by the Court's holding in *Terry* that before an officer is justified in stopping a citizen on the streets for the purpose of making a brief inquiry as to his identity and explanation of his actions, there must be "specific and articulable facts" to justify the intrusion, and not a mere "unarticulable hunch." It also involves the officer's highly subjective judgment that the suspect acted "nervously." ("...he observed the defendant nervously remove his hand from his coat pocket and begin rubbing his face while watching the officer...." "...periodically looking back at defendant, who was still nervously watching him.") Another question: Does "nervousness," or "acting nervously," in the presence of a police officer, especially in the situation here presented, ever afford sufficient grounds (even admitting the presence of "nervousness") to justify a stop and further inquiry by the officer?

It would seem to be clear, under *Terry*, that *if* the touching of the citizen's person (elbow) and the "Hold it, sir, could I speak with you for a second," are justified, then the subsequent actions (the "What's registered?" and the frisk) by the officer are justified. So the prime inquiry is on the justification for the stop.

On a motion to suppress the pistol, the trial court and the Court of Appeals of the District of Columbia split all over the lot. (*U.S.* v. *Burrell*, 10 Crim.L.Rptr. 2384 (1972)). The trial court suppressed, and a divided Court of Appeals reversed. The majority of the Court of Appeals was satisfied that the man's nervous behavior, coupled with his constant watching of the officer, furnished a reasonable basis for further inquiry under *Terry v. Ohio*. The minority judge felt that the majority was setting "a worrisome precedent" which would permit officers to stop citizens on a "mere hunch," which was specifically disavowed in *Terry*. While the minority opinion expressed some possible concern over the touching of the man's person (elbow) before making any inquiry, since it was only a light touching to gain his attention and not a search or frisk, neither he, nor the majority, attached any significant importance to it.

"Nervousness," alone, would seem to be insufficient to warrant further inquiry. However, nervousness plus additional actions, such as constantly watching the officer, may supply a minimum of justification under *Terry*. The majority thought so.

Problem # 8:

Due to the large number of bombings and arson in federal buildings around the country, the Director of the General Services Administration issued a directive to the effect that all persons entering federal buildings be identified and packages searched. A lawyer about to enter a federal building identified himself as such but refused to let the security guard look inside his brief case. Nor would he leave the brief case with the guard while he was in the building. He was refused permission to enter with the briefcase. He filed suit in federal court for a declaration that such searches were warrantless and illegal under the Fourth Amendment. What decision?

Commentary:

This situation involves a rather radical departure from the airport frisk cases (see *U.S. v. Lopez*) which include the preliminary use of a magnetometer scanner and a psychologically developed "hijacker profile." These have generally been upheld under the *Terry* "balancing" (personal inconvenience versus hazards involved) test. (See *U.S. v. Epperson*, 10 Crim.L.Rptr. 2415 (CA 4, 1972), in addition to *Lopez.)* Here, and more recently, outside courtrooms in various sections of the country, everyone is frisked, and all packages, brief cases, and ladies' purses are searched. It may be analogized, slightly, to the routine road blocks and cursory inspection or "spot checks" of automobiles, which occasionally result in the discovery of criminal activities or an unsafe vehicle or driver. This fact, says the Supreme Court of Pennsylvania in a recent decision, *Commonwealth v. Swanger*, 12 Crim.L.Rptr. 2398 (Jan. 19, 1972), does not furnish a strong enough government interest, under the balancing test of *Terry v. Ohio*, to justify the invasion of Fourth Amendment privacy that is involved. "Specific and articulable" facts are necessary, says the Pennsylvania court, to justify an auto stop.

However, the "balancing test" in the instant problem, and in the airport cases, perhaps reveal a much greater hazard in hijacking, bombings, arson (and the Soledad Brothers trial in California involving the kidnapping of the judge, and his subsequent death, and others at gunpoint, smuggled into the courtroom), than an auto (without nothing more) on the highway. Perhaps, also, the inconvenience to the person frisked at the airport or courthouse is less than the stop on a busy highway or street.

In *Downing v. Kunzig*, 454 F.2d 1230 (CA 6, 1972), the court upheld the federal building searches involved in our problem here, on the ground that the potential hazards were great, the inconvenience to the citizen only slight, and the search, or frisk, only cursory in nature for a particular purpose and not to learn the content of papers that may be in a brief case.

The present trend would indicate that these "wholesale" stoppings and "frisking" in particular buildings and places are becoming more prevalent. *Terry v. Ohio*, and its progeny, will be with us for a long time.

REPORT

OF THE
TWENTIETH ANNUAL
ILLINOIS JUDICIAL CONFERENCE

Lake Shore Club of Chicago
September, 5, 6 and 7, 1973

AGENDA

OF THE

TWENTIETH ANNUAL

ILLINOIS JUDICIAL CONFERENCE

WEDNESDAY, SEPTEMBER 5, 1973

10:00 A.M. - 2:00 P.M.

SEMINAR REGISTRATION
Main Lounge - First Floor

2:00 P.M.

GENERAL SESSION
Grand Ballroom - First Floor
Presiding - Hon. Rodney A. Scott
Invocation - Rev. Thomas Munster, C.M.
Report of Committee on Memorials -
Hon. Norman A. Korfist
Opening Remarks-
Hon. Thomas E. Kluczynski

3:00 P.M.

FIRST SEMINAR SESSION
Grand Ballroom - First Floor
(Lecture on Evidence)

5:30 - 6:30 P.M.

Reception for Governor Walker
Main Lounge - First Floor

6:30 P.M.

DINNER
Grand Ballroom - First Floor
Address - Hon. Daniel Walker
Governor, State of Illinois
Presiding -
Hon. Walter V. Schaefer

THURSDAY, SEPTEMBER 6, 1973

7:00 - 9:00 A.M.

BREAKFAST
Mediterranean Room - Third Floor

9:30 A.M.

SECOND SEMINAR SESSION

12:00 Noon

LUNCHEON
Grand Ballroom - First Floor
Program honoring retiring and newly-appointed judges
Presiding -
Hon. Daniel P. Ward

2:00 P.M.

THIRD SEMINAR SESSION

4:30 P.M.

SOCIAL HOUR
Main Lounge - First Floor

DINNER
No planned meal. Dinner may be had in the Mediterranean Room (3rd fl.) or in the Shore Room (2nd fl.)

FRIDAY, SEPTEMBER 7, 1973

7:00 - 9:00 A.M.

BREAKFAST
Mediterranean Room - Third Floor

9:30 A.M.

FOURTH SEMINAR SESSION

ILLINOIS SUPREME COURT

Robert C. Underwood
Chief Justice

Walter V. Schaefer
Thomas E. Kluczynski
Daniel P. Ward
Charles H. Davis
Joseph H. Goldenhersh
Howard C. Ryan

ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Roy O. Gulley
Director

ILLINOIS JUDICIAL CONFERENCE EXECUTIVE COMMITTEE

Rodney A. Scott
Chairman

Daniel J. McNamara
Vice-Chairman

Jay J. Alloy
Nichola J. Bua
Harold R. Clark
Henry W. Dieringer
George Fiedler
Frederick S. Green
Mel R. Jiganti
Peyton H. Kunce
Daniel J. Roberts
Eugene L. Wachowski

Thomas E. Kluczynski
Liaison, Officer

1973 JUDGE SEMINAR COMMITTEES

I

LECTURE ON
SELECTED TOPICS OF EVIDENCE

Hon. Prentice H. Marshall
Lecturer

II

LECTURE ON CRIMINAL LAW

Prof. Wayne R. LaFave
Lecturer

Prof. Geoffrey R. Stone
Lecturer

Prof. Charles H. Bowman

III

COMMITTEE ON SENTENCING

Hon. Richard J. Fitzgerald
Chairman

Hon. William R. Nash
Vice-Chairman

Hon. William G. Eovaldi
Hon. Louis B. Garippo
Hon. John F. Hechinger
Hon. John L. Poole
Hon. Frederick S. Green
Liaison Officer

Prof. Robert E. Burns
Reporter

Prof. Thomas A. Lockyear
Reporter

IV

COMMITTEE ON TORTS

Hon. Joseph J. Butler
Chairman

Hon. Paul C. Verticchio
Vice-Chairman

Hon. William L. Beatty
Hon. James H. Felt
Hon. Jacques F. Heilingoetter
Hon. Calvin R. Stone
Hon. Mel R. Jiganti
Liaison Officer

Prof. Leigh H. Taylor
Reporter

Prof. Vincent F. Vitullo
Reporter

V

COMMITTEE ON
FUNCTION OF THE TRIAL JUDGE

Hon. Caswell J. Crebs
Chairman

Hon. L. Sheldon Brown
Vice-Chairman

Hon. John S. Massieon
Hon. Harry D. Strouse, Jr.
Hon. Fred G. Suria, Jr.
Hon. Kenneth E. Wilson
Hon. Peyton H. Kunce
Liaison Officer

Prof. Richard C. Groll
Reporter

Prof. Donald H. J. Hermann
Reporter

VI

COMMITTEE ON THE TRIAL JUDGE
AND THE RECORD ON APPEAL

Hon. Leland Simkins
Chairman

Hon. John J. Stamos
Vice-Chairman

Hon. Raymond K. Berg
Hon. James W. Gray
Hon. Earl E. Strayhorn
Hon. Jay J. Alloy
Liaison Officer

Prof. Richard A. Michael
Reporter

Prof. Thomas D. Morgan
Reporter

VII

COMMITTEE ON MEMORIALS

Hon. Norman A. Korfist
Chairman

Hon. Anton A. Smigiel
Hon. Alvin Lacy Williams

REPORT OF PROCEEDINGS

The Illinois Judicial Conference held its Twentieth Annual Meeting on September 5, 6 and 7, 1973 at the Lake Shore Club of Chicago.

Judge Rodney A. Scott of the Sixth Judicial Circuit (Decatur), Chairman of the Executive Committee of the Conference, called the meeting to order and Father Thomas Munster of DePaul University, Chicago, delivered the invocation.

WELCOMING REMARKS OF THE CHAIRMAN OF THE CONFERENCE

Hon. Rodney A. Scott

Members of the Judicial Conference, ladies and gentlemen, welcome to the 20th Annual Judicial Conference.

After each Conference, there is mailed to every judge a questionnaire for comments and for suggestions. After they are returned, the Executive Committee reviews the questionnaires, and we select those responses which we think will result in improving the Conference and make it more responsive to what you want.

Over the years, the Executive Committee has been - and continues to be - alert to your suggestions to improve the administration of justice through the work of the Conference. Many of your comments have resulted in the appointment of subcommittees to study problem areas in substantive and procedural law. Your remarks, which have been directed to improving the mechanical operation of this annual meeting, have been considered and, in many cases, adopted by the Executive Committee.

Based on your recommendations, we have streamlined this year's meeting to eliminate unnecessary time lags between programs. Thus, we have kept the time delay between programs down to a minimum. Additionally, we have not arranged for a planned dinner program on Thursday evening so that you will have that night free.

Tonight, Governor Walker will address the Conference. At 6:00 p.m., there will be a reception in honor of the Governor. Our Supreme Court and the Governor will be in a reception line, and all of the judges will have ample opportunity to meet and talk with the Governor.

Thank you.

OPENING REMARKS

Hon. Thomas E. Kluczynski
Justice of the Illinois Supreme Court

I welcome you to the 20th annual Illinois Judicial Conference.

Once again, we come "to consider the work of the courts and to suggest improvements in the administration of justice."

The importance of this Conference is reflected in the fact that it was given constitutional status in 1964 and again in 1970. Through its Executive Committee and subcommittees, your Conference carries on continuous study of judicial practice and procedure and provides an important forum for discussion and recommendations. Past achievements of the Judicial Conference clearly demonstrate its effectiveness in this regard. In 1956, the Supreme Court accepted the Conference's recommendation to appoint a committee to develop uniform jury instructions. In 1961, Illinois Pattern Jury Instructions - Civil was published and adopted. A similar Conference recommendation resulted in Illinois Pattern Jury Instructions - Criminal, published and adopted in 1968. The Judicial Conference Canons of Judicial Ethics, in effect until the adoption of Supreme Court Rules 61 through 71; the Impartial Medical Testimony Program; a Supreme Court rule on *voir dire* examination of jurors; and the adoption of Uniform Juvenile Forms are but a few examples of Judicial Conference efforts.

A great deal of time and effort is required to carry on the work of the Judicial Conference, each year. I would like to publicly thank the members of the Executive Committee for their unselfish efforts over the past year and all of the fine judges who have served on the various Conference committees this year. I wish to also express our great appreciation to them for their contribution to the continuous effort to improve the administration of justice.

Since 1964, the Conference has also conducted a program of continuing judicial education. Although the primary purpose of the annual Conference is to review and recommend improvements in the administration of justice, the seminars also provide us with an opportunity to increase our legal knowledge and judicial skills. The annual seminars for circuit judges and associate judges, the new judge seminar and specialized regional seminars in criminal law have been very successful.

Judges, no less than the attorneys who practice before them or the members of other professions, must continue to learn. The performance of a trial judge depends on what he brings to the bench, what he absorbs after he ascends it and how well he applies his knowledge, training and personal qualities. The vast increase in litigation, the

criminal law explosion and the growing and changing complexities of the law have led to national recognition of the need for a comprehensive program of judicial education within each state.

A major step toward expanding the educational program of the Judicial Conference has already been taken by the committee on criminal law for judges under the chairmanship of Judge Richard Mills. Through the use of funds awarded by the Illinois Law Enforcement Commission, that committee, with the assistance of the Administrative Office, has conducted 6 regional seminars on criminal law. Those seminars were attended by a total of 205 circuit judges. Three more criminal law seminars will be offered beginning in November of this year. These seminars are held in three separate locations (north, central and southern Illinois) to provide judges everywhere in the State the opportunity to attend. The regional seminars have been enthusiastically received by the judges, and many think that they ought to be conducted annually. During the seminars, a proposal to develop a model "bench book" for judges hearing criminal cases was adopted. Through the use of grant funds, work on the "bench book" was begun and is now near completion.

In addition to the regional seminars put on by the committee on criminal law for judges, several other programs using federal money have been initiated during the past two years. In September 1971, our Court appointed a committee on criminal justice programs. The committee was instructed to develop programs which could utilize federal grant money to study and make recommendations for improvements in the administration of criminal and juvenile justice. The committee headed by Professor Wayne LaFave of the University of Illinois, as chairman, is comprised of distinguished Illinois citizens both in and out of the legal profession. It has a full-time executive secretary and two full-time staff assistants, one of whom specializes in data processing and one in probation and court services. The committee serves as a clearinghouse for all grant-funded projects affecting the operation of any court in Illinois, sponsors experimental programs and lends financial support to our program of continuing judicial education. During 1972 and the first part of 1973, the committee reimbursed part or all of the costs of many Illinois judges who attended education programs both within and outside of Illinois.

Recently, our Court authorized the committee to file a grant application to conduct a pilot project which would use computers to translate court reporters' stenograph machine notes and automatically produce typewritten transcripts. Such transcripts are produced by a computer from an electronic tape. The electronic tape is produced when the court reporter strikes the keys of his stenograph machine, at the same time the paper tape is produced.

The committee has also hired a consultant who is in the process of

conducting a broad survey to determine the most efficient means available to recruit and train qualified official court reporters so that we can begin to meet the tremendous need for qualified reporters. The study will look into the motivation and the physical and mental qualifications of the best qualified official court reporters and attempt to determine, in advance, whether young people who would like to become court reporters have the qualifications.

Some of these grant-funded projects can be of lasting value. One begun three years ago, as a federally funded experimental project, has matured into the Illinois Appellate Defender, a State agency which this year is funded one half by federal money and one half by monies appropriated by the General Assembly. The State Appellate Defender serves every county in the State, and will represent indigent defendants on appeal, in criminal cases, when appointed by the trial or reviewing court. The existence of this State agency insures that every indigent convicted of a crime will have an experienced lawyer, properly trained in criminal appeals. The cost of indigent criminal appeals has now been shifted from the counties to the State and some even anticipate that the cost of processing indigent criminal appeals may be reduced simply because the attorneys, and other staff members of the Appellate Defender office will be more efficient.

In the near future, we expect to see recommendations for a plan by which computers and other data processing methods could improve statistics, information gathering and management in our courts. We expect to see continued experimental use of video recording devices to determine if they have significant value in gathering and presenting evidence. We expect more experiments in the use of videotape reports of proceedings in certain kinds of cases. Our Administrative Office is installing experimental videorecording equipment in the Peoria County courthouse. We hope that by encouraging experimental efforts, we will refine our knowledge of how modern technology can be put to good use in the operation of our courts.

We are looking forward to finding some way in which federal funding can be used to build or remodel court facilities which are outdated or inadequate. In a recent report, our committee characterized the courtroom facilities used for some criminal cases in Cook County as "obsolete" and "grossly inadequate" and stated that these conditions represent "the most serious problem confronting the administration of the criminal courts in Cook County." Judges from downstate indicate that they have similar problems in their own counties. Many trial courtrooms are poorly lighted, poorly ventilated, and badly maintained. Accoustical problems are so serious that hearing is difficult without loud speaker systems. Staff quarters are crowded, conference rooms are not available, parking and other service facilities for judges, jurors, witnesses, attorneys, court staff and visitors are in-

adequate or non-existent. Nevertheless, many of our counties are to be commended for their efforts to improve the court facilities even without federal assistance. In the northeastern portion of the State, alone, several counties have recently built new courthouses. Lake, McHenry, Winnebago, Will and Iroquois counties all have new facilities. Elsewhere in the State, Williamson and Saline counties have just completed their new courthhouses; Peoria County's courthouse is less than 10 years old, and both Randolph and St. Clair counties have courthouses under construction. Cook County will soon dedicate a brand new multi-million dollar Juvenile Justice Center containing a modern detention facility for juveniles and a juvenile court complex. The Cook County Board has recently voted a $7,000,000 bond issue to renovate the criminal court building at 26th and California. However, a request for $33,000,000 to build an office building to relieve the congestion in the criminal court building still has not been acted upon. According to newspaper reports, Cook County has about one-third the number of criminal courtrooms per 100,000 persons as New York, Los Angeles and Philadelphia. Many of our counties have been unable or unwilling to commit adequate resources to improve the physical facilities in which our courts must operate and the federal government has been hesitant to allow grant money to be used for construction. But until and unless the resources are forthcoming either from the counties, the State or the federal government an essential part of our program to improve the administration of justice will not be adequately dealt with.

The problems in the Illinois court system are not exclusively related to inadequate facilities or inadequate maintenance of the facilities that we have. Fortunately, we appear to be making consistent progress in some of the most troublesome areas. Delay in the trial of law jury cases in the Circuit Court of Cook County has long been one of the most serious and most highly publicized problems in the operation of the Illinois courts. Cook County had long been charged with having had the worst civil law jury backlog in the nation. I think we can take some pride in the fact that Illinois now has less delay than three other major jurisdictions. Cook County, as of the end of 1972 suffered a delay of 49.8 months. Philadelphia has a delay of 53 months, Boston has a delay of 51 months and the Bronx has a delay of 52.2 months. Almost equally important, when we look at the overall problem, is the fact that of 20 jurisdictions reporting delays of 30 months or more, 13 are now suffering greater delay than they did 10 years ago. Only 6 have, over the last decade, reduced the time it takes to get a jury verdict in their jurisdiction. Cook County stands out as one of those having accomplished the greatest reduction since 1962. Cook County has shaved a full one and one half years off the delay between the date on which a case is filed and the date of verdict. As recently as January 1, 1971, a litigant in the Law Division would wait an average of over 5 years for a jury verdict. Today, while the wait is still too long, it has been reduced to an average of 44.5 months as of May 1973. We commend the efforts of Chief Judge Boyle, Judge Ward, Assignment Judge Joseph J. Butler, Supervising Judge Sigmund J. Stefanowicz, all the judges who serve in the trial and pre-trial sections of the Law Division, the administrative staff of the Circuit Court of Cook County and all the fine judges from downstate who have been so generous with their time and have served so unselfishly helping Cook County to achieve this remarkable progress.

The Illinois court system has achieved international prominence because of its simplicity, efficiency and flexibility. We can be proud of the fact that our court system is among the most modern, most efficiently organized in the country. Unlike many other major jurisdictions our system has demonstrated its ability to cope with the difficult problem of delay. While the civil law jury backlog continues to be a matter for concern, the steady progress made in recent years has given us reason to believe that the backlog will be beaten. It also gives us confidence that other problems facing our courts can be dealt with and that we can achieve justice with dispatch throughout the system.

Delay in processing criminal cases has become a matter great concern both to the courts and to the public. Unnecessary delays in handling criminal cases corrode respect for the courts. Our citizens rely on our courts to promptly redress each imbalance of justice, to promptly try the accused, to promptly free the innocent and to promptly punish the guilty.

If we are to cope with the problem of delay in the criminal courts, we must begin to measure both delay and the consequences of delay in disposing of criminal cases. We must identify the most probable causes for unnecessary delays and we must marshall the resources available to us to insure that unnecessary delays will neither impair the efficiency with which we dispose of criminal cases, nor compromise the quality of criminal justice.

Even if the right to a speedy trial may protect most defendants from the effects of delay, there is no similar protection for the victims, the witnesses, the prosecutors, the police or for our already over burdened judicial machinery.

A less publicized but equally serious problem of delay faces the Appellate Court. There are more judges sitting on the Appellate bench now than at any time in history. But still the backlog mounts. On an average, each Appellate justice is writing more opinions this year than ever before. Using our power of appointment, assignment and recall, the Supreme Court created 5 divisions of 4 justices each in the First District and 4 justices in each downstate district. But still the backlog mounts.

Our Court has received and has given serious consideration to many proposals to alleviate the soaring business in the Appellate

Court. Recommendations have been made that the Appellate divisions be authorized to summarily dispose of cases by memorandum or order. Recommendations have been made to establish a central research facility to prepare research memoranda on each case appealed to the Appellate Court. There are two experimental research teams presently in operation—one in the First District and one in the Fourth District. Professional research staffs are assigned to prepare memoranda concerning cases which may be considered routine or do not present novel questions of law, so that the Appellate judges may be relieved of some of the burdens of preliminary review in routine cases. All these proposals and experiments are under study to determine which might speed the appellate process without in any way affecting the quality of appellate review. The General Assembly has passed a bill (H.B. 767) increasing from 3 to 4 the number of Appellate justices to be elected in each downstate Appellate District.

A brand new tool at our Court's disposal which can be used to improve the management of the court system, is our supervisory authority.

Since 1964, our Court has had "general administrative authority over all courts..." Under section 16 of article VI of the 1970 Constitution our Court has now also been given "supervisory authority over all courts...." In its April 10, 1970 report to the Illinois Constitutional Convention, the Committee on the Judiciary recommended that supervisory authority be added to our Court's administrative authority "to emphasize the urgency and importance of the general administrative authority...." in the Supreme Court. The Committee on the Judiciary of the 1970 Constitutional Convention commented that vesting supervisory authority in the Supreme Court would "strengthen the concept of an effective centralized administration of the judicial system."

Since July 1, 1971, our Court has invoked its supervisory authority on many occasions. Depending upon the nature of the case, our Court has entered supervisory orders in two broad areas: First, where the order was directed to a specific judge. Second, where the order was directed to the circuit or Appellate Court to carry out a policy laid down by our Court. The latter instance shows our willingness to use our supervisory authority to carry out general policy and provide for effective centralized administration of the court system. I would like to review very briefly some of the cases.

1) *Brokaw Hospital* v. *Circuit Court* (52 Ill. 2d 182) the first case in which our supervisory authority was invoked, was an application for a writ of prohibition to prevent the enforcement of a certain order of the circuit court. We found it unnecessary to examine the limitations of the writ of prohibition as they existed at common law and to the extent to which those limitations have been modified over the years

for we found that we have jurisdiction to authorize the issuance of an appropriate order in the exercise of supervisory jurisdiction.

We held that the trial court was without jurisdiction to enter the order, and we entered a supervisory order, directing the trial court to vacate its order.

2) In *People ex rel. Dari* v. *Uniroyal, Inc., et al* (No. 45161), and consolidated cases, our Court entered a supervisory order, vacating the judge's orders denying motions for changes of venue, and we directed the judge to grant changes of venue.

3) In September 1972, we again invoked our supervisory authority in *People* v. *LaPlaca* (No. 45403) by ordering the circuit court "to hold an evidentiary hearing on defendant's petition to set bail."

4) *People ex rel. Ward* v. *Moran* (No. 45197) presented the question of whether the Appellate Court had authority to reduce a penitentiary sentence to probation.

We held that Rule 615 "was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation." We then entered a supervisory order directing "the Appellate Court....to vacate that portion of its judgment granting probation and...to specifically reconsider whether the trial court exercised its discretion or acted arbitrarily in denying probation."

5) In a series of seven cases, our Court entered supervisory orders on June 1, 1973. In:

People v. *Wintersmith* (No. 45644);

People v. *Robinson* (No. 45714);

People v. *Bates* (No. 45736);

People v. *Delgado* (No. 45750);

People v. *Thomas* (No. 45753);

People v. *Gaines* (No. 45769); and

People v. *Anderson* (No. 45808),

we denied petitioners' petitions for leave to appeal and entered supervisory orders which modified the sentences of the defendants to conform to the new Unified Code of Corrections.

In two very recent cases, our Court used the supervisory authority to promulgate matters of general policy which affect the administration of the court system.

1) *People* v. *Prim* (53 Ill. 2d 62). Our Court held that "hereafter the trial courts of this State when faced with deadlocked juries comply

with the standards suggested by the American Bar Association 'Minimum Standards Relating to Jury Trials.' " You may recall that our supervisory order in the *Prim* case specifically sets out the instruction to be given to deadlocked juries.

2) In *People v. Warr* (___Ill.2d___, 298 N.E. 2d 164) our Court directed "that until otherwise provided by rule of this Court or by statute, a defendant convicted of a misdemeanor who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his constitutional rights may institute a proceeding in the nature of a proceeding under the Post-Conviction Act."

In the *Prim* and *Warr* cases, we used the supervisory order to promulgate general policy. You may see more supervisory orders in the future. It is a method which our Court can use to establish more efficient management in the court system.

During this past year there have been many important developments in the area of ethics and professional discipline.

A clear manifestation of concern about professional responsibility is the Supreme Court's new set of rules establishing an Attorney Registration System for the registration and discipline of attorneys. I am sure that most of you are already somewhat familiar with Rules 751 through 768 and the system we have established for investigations, hearings, reviews and discipline, in appropriate cases, concerning conduct by attorneys which tends to defeat the administration of justice or brings the courts or legal profession into disrepute. This system also provides, for the first time in Illinois, a effective tool for registration of attorneys. Any judge in Illinois can now quickly determine whether or not a particular attorney is licensed to practice law and authorized to practice law in Illinois simply by calling either of the two offices of the Attorney Registration Commission.

As of June 30, 1973, the Commission has registered 22,866 attorneys in Illinois. (19,186 paid the fee; 3,680 with no fee required; attorneys in the Armed Forces, attorneys admitted for less than one year, attorneys licensed to practice for over 50 years or over 75 years of age, and attorneys licensed but neither residing nor practicing law in Illinois are exempt (Rule 756).)

Every lawyer and judge in Illinois shares in the responsibility of maintaining high professional standards in our community, and judges in their particularly sensitive position of public trust are obligated to participate in the work of maintaining high professional responsibility. Judges are in a unique position to observe violations of the Code of Professional Responsibility, actions which bring the courts or profession into disrepute, and especially the first signs of physical or mental disability which may impair an attorney's ability to properly represent a client. We all realize that these problems are sensitive,

but I can assure you that they can be discussed at your convenience on a *personal* basis with a professional member of the staff of the office of Attorney Registration.

It takes little insight to recognize an increasing interest on the part of the people of Illinois in professional ethics and misconduct. Perhaps the clearest demonstration of this concern is section 15 of the 1970 Judicial Article which established a new judicial discipline system in Illinois. Investigation of complaints against judges was formerly a function of the Director of the Administrative Office as Secretary of the Courts Commission. The unique combination of administrative and investigatory powers, while it was not free from difficulty, did permit informal handling of some complaints. Under the present constitutional system, the Judicial Inquiry Board, after investigation, has two alternatives: It can vote to file a complaint with the Commission and prosecute the judge or it can vote to not file a complaint. Once the complaint is filed, confidentiality no longer applies. We must have faith that a responsible Inquiry Board will not be influenced by irresponsible charges.

The judiciary because of its very nature, its awesome power and the unique role in plays in a free society will always be scrutinized. However, such scrutiny can never be allowed to affect a judge's performance. A judge must perform his duties to the best of his ability and remain impervious to the pressure of popular opinion.

In conclusion, let me urge you to participate fully in the seminar sessions. We will gain the most benefit from the give and take of frank and open discussion, and significant recommendations for the improvements of the administration of justice in Illinois will surely be the result.

ADDRESS

Hon. Daniel Walker
Governor, State of Illinois

I really am delighted to be here this evening. Mr. Chief Justice Underwood, Judge Scott, Judge Gulley, distinguished justices of the Illinois Supreme Court, and distinguished jurists, it is a pleasure to be here.

I gave a lot of thought as to what I would speak about tonight, and if any of the judges came here thinking that I was going to give a long and learned disertation about any subject, I am afraid you are going to be disappointed. I am going to be serious. I am going to talk about a few things that relate directly to the judiciary. I gave some consideration to taking executive action here tonight. I have done some difficult things in terms of signing and vetoing bills, and I gave some thought about talking at this public ceremony about the "no-fault" automobile insurance bill which I vetoed. I did not know whether I would get run out of the room or welcomed with open arms, and I still do not know. Bill Sutter, the President of the State Bar Association, who is here tonight, was not very happy. I am sure of that. Since I did not know, I decided not to speak to that subject. I decided to just share some thoughts with you this evening about some things that interest and concern me about the judicial branch of government.

It is obvious that it is worth repeating every now and then because some people tend to forget it, that there are three branches, three co-equal branches of government: The executive, the legislative and the judicial. We hear a lot about these things. You have heard it. We have read it in the newspapers everyday. We hear from our criticizers about overstepping the bounds in one branch of government, and usurping the powers of the other branch. There was a time in America when that was not very easy to do: Government (and life) was a lot more simple than it is today. But it is more difficult today, as you know. It is more complex, and you do continually run into problems where you, as judges, where I, as the chief executive, wonder if we are overstepping the bounds.

The judiciary is increasingly confronted with this problem, and I believe that it is in a large measure being forced upon the judiciary. I would like to raise with you this question tonight, a question for which I have no answer: Are we in America today asking too much of our judicial system? As I said, life used to be different in the courts. The courts were there, and they were almost totally pre-occupied with resolving two-party litigation, constitutional and statutory interpretation, and criminal law problems. Now the courts, you the judges, are thrust daily into large questions of public policy and new forms of litigation that affect very, very broad groups of people.

You remember the old rule we learned in law school; if the general public is affected, an individual usually could not sue to protect the public right. But that seems to be different today. The individual now has a much broader right to go into court and to seek redress for people, far beyond himself. Imagine, if you will, what will happen in the courts of Illinois if vast numbers of our citizens decide to exercise the right conferred by the new Constitution to challenge the area of pollution. Every citizen is given a right to go to court under our new Constitution to do that.

There are new interpretations of constitutional rights I learned about in private practice, when I was a corporate lawyer. These rights are being tested repeatedly by young lawyers, by lawyers of all ages, who are seeking to open up new ways to attack what government is doing, what corporations are doing, and what individuals are doing. In Illinois, we have not seen the bargaining use of the class suit to the extent that it has been utilized in other states. I was involved in it as a trial lawyer. I looked at some figures in last year's report of the American College of Trial Lawyers, and the report gave these figures for the Seventh District Court of New York which includes Manhattan: In 1967, 118 class actions; in 1971, 410 class actions.

As you know, many of these class actions are being utilized to try to bring social change directly through the courts. The increase of class actions has resulted, as some of you know, in a tremendous increase in judicial business. There are administrative problems. Judges find themselves being involved in all of the problems of letting a various class of people know about the litigation so that the members of the class can decide whether they will exercise their rights. In some of these cases notices have gone out to literally millions of people. In one case that I read about, two million people were notified of the pending class suit. Of the two million, twelve thousand responded. Of those twelve thousand, ninety per cent said that they did not want to be parties to this suit. This raises some very valid questions as to the proper utilization of the class suit. It raises the whole question of the righteousness of that particular kind of procedure. How many of the notices that go out, end up in the waste basket of people who might have been interested if they had been approached in a different way? These class actions are often so small that the only one—the only one—who really collects anything from the action, is the lawyer who brings it.

In some cases, as you know, a lawyer is following up a government investigation which has resulted in correcting the wrong. The lawyer collects damages which may involve (and this happens frequently) only a few cents or a couple of dollars for every person in the class. Yet, the aggregate, the total amount of the settlement, is so great that the many companies, which are sued in these actions, feel that they have absolutely no recourse except to settle out of court.

I think these class actions raise some very real questions for the judiciary. Are they really righting a wrong? Do the amounts involved justify the amount of time and work that is required of the courts to decide the relief and to compute the damages? Should judges concentrate more in handling these cases on the concept of whether the case is completely manageable as opposed to the question of whether there is a common question of law and fact affecting the whole group?

I use a class action as just one example of the kinds of broad policy questions that are increasingly being thrust upon the judges. At the same time that you are being thrust into social arenas, we have the other problems with which you are familiar, the ones you deal with every day: Crowded calendars in metropolitan areas and too many civil and criminal cases for some courts to cope with. You have the concept of bargaining in the criminal courts. Many of you, more familiar than I, know that system of justice. We have the problem of continuance after continuance; the effect this has on the witnesses, on you, on the lawyer, on justice, and on the physical facilities. How many of you have the kind of physical facilities that you really need in order to do the kind of job that is expected of you? Some of you do. I have seen your courtrooms around the State. I have walked and jeeped for two years through the communities of Illinois, and some courtrooms are good, but a lot of them are not. I wondered time and time again as I went into the courtrooms: How could you render justice in that kind of cramped surroundings?

Let me specifically say that I believe our State can be proud of the progress that we have made in some of the areas that I have mentioned. I think we are way ahead of some of the states in the Union, thanks to some very outstanding people, many of them here, who have worked on this problem. This kind of conference, the Administrative Office, and the hard work that a lot of people are putting into making the judicial system work better are examples of progress. But we have a long way to go, and I am sure that you would agree with me on that.

I do want to mention one subject that is going to be before the public next year as a result of the actions taken in this legislature. Let it be made perfectly clear to you my views on it. I want politics out of the selection of judges. I do not believe that this State should go back to the old system. I believe that we should continue the way that this State has been going in recent years—free the judges from running in a partisan political campaign in order to remain on the bench. If I may say, I think I know something about getting around the State and about campaigning. A lot of people in this State are going to be hearing my views on that subject in 1974.

But going on as we work for an asnwer to some of the problems that you are going to be discussing during this conference, and some

of them that I have just touched upon tonight, I would like to voice one concern that I have. It is not very often discussed, and I have not seen it written about. I have not heard it talked about at conferences of this type, but it is something I learned from my own brief encounter with the highest appellate court in the nation, the United States Supreme Court, and that is the onslaught on your time.

Let us not turn our judges, our judicial system, into administrative robots as we try to modernize the system. I would like to suggest something that I think on which every judge here agrees with me. That is, that justice requires thoughtfulness. Judges must have time: Time to reflect; time to read; time for quiet discussions with your colleagues. Yes, time to take a brief or a law book and walk out in the court yard and sit under a tree and do some quiet reflection as you study a brief of a case. Time to sit in your library and let some of the precedents seep into your mind. If we come to the time when every judge has to rely on his law clerks to do all of his research, and if we come to a time when a judge does not have time to sit in the library and think as he reads, then I think we have come to a time that bornes ill to our judiciary.

I would like to conclude with this thought. Neither you nor I, nor the legislature, can right every wrong in our society. I would like to ask this: Let us be sure,you and I, who do have powers given to us under the Constitution and laws of this State, that those wrongs which we redress in the performance of our respective duties are redressed, but redressed with fullest thoughtfulness for tomorrow's effect on today's action.

Thank you very much.

PROGRAM IN HONOR OF NEWLY APPOINTED JUDGES AND RECENTLY RETIRED JUDGES

Hon. Daniel P. Ward
Justice of the Illinois Supreme Court

Judge Scott and ladies and gentlemen of the Conference, we have assembled this afternoon for an important and satisfying, although brief, ceremony. We need to honor the newly appointed judiciary of Illinois—both those who in the past year have received their first judicial appointment and those who have received appointments of elevation within the judiciary. We also need to honor those who have retired this year from active judicial service. Many of them are unable to be here today, and what remarks we make will have to be addressed to them *in absentia*.

First, we welcome the newly appointed judges to the responsibilities and burdens as well as the invigorations, sentiments and satisfactions of judicial office. Our wish is for long service and high accomplishment. We can express no higher hope than that your retirement in time may come to match the distinguished achievements of the retiring judges we honor today.

Typically, when the retirements of successful men are announced, their noteworthy achievements are reviewed and publicly called to mind by fond colleagues. The great affairs of state they handled so ably; the industrial innovations they made; their contributions to companies' profitable growth; the important legislation they introduced; or the significant books they wrote, are all carefully spread out to be admired and remembered.

But when judges come to retire from their service, there is no need that this be done. It should not be attempted. This is because, without exception, we know the works of judges are high works. All of their affairs are great affairs of man because they involve the doing of justice. Involved in this most important human conduct, the judge has no mean duties, and, in a proper sense, no case in which he presides is of greater importance than another. It is to be observed, too, that judges are professionals, unaccustomed to praise, for that is for their service. This, I suppose, is as it should be, for having justice done to him is the right of every man. It would be awkward and embarassing to them, the retiring judges here, were I to attempt to eulogize unduly their services and to speak at any length of their professional contributions.

Today, I will simply record our deep appreciation for their distinguished service, and the office they have loved and served so well. We

can note admiringly that judicial office in Illinois is larger and better because they occupied it.

The retiring judges here today are: The Honorable Stephen Adsit; the Honorable J.H. Benjamin; the Honorable Stewart C. Hutchinson; and the Honorable William Johnson. Those judges who have retired since June 1972, but who are not with us today, are: The Honorable L. Eric Carey; the Honorable William Carroll, the Honorable George Hebel; the Honorable James Hurley; the Honorable Fred Kullberg; the Honorable Daniel Roberts; the Honorable Herman Snow; the Honorable William Barth; and the Honorable Mel Abrahamson.

The judges appointed since June 1972 are seated at the tables immediately in front of me. May we ask that each new judge stand as his name is called, so that there may be a welcome by acclamation to your new and high office:

Judge Jack Alfeld; Judge David Babb; Judge Frank Barbaro; Judge Robert Buckley; Judge Patrick Burns; Judge Henry Caldwell; Judge Robert Cherry; Judge U. S. Collins; Judge John DeLaurenti; Judge Eric DeMar; Judge Edward Egan; Judge Thomas Flood; Judge Simon Friedman; Judge Robert Gagen; Judge William Gleason; Judge Albert Hallett; Judge Moses Harrison; Judge John Hayes; Judge John Hoban; Judge William Hopf; Judge Thomas Hornsby; Judge Glenn Johnson; Judge Wilbur Johnson; Judge George Kaye; Judge Alfred Kirkland; Judge Carl Lund; Judge Benjamin Mackoff; Judge Victor Mosele; Judge Frederick Patton; Judge Joseph Schneider; Judge John Shonkwiler; Judge Jack Sperling; Judge John Sullivan; Judge John Sype; Judge Thomas Vinson; Judge Daniel White; and Judge Guy Williams.

REPORT OF COMMITTEE ON MEMORIALS

Hon. Norman A. Korfist

Mr. Chairman, Justices of the Supreme Court, Justices of the Appellate Courts and Members of the Judicial Conference, it is the distinct honor and solemn privilege of the committee on memorials, consisting of Judge Anton A. Smigiel, Judge Alvin Lacy Williams and myself, to present to this Conference appropriate Resolutions honoring the memory of our fellow judges, both sitting and retired, who have departed this life since our last Judicial Conference held in 1972.

We so honor these Illinois judges:

The Honorable William H. Chamberlain, Chief Judge of the Circuit Court, Seventh Circuit;

The Honorable Harry I. Hannah, Judge of the Circuit Court, Fifth Circuit;

The Honorable Warren J. Hickey, Judge of the Circuit Court, Cook County;

The Honorable Ray I. Klingbiel, Justice of the Supreme Court of Illinois, retired;

The Honorable John J. Lupe, Judge of the Circuit Court, Cook County, retired;

The Honorable Francis T. McCurrie, Judge of the Circuit Court, Cook County, retired;

The Honorable James O. Monroe, Jr., Judge of the Circuit Court, Third Circuit;

The Honorable Francis T. Moran, Judge of the Circuit Court, Cook County;

The Honorable Arthur J. Murphy, Justice of the Appellate Court of Illinois, First District, retired;

The Honorable Alexander J. Napoli, Judge of the United States District Court, Northern District of Illinois;

The Honorable Herbert C. Paschen, Judge of the Circuit Court, Cook County;

The Honorable William Braxton Phillips, Judge of the Circuit Court, Fifteenth Circuit;

The Honorable Bert E. Rathje, Chief Judge of the Circuit Court, Eighteenth Circuit;

The Honorable Charles Seidel, Judge of the Circuit Court, Sixteenth Circuit; and

The Honorable Jesse L. Simpson, Justice of the Supreme Court of Illinois, retired.

Your committee has prepared appropriate Commemorative Resolutions for each of the judges named. In the preparation of the Resolutions, the members of your committee were mindful of Justice Benjamin Cardozo's remark that "The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its satisfaction is a negligible good".

In nostalgic retrospection involving our past association both socially and judically with our deceased colleagues, our immediate response and reaction is certainly one of sorrow and regret at the loss and termination of remembered and treasured associations, and in many instances, friendships. In further and deeper reflection, our sorrow and regret are completely submerged and overwhelmed by the heritage which they have bequeathed to us, a heritage of not only performances of excellent judicial service in the greatest tradition of the law, but a constant adherence to the highest standards of ethics and deportment. May we hopefully muse that our deceased brethern, as spiritual reward, now sit in a collective banc as judges of a mythical Valhalla Court.

Mr. Chairman, I move that the Memorial Resolution for each of the judges who has departed this life since our last Conference be made a part of the permanent records of the Conference and that copies thereof be sent to their nearest relatives and to the clerks of the respective courts over which they presided, to be spread upon the records of said courts.

RESOLUTION

In Memory of

The Honorable William H. Chamberlain

The death of Judge William H. Chamberlain on October 12, 1972, removed from the Illinois judiciary a young Judge whose background and experience portrayed a most brilliant future.

Judge Chamberlain is survived by Carolyn Jenot Chamberlain, his wife, and Karen Sue, Lisa Lynn, William and Robert Chamberlain, his children, born in 1959, 1961, 1964 and 1968 respectively. We mention them by name because his family was his strength and purpose.

William H. Chamberlain was the son of Donald Chamberlain, a longtime Springfield newsman. Judge Chamberlain came to know the city and its politics well, knowledge that helped make a relatively short career brilliant.

Judge William H. Chamberlain was a graduate of Cathedral High School, Springfield, Illinois, Springfield Junior College, the University of Illinois, and the University of Illinois School of Law in 1955.

Judge Chamberlain in 1961 joined the staff of Governor Kerner and served as an assistant to the Governor and as liaison man with the Illinois legislature from 1961 to 1964. Upon the death of Charles Carpentier, Secretary of State of the State of Illinois, Governor Kerner's great faith in William H. Chamberlain prompted him to appoint William H. Chamberlain to fill the unexpired term. Thus at 33 years of age William H. Chamberlain became one of the youngest men to hold the high office of Secretary of State, holding that office from 1964 to 1965.

It is the consensus of opinion that had he chose to run for that high office, he could have been elected. Instead he determined to be a candidate for circuit judge of the Seventh Judicial Circuit, Sangamon County, Illinois. He was elected to the office of circuit judge on November 3, 1964. The decision made by Judge Chamberlain tells us of the high esteem in which he held the office of circuit judge, the position he held until his death. He was elected as Chief Judge of the Seventh Judicial Circuit, a tribute of the respect he had earned from his fellow judges.

Judge Chamberlain was a member of the Knights of Columbus, Illinois State Bar Association and Sangamon County Bar Association, and served in the Marine Corps. In 1961 he had written an article on

discovery in civil cases and in 1965 a review of new legislation. His death terminated a brilliant career.

The Illinois Judicial Conference extends to the family of Judge Chamberlain its deep and sincerest sympathy.

RESOLUTION

In Memory of

The Honorable Harry I. Hannah

Judge Harry I. Hannah was born on the 12th day of June, 1890, at Fithian, Illinois, and died on the 20th day of May, 1973. Judge Hannah married Vivian Britton. Mr. and Mrs. Hannah were the parents of three children, Norman Britton Hannah, born in 1919, Marilyn Hannah Crocker, born in 1925, and David Morgan Hannah, born in 1931.

As a high school student, Harry I. Hannah graduated from the Thornburn High School located in Urbana, Illinois, in 1909 and received an A.B. degree from the University of Illinois. He enrolled in the University of Illinois School of Law and received a Doctor of Laws degree from that institution in 1915.

Judge Harry I. Hannah commenced the practice of law and from 1923 to 1933 served as city attorney of the City of Mattoon and also served as assistant Attorney General of the State of Illinois from 1925 to 1933. He was elected circuit judge of the Fifth Judicial Circuit, Coles County, in 1947 and served the people of the Fifth Judicial Circuit and the people of the State of Illinois in that capacity to the date of his death.

Judge Hannah was a judicial scholar and was author of "Jury Instructions: An Apprraisal by a Trial Judge" printed in the University of Illinois Law Forum in 1963. He also wrote for the Illinois Bar Journal an article entitled "Instructions." His ability in the field of instructions, as well as in other fields, was recognized throughout the profession. He was selected as a member of the authoring committee on Illinois Criminal Pattern Jury Instructions.

As further recognition of his ability and judicial scholarship, by order of the Supreme Court, he sat on the Appellate bench for both the Fourth and Fifth Districts.

Many knew Judge Harry I. Hannah and association with him was always a pleasure. Judge Harry I. Hannah was a gentleman, always ready to assist, and his many varied interests and wide knowledge made association with him a stimulating experience.

The Illinois Judicial Conference extends to the family of Judge Hannah its deep and sincerest sympathy.

RESOLUTION

In Memory Of

The Honorable Warren J. Hickey

The Honorable Warren J. Hickey, Judge of the Circuit Court of Cook County, departed this life on May 12, 1973, leaving surviving his widow, Dorothy Hickey, nee Torgerson, and two children, James P. Hickey and Cathryn Ann Hickey.

Judge Hickey was born in Chicago on March 3, 1918. He attended St. Ignatius High School in Chicago and completed his undergraduate schooling at St. Viator College at Bourbonnais, Illinois. He graduated from De Paul University College of Law in 1941, was admitted to the Illinois Bar in the same year and commenced the general practice of law.

Judge Hickey as a practicing lawyer was nationally recognized as a brilliant trial lawyer, particularly in the personal injury field.

The acknowledgment and recognition by his peers of his success as a trial advocate is best epitomized by his election as President of the Illinois Trial Lawyers Association in 1962, of the Trial Lawyers Club of Chicago in 1951, of the Celtic Legal Society in 1970, of the Catholic Lawyers Guild of Chicago in 1971, and his appointment as a fellow of the American College of Trial Lawyers and of the International Society of Trial Lawyers.

Judge Hickey was appointed Judge of the Circuit Court of Cook County on March 1, 1973 by the Supreme Court of Illinois. His demise shortly after his appointment was a tragic loss to the judiciary, as his lawyer peers and his judicial colleagues strongly felt that the Illinois Bench would have been enriched by the wisdom, experience, talent and incomparable wit of Judge Hickey.

The Illinois Judicial Conference extends to the family of Judge Hickey its deep and sincerest sympathy.

RESOLUTION

In Memory of

The Honorable Ray I. Klingbiel

Justice Ray. I. Klingbiel was born on the 2nd day of March, 1901, in the City of Moline, Illinois, where he made his home until the time of his death on January 19, 1973. Julia Stone Klingbiel, his wife, died in 1972 and he is survived by Donna Klingbiel Simpson and Tom Klingbiel, his children.

Justice Klingbiel graduated from the United Township High School of East Moline, Illinois, in 1919, having attended elementary school of the same city, and enrolled in the University of Illinois, received his law degree from that University and was admitted to practice in 1924. He received an honorary Juris Doctor's degree from Chicago Kent Law School in 1964 and was a member of Phi Delta Phi professional fraternity.

From the time of his admission to the Bar, Justice Klingbiel was a busy, capable, active, and community-minded lawyer and public servant. He became justice of the peace of East Moline in 1925 and served until 1929, also in 1925 became city attorney of East Moline, which office he held for fourteen years and then became Mayor of East Moline until 1945, a period of six years.

In 1945 Ray I. Klingbiel was elected circuit judge of the 14th Judicial District and was re-elected to that position in 1951, having the background of a very active and able practitioner from 1924 to 1945. In 1953 Ray I. Klingbiel was elected to the Supreme Court and re-elected in June of 1957.

He was the first Justice elected permanent Chief Justice under the new Judicial Article for a term of three years, ending January 1, 1967.

Justice Klingbiel, during his term on the Supreme Court, demonstrated that he was a strong, capable and competent Justice. He participated in many outstanding and landmark cases affecting the future of Illinois law. Some of these were *Molitor v. Kaneland Community Unit District #302*, 18 Ill. 2d 11, 24 Ill. 2d 467; *Wolfson* v. *Avery*, 6 Ill. 2d 78; *People of the State of Illinois* v. *Richard Franklin Speck*, 41 Ill. 2d 177, and many other with which the profession is familiar.

He was a member of the American Bar Association, Illinois State Bar Association, Rock Island County Bar Association. During his busy career as a lawyer, mayor and Judge, he found time to be President of the East Moline Rotary Club, member of the Masonic Lodge as a 33rd

degree Mason and to serve as President of the Illinois Municipal League.

Justice Ray I. Klingbiel was a man, lawyer, and Judge and Justice of the Supreme Court of Illinois who has many good deeds to his credit and a man who has rendered substantial service to the people of the State of Illinois in the professional and public offices he has held.

The Illinois Judicial Conference extends to the family of Justice Klingbiel its deep and sincerest sympathy.

RESOLUTION

In Memory Of

The Honorable John J. Lupe

The Honorable John J. Lupe, Judge of the Circuit Court of Cook County, died on December 4, 1972, leaving surviving his widow, Ethel C. Lupe, nee Whaley, one daughter, Frances L. Mandebach, five grandchildren and seven great grandchildren.

Judge Lupe was born in Chicago, Illinois on June 25, 1888. He attended and graduated from Wendell Phillips High School and was graduated from John Marshall Law School and admitted to the Illinois Bar in June of 1909. Thereafter, he continued in the private practice of law until commencement of his judicial career in 1923.

Judge Lupe's judicial career, involving both trial court and Appellate Court exposures, was most extensive and exemplary. He had the longest, unbroken judicial career in the judicial history of Illinois. His distinguished judicial career of forty-seven years commenced with his appointment to the Municipal Court of Chicago in 1923 by Governor Len Small. He was elected to the same court in 1924 and reelected in 1930. He was elected to the Superior Court of Cook County in 1935, during his second elected term in the Municipal Court of Chicago. In 1944 the Supreme Court of Illinois appointed Judge Lupe as one of the Appellate Judges for the First District where he performed with distinction until 1946 when he resumed his trial court career. Judge Lupe continued to serve as a Superior Court Judge and then as a Circuit Court Judge to the date of his voluntary retirement on December 1, 1970.

Judge Lupe had a deep understanding and empathy for the feelings and problems of the practicing lawyers before him as well as for his judicial colleagues, which ripened into a mutual affection and respect.

He truly could be described as a learned judicial activist as demonstrated by his decisions upholding the constitutionality of Chicago's occupancy law, the State income tax and the State rent withholding law. His attainments, dedicated service and contributions to the law of our State were fully recognized and acknowledged by the many awards rendered him by the Justinian Society of Lawyers, John Marshall Law School, Tau Epsilon Rho law fraternity and the Decalogue Society of Lawyers.

To those of us who fortunately knew him, his memory is indelible.

The Illinois Judicial Conference extends to the family of Judge Lupe its deep and sincere expression of sympathy.

RESOLUTION

In Memory Of

The Honorable Francis T. McCurrie

Judge Francis T. McCurrie of the Circuit Court of Cook County passed away on May 21, 1973 at Chicago, Illinois. Surviving the Judge were his widow, Winifred, daughter, Mrs. Mary Crowder and a son, Thomas F. McCurrie.

Judge McCurrie received his college education and attended Law School at the University of Notre Dame, graduating with an L.L.B. *cum laude* degree in 1927. He was admitted to the practice of law in 1928 and remained in private practice until 1933 when he accepted the post of assistant State's Attorney where he remained for twelve years, until 1945. He then joined the office of Public Defender of Cook County and fulfilled that position until his election to the Municipal Court in 1954. In January of 1964 he became a Judge of the Circuit Court of Cook County in the transition that took place under the Judicial Article.

Judge McCurrie remained on the bench until his resignation in March of 1973.

The Illinois Judicial Conference extends to the family of Judge McCurrie its sincerest expressions of sympathy.

RESOLUTION

In Memory of

The Honorable James Oliver Monroe

Judge James Oliver Monroe died on the morning of June 7, 1973, in a tragic automobile accident. The judiciary and the people of the State of Illinois, particularly those of the Third Circuit, lost the services and rare gifts of a judicial scholar.

Judge Monroe was born on the 16th day of September, 1917, and is survived by his wife, Gertrude Renwick Monroe, and by his children, Kristen Renwick Monroe, born in 1946, and James David Monroe, born in 1951.

Judge Monroe was educated in the schools of Collinsville, Illinois, graduating from the Collinsville High School in 1935 and receiving his A.B. degree from the University of Illinois in 1939. Graduation from the University of Illinois Law School was in 1942. His social fraternity was Delta Chi, his professional one Phi Alpha Delta, and his scholastic fraternity Phi Betta Kappa.

Judge Monroe's origins were those that tend to produce scholarship. James O. Monroe, his father, was a weekly newspaper publisher, state representative and senator. Frieda Koch Monroe, his mother, a history teacher. His associations were those that tend to maintain scholarship. Gertrude A. Renwick Monroe, his wife, a Spanish, French and English teacher.

Judge Monroe was a member of the U. S. Treasury legal staff from 1942 to 1945, U. S. Air Force, and a member U.S. War Crimes Commission, and in 1946 Staff Judge Advocate U. S. Military Government in Korea. Things move rapidly for the qualified.

Out of the service and in private law practice in Collinsville, 1947 to 1957. In this period we see Judge Monroe serving as city attorney, assistant State's Attorney, President of the Madison County Bar Association, and then in 1955 secretary to the late Supreme Court Justice Harry Hershey.

1957 sees James Oliver Monroe elected as Circuit Judge of the Third Judicial Circuit and then on to Chief Judge in 1964 and President of Illinois Circuit and Appellate Judges Association in 1967.

During his years as lawyer and Judge he carried out his professional and judicial duties with zeal, scholarship and a high devotion, but for Judge Monroe this was not enough. He found time to write for the Hastings Law Journal of the University of California, the St.

Louis University Law Review and the Elementary and Secondary School Curriculum Study and New York Law Review. He also found time to write about the law on many topics—law for laymen, legal aid to low income groups, Illinois trial courts, magistrates and pre-trial procedure, an amazing scope of stimulating subjects.

Judge Monroe was a member of the American Bar Association, Illinois State and Madison County Bar Associations. He also had many interests outside of the field of his profession, being a member of the American Legion, Veterans of Foreign Wars and the St. Louis Public Question Club.

Judge Monroe brought to the judiciary and people of Illinois rare scholarship that few have the capacity to attain and fewer have the will and determination to maintain.

The Illinois Judicial Conference extends to the family of Judge Monroe its deep and sincerest sympathy.

RESOLUTION

In Memory Of

The Honorable Francis T. Moran

Judge Francis T. Moran of the Circuit Court of Cook County died on August 22, 1972. He was born in Chicago on October 5, 1906 and after attending DePaul College of Law was admitted to the Bar in 1933. He became an attorney in the securities department of the Secretary of State's office and served in that capacity from 1933 to 1937. He then entered into private law practice and subsequently served as master in chancery from 1937 to 1944.

After two years in the Armed Forces, Judge Moran was appointed assistant Corporation Counsel and subsequently an assistant State's Attorney of Cook County. In 1960 he was elected Judge of the Municipal Court of Chicago and four years later elected Judge of the Circuit Court of Cook County.

Surviving Judge Francis T. Moran were his wife Kathleen and a son, Francis T., Jr.

The Illinois Judicial Conference extends to the family of Judge Moran its sincerest expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Arthur J. Murphy

The Honorable Arthur J. Murphy, Justice of the Appellate Court of Illinois, First District, departed this life on March 9, 1973, leaving surviving his widow, Lauretta B. Murphy, nee Byrne, three children, a son, Arthur John, two daughters, Sister Cathleen Mary and Mrs. Joan Haggerty, eight grandchildren and a sister, Mrs. Catherine Peterson.

He was born in Chicago, Illinois on May 8, 1897 and attended and graduated from De La Salle High School. He graduated from the University of Chicago Law School and was admitted to the Illinois Bar in 1921. Thereafter, he engaged in the general practice of law until his election as Judge of the Superior Court of Cook County in 1953.

Judge Murphy served in the United States Marine Corps in both World Wars I and II. In World War I he participated in four major battle engagements, including Chateau Thierry where he was not only decorated for bravery in action but was also wounded, resulting in the loss of his left eye.

As above stated, in 1953 Judge Murphy was elected to the Superior Court of Cook County and was reelected in 1959. In 1957 the Supreme Court of Illinois appointed him to the Appellate Court of Illinois, First District. Thereafter, in 1964, Judge Murphy was elected to the Appellate Court where he continued as a Judge until his retirement on November 30, 1970 because of failing eyesight.

The Supreme Court of Illinois appointed Judge Murphy as chairman of a ten-man committee of judges, known as the Cook County Judicial Organization Committee, to restructure and implement the integrated Circuit Court of Cook County as mandated by the Judicial Article of the Illinois Constitution.

Judge Murphy contributed his great talent for organization and executive performance in acting as chairman of the Illinois Judicial Conference in 1957 and 1958 and as a member of said Conference's Executive Committee from 1957 to 1966.

Judge Murphy had an active interest in the welfare of the members of the Bar as exemplified by his membership on the Board of Managers of the Chicago Bar Association from 1948 to 1950 and his chairmanship of its Grievance Committee in 1947.

In his demise the Illinois Bench and the Bar have lost one of their dedicated and distinguished members and the Illinois Judicial Conference, one of its stalwart mainstays.

The Illinois Judicial Conference of 1973 extends to the family of Judge Murphy its sincerest expression of sympathy.

RESOLUTION

In Memory of

The Honorable Alexander J. Napoli

The Honorable Alexander J. Napoli, Judge of the United States District Court, died on July 12, 1972. He was survived by his widow, Helen M. and three sons, Thomas J., Robert A. and Richard G. Napoli.

Judge Napoli was born in Chicago on October 7, 1905, attended and was graduated from Curtis Elementary School and Fenger High School. He graduated from the University of Chicago with a Ph. B. degree in 1927 and completed his J.D. degree law curriculum at the University of Chicago Law School in 1929.

After his admission to the Illinois Bar in 1929 he engaged in the general practice of law until 1933 when he became an assistant State's Attorney. Judge Napoli was one of the most capable trial assistants in the Cook County State's Attorney's office, having served nearly eighteen years as prosecutor during the terms of three State's Attorneys.

In 1950 he was elected to the former Chicago Municipal Court where he served ten years until 1960 when he was elected to the former Cook County Superior Court. In addition to serving in jury, felony and narcotics courts, Judge Napoli was appointed acting chief justice of the criminal court in 1963 and became the presiding judge of the Criminal Division of the unified Circuit Court of Cook County in 1964 when the Judicial Article went into effect. Judge Napoli lectured on special courses for prosecutors at Northwestern University prior to his appointment to the Federal Court.

President Johnson appointed Judge Napoli to the Federal District Court effective October 17, 1966 where he served until his death. He was the first Italian-American appointed to the Federal District Court in this area.

Judge Napoli had an enviable record, first as a practicing lawyer, then as an expert trial assistant for the State's Attorney's office of Cook County, and twenty-two years as a distinguished jurist whose reputation was unblemished and integrity unchallenged.

The Illinois Judicial Conference extends to the family of Judge Napoli its sincerest expressions of sympathy.

RESOLUTION

In Memory Of

The Honorable Herbert C. Paschen

Judge Herbert C. Paschen of the Circuit Court of Cook County died on August 9, 1972, leaving as survivors his wife, Helen, a son, Herbert C. Jr., and a daughter, Mrs. Caroline O'Connell. A Chicago newspaper paid tribute to Judge Paschen in an editorial following his death which read in part:

> "He established a reputation as a firm but fair Judge, and was widely respected for his scholarship and integrity. No suspicion or appearance of impropriety ever attached to his name."

Judge Herbert C. Paschen was born in Chicago, Illinois on July 9, 1905, was educated in Chicago schools and received his law degree from Northwestern Law School in 1929. For several years he worked in the building contracting firm headed by his father. Judge Paschen won his first elective office in 1950 when he was elected Democratic committeeman for New Trier Township and, two years later, ran unsuccessfully for Lieutenant Governor. He was elected Cook County Treasurer in 1954 for a four-year term. However, in 1956 after he became the Democratic gubernatorial nominee, he subsequently withdrew in the midst of a probe of the County Treasurer's office, stating he "preferred to devote all of his energy and time to repel attempts to becloud my reputation." The Chicago newspaper editorial further states:

> "When he died at the age of 67, Herbert Paschen had done all of that and much more."

Judge Paschen returned to private law practice in 1958 after his term as County Treasurer and continued as master in chancery of Cook County, an appointment he held for 20 years. He was elected to the former Superior Court of Cook County in 1962 and in 1964 he was transferred to the Criminal Division of the Circuit Court of Cook County. It was during his assignment to the Criminal Division that Judge Paschen gained national publicity as the Judge in the Richard Speck trial. Speck was accused of murdering eight nurses. Judge Paschen transferred the case to Peoria to cut down on massive publicity surrounding the case. He never discussed the case, even in chambers. The trial concluded in April, 1967 with Speck's conviction and a sentence of death by Judge Paschen. The sentence was subsequently reversed by the United States Supreme Court when it voided death penalties in cases where jurors who opposed capital punishment were rejected.

The editorial referred to concluded:

"To many it will seem that the Court's gain was politics' loss. Judge Paschen will be missed."

The Illinois Judicial Conference extends to the family of Judge Paschen its sincerest expressions of sympathy.

RESOLUTION

In Memory of

The Honorable William Braxton Phillips

William Braxton Phillips was born on the 7th day of August, 1913, at Ridgway, Illinois, and died on the 27th day of February, 1973. Judge Phillips is survived by Vera Dorothea Britton Phillips, his widow, William Braxton Phillips III, born in 1948, and Valerie Jean Phillips, born in 1950, his children.

Judge Phillips graduated from the Ridgway Community High School in 1931 and in 1938 from the Pennsylvania State College of Optometry. In a change of profession, Judge Phillips enrolled in the University of Illinois and obtained his law degree in 1954. He was a member of Phi Sigma Kappa social fraternity and the professional fraternity of Phi Theta Epsilon.

After graduation from law school Judge Phillips served as master in chancery of Gallatin County and held that office from 1957 to 1960. He was assistant Attorney General of the State of Illinois from July, 1959 to December of 1960 and in that year became State's Attorney of Gallatin County and served the people of the State of Illinois in that position until 1962.

Judge Phillips became a magistrate of 15th Circuit, Ogle County, Illinois, in September, 1967, and continued in that position to December of 1968 when he became Associate Circuit Judge of the 15th Circuit in Ogle County, Illinois.

Judge Phillips was a member of the Illinois State Bar Association, Ogle County Bar Association, American Legion and Veterans of Foreign Wars. Judge Phillips was a man of many interests and much experience as is demonstrated by his educational and professional background.

The Illinois Judicial Conference extends to the family of Judge Phillips its deep and sincerest sympathy.

RESOLUTION

In Memory of

The Honorable Bert E. Rathje

Judge Bert E. Rathje was born on the 28th day of March, 1900, in Wheaton, Illinois. He died on the 15th day of September, 1972, having lived a useful life of seventy-two years in the City of Wheaton.

Judge Bert E. Rathje is survived by Margaret Peironnet Rathje, his wife, and Sue R. Block, born in 1936, Margot R. Moenning, born in 1938, S. Louis Rathje, born in 1939, and Linda R. Barnes and Lois R. Boecker, born in 1941, his children.

Judge Rathje graduated from Beloit College in 1918 and from Northwestern University School of Law in 1922 and upon graduation entered the practice of law.

In 1950 he became Probate Judge of DuPage County, Illinois, and served the people of DuPage County in that capacity until 1957. In that year Judge Rathje was elected Circuit Judge of the 18th Judicial Circuit, DuPage County, Illinois.

Judge Rathje was held in high esteem by the people of Wheaton, Illinois, and commanded the respect of his fellow judges, being selected by them as their Chief Judge in 1964. Judge Rathje served as Chief Judge until his death in September of last year.

He was a member of the Moose Lodge and an active and respected member of the community of Wheaton during his entire professional life.

The Illinois Judicial Conference extends to the family of Judge Rathje its deep and sincerest sympathy.

RESOLUTION

In Memory of

The Honorable Charles G. Seidel

Judge Charles G. Seidel served as Judge of the Circuit Court of the 16th Judicial District for twenty-three years. Judge Seidel was born on the 28th day of September, 1893, and died on the 22nd day of February, 1973, at the age of seventy-nine years. Between the two dates experience became wisdom. Now that wisdom is lost and can not be replaced. Judge Seidel is survived by Helen M. Seidel, his wife, and Joan M. Seidel, his daughter.

Judge Seidel graduated from the Elgin High School, Elgin, Illinois, attended the University of Illinois, and received his law degree from the University of Michigan in 1917. Judge Seidel commenced the practice of law in Elgin, Illinois, in 1919 and became one of the best trial lawyers in Kane County. In 1940 he decided upon a public career and ran for the office of State's Attorney. He served the people of Kane County in this capacity until 1950. He was elected to the bench of the County Court of Kane County in 1950 and served as Judge of that court until 1958. He was on the bench at Geneva in Kane County for twenty-one years without opposition. He has served as Chief Judge of the circuit and was elected as chairman of the Illinois Conference of Chief Circuit Judges in 1963.

Judge Seidel acquired a vast experience in his career as a lawyer, prosecutor and Judge, yet he never lost his faith in people. He possessed the ability, despite or because of his years of experience, to understand youth, its problems and indiscretions. He believed that the law should be equally enforced and punishment judiciously applied.

Judge Seidel served as an officer in the Navy, was a member of the Masons, Elks, Eagles and Moose Lodge, the American Legion and the American, Illinois State, Elgin and Kane County Bar Associations. He was, as someone said, a "Judge who understands the people."

The Illinois Judicial Conference extends to the family of Judge Seidel its deep and sincerest sympathy.

RESOLUTION

In Memory of

The Honorable Jesse L. Simpson

Eighty-nine years ago Justice Jesse L. Simpson was born. A long and useful life was terminated on May 7, 1973.

He was a native of Troy, Illinois, but spent most of his life in Edwardsville. Justice Simpson received his law degree from Illinois Wesleyan University in 1909 and commenced the private practice of law in Edwardsville that same year.

Justice Simpson was active in professional, business and community affairs throughout his long life. Justice Simpson started his long productive working life as railroad section hand and then became a telegraph operator. After admission to the Bar he became city attorney of the City of Edwardsville.

He was elected to the Madison County Circuit Court in 1946, and the following year by a special election was elected to the Supreme Court, and during his last year on that Court served as Chief Justice.

Justice Simpson served as President of Edwardsville Savings and Loan Association and was a member of the Illinois Commerce Commission from 1952 to 1963.

On May 7, 1973, a long, active, productive and useful life of service was ended.

The Illinois Judicial Conference extends to the family of Justice Simpson its deep and sincerest sympathy.

REPORT OF DISCUSSIONS

Topic I—EVIDENCE LECTURE

Hon. Prentice H. Marshall

PROPOSED FEDERAL RULES OF EVIDENCE

Over the past six years, I have looked forward to each of these opportunities to work with you and with the associate judges and their seminar. I stand before you today in a slightly different vocation than I have over the past five years. I want to thank all of you for your attention and hospitality over these past years. I don't know whether this is a swan song, but I certainly don't intend to pass up the opportunity to come and visit with you. On the assumption that this may be my last opportunity to speak to all of you collectively, I do want to tell you how great it has been for me to work with you over these past five or six years. As you all know, I practiced for about fifteen years before I went into teaching. The experience that I learned there I have tried to bring to you as I did to my students, but I must say in retrospect the collective experiences that you brought to me were far more beneficial than I brought to you. In short, I have been the learner and it has been a very pleasant learning experience.

In addition to that, many of you over the years have taken the opportunity of these conferences to volunteer to participate in our advocacy program at the University of Illinois. I don't say this boastfully, but I do want you to know that it has been recognized as one of the outstanding advocacy programs in the country. The thing that amazes people throughout the country when we describe the program to them is the high degree of actual judicial involvement in it. So frequently moot court programs or trial advocacy programs are run entirely by law professors, and many of them have never set foot inside a courtroom, let alone sat on the bench. The dimension of a real judge presiding over student cases has been, I believe, the single most significant dimension which has made the Illinois program what it has turned out to be. So for that added reason, I owe to all of you who participated my real sincere thanks.

Now to the business at hand. When we completed the series of five lectures last year, we were in some state of concern as to where we should go from there. While it may be appropriate, in view of my recent change in vocation, that I be here to discuss with you the proposed Federal Rules of Evidence, this idea was hatched at our last

conference. At that time, the Federal Rules were moving along on a rather smooth course, and in November 1972 they were approved by the U.S. Supreme Court and were transmitted to the Congress under the Federal Rules Enabling Act. It was in that context that I suggested to the executive committee that this might be a good way station to take a look at the Federal Rules, with the thought that as the Federal Rules of Civil and Criminal Procedure stimulated a significant amount of procedural reform, so too might the Federal Rules do likewise. The thought was that we might stimulate some interest on the part of this group to consider the creation of a committee, which would take the Federal Rules and adopt them here in Illinois. I have not departed from that hope.

Illinois is essentially a common law evidence State. We do have some statutory provisions, particularly in the areas of privilege and incompetency of witnesses. But, essentially, we are a common law State and our Supreme Court does have supervisory powers which Mr. Justice Kluczynski discussed with you. Thus, we can go the way of evidence modification in this State by way of court rules or statute.

The American Law Institute proposed a Model Code of Evidence some years ago, which was ultimately approved by the House of Delegates of the American Bar Association. It has not been adopted anywhere. It stands as a good review, a good source book for evidentiary rulings. The commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence, and they have received rather substantial approval and adoption in Kansas and in New Jersey. California, several years ago adopted a very expansive evidence code. On the whole, however, the history of evidence codes has been rather grim. Regrettably, that appears to be the current status of the Federal Rules.

After the Court approved the Rules in November under an effective date of July 1, 1973, the Congress took hold of the matter. First it passed a bill, which the President approved in April, which expressly states that the Rules will not become effective until they are explicitly approved by the Congress. Now a sub-committee of the House Judiciary Committee has reported out a proposed Federal Code of Evidence, which finds for its basis, much of the pending Rules, but also, I must say, emasculates certain portions of those Rules.

If you are interested in the House Committee's suggested Code, you may obtain it from the publishers of United States Law Week. The June 17th issue had a special supplement and, I believe that the supplement is available to you at a very modest charge.

Despite the present status of the Federal Rules, I think that it is worth our time to review them as they were promulgated by the Supreme Court, with some footnotes as to what has happened to them under the pending House version. I am not going to discuss them in

order. They have been reproduced for your consideration in the reading materials that you have. I urge you to use them as a reference in your grappling with evidence problems during the course of trials in your court.

What we will do today is to take the Federal Rules and break them down into what might be denominated as procedural evidence rules and substantive evidence rules. The order we are going to take them in may seem to skip around a bit. The Rules themselves have that tendency. They start, as we once did, with the responsibility of the court and of the lawyers, particularly, to require that objections be specific. I urge you to adhere to that attitude.

The objection to proof is the equivalent of a pleading. The offeror of proof is entitled to know the grounds of the objection and the basis for the court's ruling. If the objection is specific and well-stated, your sustaining of it is notice to the offeror as to what the defect is; but if the objection is general and it is sustained, the offeror has no notice of the defect.

I had occasion recently to read an appellate court opinion. It was a federal case, I am pleased to say at least to this audience, in which the writer said that the court had read 1,000 pages of transcript and there were only 90 pages of evidence in it. All the rest consisted of the following:

"1st Counsel: Objection
Court: Sustained

2nd Counsel: Your Honor, may I have reasons for your ruling?
Court: I am not conducting a course in evidence. Ask your next question.
1st Counsel: [After question propounded] Objection
Court: Sustained

2nd Counsel: If the Court please, I believe that the subject matter that I am seeking to prove is relevant and I believe I am properly phrasing my question. Might I have the basis for your Honor's ruling?
Court: Counsel, as I said to you a moment ago, I used to teach evidence, but I don't anymore. This is a courtroom, not a classroom. Ask your next question."

It is amazing to me that the lawyer had the tenacity to hang in for 1,000 pages of transcript under those conditions. I think I would have broken down and cried at the end of an hour. The specific objection should be insisted upon. I think that if you do so, you will find that the lawyers in your courtrooms will sharpen up and while it may

seem to slow you down a bit at the outset, in the long run I think it will speed up the trial of your cases.

If the proof is excluded, unless the question clearly disclosed the nature or the purpose of inquiry, the offeror of proof is held to the responsibility of making an offer of proof. The Federal Rules opt for the question and answer method. In the bench trial, it can be taken right at the time of the inquiry. In a jury trial, it can be taken at the first available recess when the jury is excused.

The narrative offer by the lawyer is acceptable, but reviewing courts on occasion, are troubled by narrative offers because they doubt that the offering lawyer is going to be able to prove that which he or she offers to prove.

The Federal Rules, as they were promulgated by the Court, contained a specific provision in Rule 105, which authorized trial judges to sum up the evidence and comment on it. This has been traditional in the federal courts. Of course, it is a clear part of the practice in Great Britain. The House Resolution, which proposes the new Federal Code, deletes it upon the grounds that it is the practice and the necessity for the rule is questioned. Here, in the Northern District of Illinois, I am told the judge's opportunity to comment is not engaged in very extensively because many of the judges are the products of the Illinois State court system where, of course, comments on the evidence and, particularly on the credibility of it, are forbidden.

Competency of witnesses is one of the areas that the Federal Rules made one of the greater leaps forward and its proposal, interestingly enough, has survived the House of Representatives' action. Rule 601 of the Federal Rules expressly provides that every person is competent to be a witness, except as otherwise provided by the Rules. The result, as far as the trial of cases in the federal court is concerned, is a doing away with the old rules of competency, such as the Illinois Dead Man's Act. The Court of Appeals of this circuit in diversity cases had held the Illinois Dead Man's Act applicable. Rule 601 will do away with that.

We have proposed in Illinois an amendment to our Dead Man's Act. The last information which I have, which was provided to me today, is that the Governor, as yet, has not signed the amendment to section 2 of the Evidence Act; but Senate Bill 132, does significantly amend the Illinois Dead Man's Act so as to limit its use to conversation with the decedent or events which took place in the decedent's presence. You will recall our existing Dead Man's Act renders incompetent any party adverse to an heir, legatee, executor or administrator, or guardian or trustee of an incompetent to testify to anything during the course of a trial...subject to a half a dozen exceptions. It is not limited to conversations with the decedent or to events occuring in the decedent's presence.

The proposed amendment to the Illinois Dead Man's Act limits the prohibition, but it doesn't limit it enough. The time has come to do away with the Dead Man's Act prohibition and content ourselves with the question of the credibility of a surviving party to a transaction with a decedent.

Under the Federal Rules, there are two express exceptions with respect to general competency. The judge may not testify in the case on trial before him and a juror may not testify in the case in which the juror is sitting as a juror.

The impeachment provisions of the Rules are very liberal. They provide that the credibility of a witness may be attacked by any party, including the party calling him. We still require in Illinois other than, of course, the adverse witness situation, some showing of suprise. We have a turn-coat rule, which I think is reasonably effective. But there are certain conditions precedent to it which we can get away from. We should permit impeachment, particularly by prior inconsistent statements, by any party, including the party who has called the witness. The House Resolution, incidentally, leaves that general impeachment rule intact.

The Federal Rules permit impeachment by way of reputation in the community for untruthfulness; i.e., opinion testimony that the witness is untruthful and would not be believed under oath. Rehabilitation by countervailing testimony is permitted only in the event there has been an initial attack on the credibility of a witness. Misdeeds, which are relevant to truthfulness or untruthfulness, are admissible even though they have not been reduced to a conviction. Here, however, the Rules expressly provide that collateral evidence of the misdeeds is not admissible. If the witness denies the impeaching conduct on cross-examination, the cross-examiner is precluded from introducing collateral proof.

This type of impeachment has not been approved in Illinois. There are some cases that talk about the right of the jury to know the general background of a witness, but we have generally refrained from permitting this type of cross-examination. My inclination is to adhere to that preclusion. I have the feeling that the cross-examination, although denied, carries with it a significant innuendo which, perhaps, unfairly attacks the credibility of the witness. It puts the witness himself on trial and has a tendency to move down the line of the collateral issues.

The Rule with regard to impeachment by prior convictions has moved back and forth rather substantially. As it was submitted by the Supreme Court to Congress, impeachment was permitted if the prior conviction carried with it an incarceration in excess of a year or if the prior conviction involved dishonesty or a false statement. There had

been an earlier draft in the Rules which stated that the trial court, in dealing with what we might loosely denominate felony impeachment, would conduct a hearing to determine whether the prejudice that followed through the disclosure of the conviction outweighed the relevancy of the conviction for the purposes of impeachment. That latter discretionary provision was removed from the final draft of the Rules, and the House Resolution has now put it back in. I think that that type of hearing might have a tendency, on occasion, to enlarge, briefly, the trial of a case. But I must say that insofar as the defendant on trial in a criminal case is concerned, there should be lodged in you, as trial judges, a substantial degree of discretion as to whether you will permit the defendant to be impeached by a prior conviction. In your discretion you may conclude that the disclosure of the conviction will so prejudicially affect the case that it will significantly outweigh any probative value the conviction has for purposes of credibility.

Of course, in the *Montgomery* case in Illinois (47 Ill. 2d 510 (1971)), our Supreme Court pretty well emphasized the Federal Rule as it then existed and, now, in a more recent case the Court does bring the impeachment rule up to the current status of the Federal Rules.

As far as the procedure of interrogation is concerned, federal courts throughout the country have traditionally held to the notion that cross-examination, except of a party, is limited in subject matter to the scope of direct, plus inquiry reflecting on credibility. Federal Rule 611 (a) proposed to abolish that limitation and open up the so-called British rule of cross-examination, in which any witness is regarded as a witness in the case and can be cross-examined with respect to any relevant subject matter so long as the answers are otherwise admissible. The House has rejected this proposal, and has gone back to the limited scope of cross-examination. I was disappointed when I saw that because the problems which are occasioned by limiting the scope of cross-examination outweigh the alleged benefits.

As far as the form of questions is concerned, the Federal Rules, as we would expect, limit the use of leading questions to cross-examination save in those instances where they are necessary for other purposes; for example, to refresh recollection on direct.

We made a contribution to the proposed Federal Rules as they came out of the Supreme Court as far as a writing used to refresh recollection is concerned. Illinois decided the *Scott* case (29 Ill. 2d 89) about twelve years ago in which our Supreme Court concluded that memoranda used by a witness for the purposes of refreshing recollection prior to testifying should be available for use on cross-examination and that it was no longer necessary that the memoranda be used while the witness was on the stand. The initial draft of the Federal Rules adopted that attitude. The House has now backed off saying that a writing used while the witness is on the stand is available as a

matter of right for cross-examination, but requests for writings used prior to the witness taking the stand are addressed to the trial court's discretion.

The Federal Rules explicitly authorize the court to call and interrogate witnesses. They also recognize that an improper examination by the judge is subject to objection, and they go on to say that counsel should be afforded the opportunity of making the objection out of the presence of the jury in a jury case. In the years that I was trying cases, on more than one occasion I found it necessary to object to an interrogation by the court, and on more than one occasion, I have had judges say to me, "You can't object to my questions." I know that we are divine, but we are not infallible. If our questions are objectionable, they must be objected to. There are a number of reviewing court decisions to the effect that if counsel fails to object to the court's interrogation, error is waived.

Well, that is a brief summary of the procedures of evidence under the proposed Federal Rules.

Turning to the subject that I denominate substantive content of the Rules, the first topic I would like to discuss with you, briefly, is the subject of privileges. The Rule proposers made a valiant effort to do something with the subject of privileges. Regrettably, the House Committee has adopted a single rule, which states that the subject of privileges shall be determined by common law as interpreted on a case by case basis, and the Committee has abandoned all efforts at codification. The Rule proposers had taken quite a different view of it. They first acknowledged that no witness has a personal right to refuse to testify other than as provided by the Rules, statutes of Congress or the Constitution, and they proceeded to articulate what they regarded as the most significant areas of privilege.

Let's reflect for a moment on what a privilege is. We can presuppose in this area that the content of a communication would be relevant in the controversy and it would not violate other standards of admissibility; e.g., the hearsay rule.

Generally, privileged communications would be admissible as admissions and as an exception to the hearsay rule, were they not privileged. The Rule writers attempted to codify the attorney-client privilege, which of course, pertains in all jurisdictions of this country. In Illinois, it is a common law privilege. The Rule writers tried to make it a codified privilege. They did a couple of things which are worthy of mention. They protected against the eavesdropper in the attorney-client privilege. The general rule has been if an eavesdropper hears a conversation between a lawyer and a client, the eavesdropper may testify to it. The Federal Rules held that the communication was privileged if made in circumstances reasonably conducive to privacy. I thought that was an improvement on the attorney-client privilege.

The Federal Rules of discovery still give some recognition to the old work-product doctrine; there must be a showing of need before work-product statements will be disclosed. But the attorney-client privilege stood as a safeguard when the lawyer interviewed corporate employees. You may recall that there has been a good bit of a struggle as to who can communicate confidentially to the lawyer on behalf of the corporation. The so-called control group test came out of anti-trust litigation in the *Westinghouse* case (210 F. Supp. 483) in which the court concluded that only those who sought and could act on the lawyer's professional advice spoke confidentially. Then the Seventh Circuit decided the *Harper & Row* case (423 F.2d 487, aff'd without opinion 400 U.S. 955) which enlarged the scope significantly to include those who were instructed by the control group to communicate with the lawyer. As a practicing lawyer, I found that more compatible with my understanding of my responsibility to my client.

The Rule writers struggled with the corporate privilege. They tried one formula in an early draft and in another later draft, and then they finally abandoned it. They did not undertake to define the "representative of the client". Rule 503, which concerns itself with the attorney-client privilege, is rather cumbersome. Judge Fiedler spoke to me about it briefly during the recess. It is cumbersome, but I do think that, with the exception of the fact that the draft plan backed away from defining the "representative of the client," they did a good job of preserving the attorney-client privilege.

They abolished the doctor-patient privilege in the traditional sense, and there was an extraordinary hue and cry over that. I don't know why. Evidently, there are some jurisdictions in which the doctor-patient privilege is significant. In Illinois we codified it and the exceptions.

They did preserve and sought to define a psychotherapist-patient privilege, and they enlarged it a little beyond that which is prevalent in most jurisdictions by including a medical practitioner who gives psychotherapeutic advice. That is to say, if the family doctor functions in the role of a psychological counselor, the privilege would pertain there.

The husband-wife privilege under the proposed Rules should be denominated as one of competency. It is limited to criminal prosecutions, and prohibits either spouse from being called to testify against a defendant-spouse except in those instances where the testifying spouse is the victim of the crime. This is a carry over from common law competency.

Communications to clergyman was reserved by the Rules. Political vote and trade secrets were likewise recognized. The trade secret problem is one that has always been troublesome, particularly in significant commercial litigation involving the assertion of trade secrets.

One that brought on the rath of Senator Ervin was the so called "secrets of state and other official information" privilege. Secrets of state were defined as information relating to defense or international relations. Official information was defined as information within the control of a governmental agency, the disclosure of which is shown to be contrary to public interest. The assertion of the secrets of state privilege is limited to the chief officer of the agency involved. Official information may be asserted by any lawyer representing the government. A hearing was required with respect to whether a disclosure would be contrary to the public interest. There were sanctions imposed and made available against the government, if the government was the party in the case and it asserted the privilege so as to frustrate the elicitation of relevant proof. In both civil and criminal cases, the defense could be stricken; the briefs could be stricken; and even the testimony could be stricken. And the charges could be dismissed.

The identity of the informer was codified, and was enlarged to accommodate the rather substantial amount of litigation which is in the federal court involving a state being sued.

There was no journalist privilege recognized by the Rules. It was concluded that it was more appropriately a First Amendment question. There was no accountant's privilege recognized by the Rules, unless the accountant was connected with an attorney as an attorney's representative in the preservation of the attorney-client privilege. There was no social worker or psychologist privilege as we have in Illinois. The whole area of privilege was significantly circumscribed by the Rules. It was a step in the right direction in view of our overall commitment to the reception of all relevant data, but as I said at the outset, the House Committee concluded that there should not be an effort to codify privileges. They have swept them all away, substituting a simple statement that privileges will be determined on a case by case basis in light of the common law.

The next substantive matter that I want to discuss is hearsay. When the hearsay rules were first proposed, they generated a substantial amount of controversy, more emotional than reasoned controversy. Taking them analytically for a moment, you may recall from our discussion of hearsay a couple of years ago, we saw that Illinois has a couple of cases that embrace the doctrine of non-assertive conduct hearsay. The *Bush* case (300 Ill. 532) is the leading case in Illinois. In that case the witness testified to the conduct of another person. That conduct was relevant only with regard to establishing the belief of the other person, and that belief was being transmitted to prove the truth of the matter believed. The Illinois Supreme Court concluded that that was inadmissible, non-assertive conduct hearsay. The Federal Rules rejected that concept and said that hearsay conduct was proscribed only if it was intended as an assertion, such as the accusing finger.

The Rules also treat admissions by a party opponent as non-hearsay, and this, it seems to me, was a rather conceptualistic approach which really didn't advance things a great deal. The important aspects of the admissions doctrine is the treatment of statements made by agents or servants. Again, going back to our discussions of a couple of years ago, the Illinois cases pretty well require that the employee or servant have what is commonly known as speaking authority. There is an Illinois case involving a room clerk in a hotel which caught fire. The day after the incident, he admitted that "X" had been a guest of the hotel at the time of the fire. It was a death action against the hotel, and the identity of the decedent was an issue in the case. Our Appellate Court ruled the room clerk did not have the authority to make that admission, which would be admissible against the principal. It was a hearsay declaration, and it was inadmissible against the principal because the room clerk didn't have the authority to make the admission. The Federal Rules reject that speaking authority concept. The declaration of an agent or servant concerning a matter within the scope of his agency or employment and made during the existence of that relationship are admissible against the principal.

Another non-hearsay treatment under the Federal Rules, and the one that I think generated the greatest controversy, was the prior inconsistent statement. We have litigated this question recently in Illinois in *People* v. *Collins* (49 Ill. 2d 179 (1971)) where our Supreme Court was asked to adopt the Rule 801 treatment and refused to do so. Rule 801, as it was sent to Congress, said that the prior inconsistent statement of a witness who testified at the trial or a hearing is not hearsay. The consequence was that it would not be limited to purposes of impeachment. Many trial lawyers were distressed by that. I heard an angry statement that, well, all they have done is approved *ex parte* depositions.

The House Committee has amended the Rule to provide that prior inconsistent statements made under oath with penalty of perjury during a deposition, preliminary hearings, or grand jury hearing will be admissible to prove the truth of the matter asserted, if the declarant testifies during the trial or hearing. I think on balance their decision was a wise one.

Now, the Rule writers did us a great favor. They catalogued exceptions to the hearsay rule, and I truly commend them to you. They start with one with which we are not particularly familiar in Illinois; that is, the so called present sense impression in which the declarant, not necessarily in an excited fashion but as the matter is unfolding before him, recites what he is observing. Most judges in applying the present sense impression rule would insist that there be a showing of no motivation to fabricate.

The balance of the exceptions read like a good familiar catalog,

and we won't go over them here. I do recommend them to you as an exceptionally good hearsay check list.

The Rules do contain another good reminder in the area of hearsay, and that is Rule 806, which authorizes the impeachment of the hearsay declarant. A good many hearsay exceptions involve situations where the declarant is not available. Even if the declarant were available, generally he does not testify. It is the witness on the stand who testifies to the hearsay declaration. Take, particularly, the witness on the stand who is more credible than the hearsay witness would be. We have a problem with impeachment by a prior inconsistent statement because we don't have the declarant available to lay the foundation. Rule 806 permits, and the Illinois cases also allow, impeaching the hearsay declaration when it is received as an exception by showing that the hearsay declarant on a prior occasion made a statement inconsistent with that which has been offered.

Back in 1968 when we first got together at the Center for Continuing Education, one of the first topics I undertook with you was presumptions. Certainly there is no more challenging subject in the area of evidence. Here the Federal Rules made a great effort at simplification. I think that they achieved it.

You may recall the split between Wigmore and Morgan. Wigmore maintained that contradictory proof bursts the bubble of the presumption and causes it to vanish. Morgan asserts that a presumption with any real vitality shifts the burden of persuasion to the person against whom the presumption has been directed. The Federal Rule writers adopted the Morgan approach and provided very distinctly that the presumption imposes on the party against whom it is directed the burden of proving the non-existence of the presumed fact to be more probable than its existence. They concluded that presumptions were available in criminal cases that did not violate the due process standard of proof beyond a reasonable doubt, and that a jury could be instructed with respect to the existence of the presumption. But if the presumption went to an ultimate issue in the case, then the jury must be instructed as to the basic fact of proof beyond a reasonable doubt. The government, of course, must sustain the burden of proving guilty beyond a reasonable doubt.

Opinion testimony has always been a vexing subject. Here again, I thought that the Rule writers took the existing state of law, the case decisions, and brought them together quite well. As far as opinion testimony by a layman was concerned, the Rule requires that they be rationally based upon personal perception, and that they be helpful for a full determination of the cause. What we are talking about in "helpful to the determination of the cause" is the old doctrine where the lay persons speaks in opinion terms. Does it help the witness to communicate with the fact-finder what the witness believes he or she

perceived and are those opinions predicated upon personal observations by the witness? I think that really is the state of the law as far as lay opinions are concerned in Illinois.

In the area of expert testimony, the Rules again made an effort at simplification. Perhaps, after what I have been doing for a couple of years and what you, ladies and gentlemen, have been doing for many years, I will change my mind. But in essence what the Rules propose is that the expert witness should be able to come in and express an opinion without initial disclosure of the underlying data upon which that opinion is based. Thus the extraction of the data can be deferred until cross-examination.

The Rules speak to the problem of authentication and identification of documents and other tangible things. Again, I commend them to you as a good distillation of what we might characterize as the common law of authentication. One in particular that I would like to call to your attention is Rule 902 which concerns itself with the authentication of trade inscriptions and the like. Over the years there has been a lot of litigation relating to whether a can says Green Giant on it is a hearsay declaration that Green Giant produced the can of peas. There are decisions to the effect that it is hearsay and that without first hand authentication and identification of the can, the can should be inadmissible. The Federal Rules take the position that those labels and legends are presumed authentic. Their self-authentication is equivalent to the rule that we have in Illinois: The name appearing on the side of a vehicle is the name of the owner. It comes in despite its analytical hearsay problems.

Article X of the Federal Rules concerns itself with what we in Illinois call the best evidence rule. It concerns itself with the contents of writings, recordings and photographs. I do want to remind you that the best evidence rule, or the so called original document rule, speaks essentially to the contents of the writings. It is not related to other tangible things. It goes back to the days when there were many things which could be done only in writing. It also goes back to the days when copies were done by hand, and in the process of the transcriber making the copy, omissions were not infrequent. Thus, if the contents of the document were material and relevant to the controversy, the requirement was to reproduce the original or explain the inability to do so. With the advent of means of reproductions, starting with carbon copies, tracing machines and tracing paper, and coming down to Xerox machines and so forth, there has been a tendency to liberalize, or shall we say to render more admissible, what we might be tempted to call copies. The Federal Rules suggest that duplicates of a writing should be received in evidence as the original, unless there is a general question as to the authenticity of the original, or it would be unfair in the circumstances to permit a duplicate to be used. That is a pretty sophisticated recognition of modern xerography, and I think it is called

for. In my experience as a lawyer, on more than one occasion I was distressed to find that Xeroxed copies purporting to be that of an orignal were really something that has been altered by resorting to an opaque material that is available. Then a second Xeroxing of a Xeroxed copy was made so that the untrained eye could not really discern that there had been any significant alteration in the writing. I think these are things that you have to be alert for. The best evidence rule, or the original writing rule, is a protection against it. There has been a movement to dispense with the original writing rule, and I am pleased that the Federal Rule makers did not do that, and instead found that there was still some significant vitality to the rule.

Rule 1007 speaks to the proof of the contents of the writing by testimony, by a writing or by an admission of a party. If a defendant in either a civil or criminal case has made an admission with respect to what the contents of a writing are, his admission is admissible against him as a hearsay exception. Under the Federal Rules that obviates the original document or best evidence problems. There is not a great deal of authority existing on this in Illinois, but my reading of the Illinois cases indicates that the best evidence rule does obtain, despite the fact that there has been inadmissible admissions of the party with respect to the content of a particular writing.

The last subject that I want to touch upon is relevancy. Again, I commend the Rules to you as a good effort to state succinctly what the contents of relevancy are, as well as some of the recurring relevancy problems that we encounter in the trial of cases.

Of course, we are concerned with probability here. The whole problem of relevancy is one of circumstantial proof. At least, when I analyze evidence problems, I still think in terms of materiality addressing itself to the issues in the case. If there is an issue in the case, the proof speaking to it is material; but if there is no issue of, let us say, contributory fault, then proof, which might tend to prove the contributory fault, is immaterial. Relevancy, on the other hand, is not so much issue oriented as qualitatively orientated. It is a circumstantial problem. What do we ask? We ask whether it increases or diminishes the probability that the issue occurred in the way that it has been asserted to have occurred by the parties. We are committed to the proposition that all relevant data will be received because, by its very nature, it increases or diminishes the probability of the events in the case. That is the basic thrust of the Federal Rules.

They then proceed to give us some refreshers with regard to the recurring evidence problems. An example is character evidence in criminal cases, where the prosecution may not undertake to enhance its *prima facie* case by showing the bad character of the defendant. The defendant, on the other hand, undertakes to diminish the probability of the government's case by showing a good character by way of reputation.

Other offenses: If behavior is relevant to the issues in the case, the fact that it involves the commission of another offense does not exclude it.

Habits: The Federal Rules are significantly more liberal than ours. We have our eye-witness rule in Illinois. If eye-witnesses are available, habit is admissible. The Federal Rules expressly reject that notion and say that habit testimony is admissible irrespective of the existence or non-existence of eye-witnesses.

There is also a rather marked deviation with respect to offers in compromise. All communications made during the course of settlement efforts are deemed inadmissible under the Federal Rules. In Illinois there is substantial case law to the effect that the only thing that is excluded is the offer itself, and that admissions made by the parties during the negotiations are admissible against them.

I would like to see Illinois make an effort in the direction of evidence codification. We have three evidence books in Illinois with which most of you are familiar: Cleary's Handbook, Gard's Handbook, and Hunter's Handbook. The latter was originally put together by Judge Hunter and is now being kept up-to-date by Lawyers Co-op. These are all worthwhile desk books. But all of them are a little more cumbersome and a little more uncertain than they should be.

Obviously, we will never come up with a code which anticipates everything. The Federal Rules recognize this. The legislation that is now pending in the Congress recognizes it. The Uniform Rules recognized it. But the fact that we are committed to a common law tradition of case by case shaping of legislation or rules, as we do constantly in the area of civil practice and procedure, should not discourage us from making the effort to codify.

I urge that you give individual and collective attention and thought to the possibility of the formation of some form of committee or group which might first examine the feasibility of rules of evidence, and then, perhaps, encourage the Supreme Court to give serious consideration to an effort to codify the law of evidence in Illinois. Thank you.

Topic II—LECTURE ON CRIMINAL LAW AND CRIMINAL PROCEDURE

Professors Charles H. Bowman, Wayne R. LaFave and Geoffrey R. Stone

THE OCTOBER 1972 TERM OF THE U.S. SUPREME COURT

A. Lecture Outline prepared by Prof. Bowman and Prof. LaFave

(A) SEARCH AND SEIZURE

1. *Schneckloth v. Bustamonte*, 406 U.S. 942, 93 S.Ct. 2041 (1973)

   When the subject of a search is not in custody and the state would justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntary; voluntariness is to be determined from the totality of the surrounding circumstances, but while knowledge of a right to refuse consent is a factor to be taken into account, the state need not prove that the one giving permission to search knew that he had a right to withhold his consent.

2. *Cupp v. Murphy*, 410 U.S. 922, 93 S.Ct. 2000 (1973)

   Where defendant was not under arrest but was detained at police station while fingernail scrapings were taken, the detention was proper because the police had probable cause to arrest, and the search was proper without a warrant because it was a very limited intrusion undertaken to preserve highly evanescent evidence.

   Compare *People v. Todd*, 71 Ill.App.3d 617, 288 N.E.2d 512 (1972), holding search of person requires antecedent lawful arrest.

3. *Cady v. Dombrowski*, 410 U.S. 959, 93 S.Ct. 2523 (1973)

   Warrantless search of trunk of car was reasonable where car was towed from scene of accident to private garage because it was a hazard on the highway and driver was in no condition to see to disposition of the car, and where police had reason to believe there was a gun in the car, which they searched for pursuant to standard procedure to protect the public from the weapon possibly falling into improper hands.

4. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764 (1973)

   A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and a directive to give a voice exemplar likewise does not infringe any Fourth Amendment interest, so that no preliminary showing of reasonableness is required for the subpoena or directive; the compelled production of voice exemplars does not violate the Fifth Amendment.

5. *United States v. Mara*, 410 U.S. 19, 93 S.Ct. 774 (1973)

   Companion case to *Dionisio*; same result reached where person subpoenaed to appear before grand jury and then directed to give handwriting exemplars.

6. *Almeida-Sanchez v. United States*, 93 S.Ct. 2535 (1973)

   Warrantless search of accused's automobile, made without probable cause or consent by roving patrol of United States Border Patrol on highway located at all points at least 20 miles from the Mexican border was not a border search or the functional equivalent thereof, and violated the accused's rights to be free of unreasonable searches and seizures.

7. *Roaden v. Kentucky*, 411 U.S. 903, 93 S.Ct. 2796 (1973)

   Where allegedly obscene film was being shown on a regular basis at a commercial theatre, the warrantless seizure of the film incident to arrest was unreasonable under the Fourth and First Amendments, as no exigent circumstances were present.

8. *Heller v. New York*, 409 U.S. 1021, 93 S.Ct. 2789 (1973)

   A preseizure adversary hearing is not required where a film is seized for the bona fide purpose of preserving it as evidence pursuant to a search warrant, and following the seizure a prompt judicial determination of the obscenity issue in an adversary setting is available, but upon a showing that other copies of the film are not available for exhibition, the court should permit the seized film to be copied so that exhibition can be continued.

9. *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973)

   The defendants did not have standing to challenge the seizure of stolen goods from the store of a coconspirator pursuant to a defective warrant where the search occurred in the absence of the defendants who were then in custody in another state, the defendants had no proprietary or possessory interest in the premises, and they were not charged with an offense that included possession of the seized evidence as an essential element of the offense charged.

(B) SELF-INCRIMINATION

10. *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611 (1973)

    Where a taxpayer hired an independent accountant to whom

she had delivered regularly over a period of years various business and tax records which remained in his continuous possession and the accountant worked in his own office, the taxpayer's divestment of possession of such records was of such a character to disqualify her entirely as the object of any impermissible Fifth Amendment compulsion.

(C) IDENTIFICATION TESTIMONY

11. *United States v. Ash*, 407 U.S. 909, 93 S.Ct. 2568 (1973)

The Sixth Amendment does not grant an accused the right to have counsel present when the government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender; a pretrial event constitutes a "critical stage" when the accused requires aid in coping with legal problems or help in meeting his adversary, and since the accused is not present at the time of the photographic display, and, as here, asserts no right to be present, there is no possibility that he might be misled by his lack of familiarity with the law or overpowered by his professional adversary.

12. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972)

While a rape victim's station-house identification of her assailant may have been suggestive in that a showup rather than a lineup was used, under the totality of the circumstances the victim's identification was reliable and was properly allowed to go to the jury: the victim had been in the presence of her assailant a considerable time and had directly observed him indoors and under a full moon outdoors; she testified she had no doubt that respondent was her assailant; she had previously given the police a description of her assailant; and she had made no identification of others presented at previous showups, lineups, or through photographs.

(D) FAIR TRIAL

13. *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972)

Due Process Clause bars traffic-offense trials before a mayor's court that yields revenues for the village government over which the mayor presides with broad executive authority even though offenders are entitled to a trial *de novo* in another court, since due process requires an impartial tribunal in the first instance.

Cf. *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953 (1972) (higher fine by *de novo* court, after trial and lesser fine by

inferior court, not violative of due process and double jeopardy right not to have greater sentence imposed on reconviction (after reversal) for same offense. See *North Carolina v. Pearce*, 89 S. Ct. 2072 (1969)).

14. *Webb v. Texas*, 409 U.S. 95 (1972)

Trial court's extended admonition to *petitioner's* witness to refrain from lying, coupled with threats of dire consequences if witness did lie, effectively discouraged witness from testifying at all and deprived petitioner of due process of law by denying him the opportunity to present witness in his own defense.

15. *Cool v. United States*, 409 U.S. 100 (1972)

Trial court's "accomplice instruction" in effect requiring the jury to decide that a defense witness' testimony was "true beyond a reasonable doubt" before considering that testimony impermissibly obstructed the right of a criminal defendant to present exculpatory testimony of an accomplice (*Washington v. Texas*, 388 U.S. 14); and if unfairly reduced the prosecution's burden of proof, since it is possible that the testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt.

Cf. *In re Winship*, 397 U.S. 358 (1970) (The Due Process Clause requires that the conviction of a criminally accused be based upon proof beyond a reasonable doubt.)

16. *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848 (1973)

Fourteenth Amendment requires a trial judge, on *voir dire*, to interrogate jurors upon subject of racial prejudice after defendant's timely request therefor.

17. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973)

Where third person on separate occasions orally confessed murder with which petitioner was charged to three different friends, under circumstances which bore substantial assurances of trustworthiness, and where such person made, but later repudiated, a written confession, exclusion of the testimony of the persons to whom the oral confessions were made, under hearsay rule, coupled with state's refusal to permit petitioner to cross-examine the third person under Mississippi's common-law "voucher" rule after petitioner called such third person as witness when the state failed to do so, deprived petitioner of a fair trial.

(E) DOUBLE JEOPARDY

18. *Chaffin v. Stynchcombe*, 411 U.S. 903, 93 S.Ct. 1977 (1973)

The rendition of a higher sentence by jury upon retrial does not violate Double Jeopardy Clause nor does such sentence offend Due Process Clause as long as the jury is not informed of prior sentence and the second sentence is not otherwise shown to be the product of vindictiveness; choice occasioned by possibility of a harsher sentence does not place an impermissible burden on right of criminal defendant to appeal or attack collaterally his conviction.

Cf. *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969).

19. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972)

A forfeiture of imported merchandise not included in a declaration and entry pursuant to the tariff provision in 19 U.S.C. 1497 is not barred by a prior acquittal under 18 U.S.C. 545, which (unlike the civil forfeiture proceeding) requires proof of an intent to defraud; nor is the forfeiture action barred by the Double Jeopardy Clause, since Congress may impose both a criminal and civil sanction respecting the same act or omission.

20. *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066 (1973)

Where jury had been impaneled and sworn but before any evidence was taken, Illinois trial court granted a mistrial over objection of defendant after realizing that under Illinois law indictment was defective, it could not be cured by amendment and that the defect could be raised by defendant at any time on appeal or in a subsequent habeas corpus proceeding. It could not be said that the declaration of mistrial was not required by manifest necessity and the ends of public justice and the Fifth Amendment did not prevent retrial of defendant after minimal delay.

21. *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876 (1973)

Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184 (1970), which bars on the ground of double jeopardy two prosecutions, state and municipal, based on the same act or offense, is fully retroactive.

(F) SPEEDY TRIAL

22. *Strunk v. United States*, 409 U.S. 1106, 93 S.Ct. 2260 (1973)

Dismissal is the only possible remedy for deprivation of the constitutional right to speedy trial; reduction of sentence will not suffice.

(G) DISCOVERY

23. *Wardius v. Oregon*, 93 S.Ct. 2208 (1973)

Where Oregon statute precluding introduction of alibi evidence in absence of notice of alibi defense prior to trial did not by its terms provide for reciprocal discovery (of state's rebuttal witnesses), due process forbade enforcement thereof against defendant.

See Ill.Rev.Stat. 1971, ch. 38, sec. 114-13; Ill. Sup. Ct. Rule 412 (a)(i), and Rule 413(d).

(H) GUILTY PLEAS

24. *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602 (1973)

Where a state criminal defendant, on advice of counsel, pleads guilty he cannot in a federal habeas corpus proceeding raise independent claims relating to the deprivation of constitutional rights that antedated the plea, *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463 (1970), such as infirmities in the grand jury selection process, but may only attack the voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within the standards of *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441 (1970).

(I) PROBATION REVOCATION

25. *Gagnon v. Scarpelli*, 408 U.S. 921, 93 S.Ct. 1756 (1973)

Where probationer was not afforded either a preliminary revocation hearing or a final hearing, revocation of his probation did not meet standards of due process. Probationer's admission to having committed another serious crime created every sort of situation in which counsel need not ordinarily be provided at revocation hearings, but in view of probationer's subsequent assertions that his statement was made under duress and was false, failure to provide probationer with assistance of counsel should be reexamined in light of general guidelines promulgated by the Supreme Court.

Cf. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254 (1967)(probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing); *Morrissey v. Brewer*, 405 U.S. 951, 92 S.Ct. 2593 (1972) (revocation of parole not a part of a criminal prosecution but loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process).

See Ill.Rev.Stat., 1972 Supp., ch. 38, sec. 1005-6-4(c) (probationer entitled to representation by counsel at revocation hearing).

B. Lecture by Professor LaFave

My name is Wayne LaFave, and seated up here with me is Prof. Geoffrey Stone from the University of Chicago. Geoff and I will be chatting with you for the next couple of hours about some recent developments in the area of criminal procedure. It is our intention to discuss the cases decided by the United States Supreme Court during the 1972 term in the field of criminal procedure which, in our judgment, have relevance in Illinois. I direct your attention to the lecture outline which has been distributed to you. During the first half of our session, I will be discussing with you the first three topics in the outline: Search and seizure, self-incrimination, and identification testimony. Then, after the coffee break, Geoff will be talking to you about fair trial, double jeopardy, speedy trial, discovery, pleas of guilty, and probation revocation. (Cases mentioned in this discussion but not cited in the outline are cited and more fully explained in the 1971 and 1972 Reports of the Illinois Judicial Conference Lecture on Criminal Law, Search and Seizure.)

The Supreme Court decided a number of cases this last term in the area of search and seizure. Of these, by far the most important is *Schneckloth v. Bustamonte*, in which the Court for the first time explored in some detail the theoretical underpinnings of what is usually referred to as the consent search. Bustamonte was brought to trial in a California court on a charge of possessing a check with intent to defraud. He moved to suppress the introduction of certain material as evidence against him on the ground that the material had been acquired through an unconstitutional search and seizure. The judge conducted an evidentiary hearing where the following facts were established: While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, a police officer stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. One Alcala and Bustamonte were seated in the front seat with Gonzales the driver. When Gonzales could not produce a driver's license, the officer asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six occupants had stepped out of the car at the officer's request and after two additional policemen had arrived, the officer asked Alcala if he could search the car. Alcala replied, "sure, go ahead." Prior to the search no one was threatened with arrest and, according to the officers' uncontradicted testimony, it was all very congenial at this time. Alcala actually helped in the search of the car by opening the trunk

and glove compartment. Wadded up under the left rear seat, the police officers found three checks that had been previously stolen from a car wash. The trial judge denied the motion to suppress, and the checks in question were admitted in evidence at Bustamonte's trial. On the basis of this and other evidence he was convicted. The California Court of Appeals affirmed the conviction, following the rule that the voluntariness of a consent search is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge as to his right of refusal is only one factor to be taken into account in assessing the voluntariness of a consent. This, I might note, is essentially the rule which has been followed here in Illinois. Thereafter, Bustamonte sought a writ of habeas corpus in a federal district court, but it was denied. On appeal, the Court of Appeals for the Ninth Circuit set aside the district court's order. The appellate court reasoned that a consent was a waiver of a person's Fourth and Fourteenth Amendment rights, and that therefore the state was under an obligation to demonstrate not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withheld. Consent could not be found, the court held, solely from the absence of coercion and a verbal expression of assent. Since the district court had not determined that Alcala had known that his consent could be withheld and that he could have refused to have his vehicle searched, the Court of Appeals vacated the order denying the writ and remanded the case for further proceedings. The Supreme Court then granted *certiorari* to consider the question of what the state must prove to demonstrate that a consent to search was voluntarily given.

In an opinion by Mr. Justice Stewart, the Supreme Court reversed the Court of Appeals. Noting that the issue concerned the voluntariness of the consent, Justice Stewart observed that the most extensive judicial exposition of the meaning of voluntariness was developed in those cases in which the Supreme Court has been required to determine the voluntariness of a defendant's confession for purposes of the Fourteenth Amendment. Between *Brown v. Mississippi* and *Escobedo v. Illinois* the Court had decided some thirty different cases in which it was faced with the necessity of determining whether in fact the confessions in issue had been voluntarily given. Thus Justice Stewart concluded that it was appropriate to turn to that body of case law for a meaning of voluntariness in the present context. Reviewing the cases, Justice Stewart noted that the ultimate test of voluntariness in the confession area has been whether the confession was a product of an essentially free and unconstrained choice by its maker, which requires an assessment of the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. The cases reflect that some of the factors taken into account have included the youth of the accused, his lack of education, his low intelligence,

the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. But the significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put.

Justice Stewart concluded therefore that the question of whether a consent to a search was in fact voluntary or was the product of duress or coercion is likewise a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. Noting the benefits to law enforcement from the consent search practice, Justice Stewart in effect stated there was no reason to depart in the area of consent searches from the traditional definition of voluntariness. He emphasized that the test used by the Ninth Circuit Court of Appeals would confront the prosecution with the nearly impossible burden of proving the nature of a person's subjective understanding. As to the defendant's claim that that would not be a difficult burden if the police followed a practice of advising persons of their right to refuse to give consent, he responded that it would be thoroughly impracticable to impose upon the normal consent search the detailed requirements of an effective warning. This is because consent searches are part of the standard investigatory techniques of law enforcement agencies, which normally occur on the highway or in a person's home or office under informal and unstructured conditions. These situations, it was noted, are far removed from "custodial interrogation" where, in *Miranda*, the Court found that the constitution requires certain warnings as a prerequisite to police interrogation.

But at this point the Court was confronted with a more powerful argument by the defendant, namely, that a consent is a waiver of a person's rights under the Fourth and Fourteenth Amendments, in that by allowing the police to conduct a search a person waives whatever right he had to prevent the police from searching, so that under the doctrine of *Johnson v. Zerbst* the state, to establish such a waiver, must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." However, Justice Stewart noted that the requirement of a knowing and intelligent waiver was articulated in a case involving the validity of an defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process, in that *Johnson v. Zerbst* dealt with the denial of counsel in a federal criminal trial. Likewise, almost without

exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the constitution guarantees to a criminal defendant in order to preserve a fair trial. Thus the *Johnson* standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel either at trial or upon a guilty plea, or the validity of a waiver of other trial rights such as the right of confrontation, to a jury trial, to a speedy trial, and the right to be free from twice being placed in jeopardy. And while the *Wade* and *Gilbert* cases indicated that the standard of a knowing and intelligent waiver must be applied to test the waiver of counsel at a lineup, once again the concern of the Court was with the protection of the trail process itself, as counsel is being provided at the lineup as an aid to the right of cross-examination at trial. As for the *Miranda* case, where the standards of *Johnson* were also applied, this is once again an illustration of an instance in which the need was to protect the fairness of the trial itself, for in *Miranda* the Court expressed concern about making the trial of a criminal case an empty formality because the most compelling possible evidence of guilt, a confession, would otherwise already have been obtained at the unsupervised pleasure of the police.

Justice Stewart then noted that the protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, the Fourth Amendment protects the security of one's privacy against arbitrary intrusion by the police. For this reason, Justice Stewart concluded, there is no need to apply the waiver requirements of *Johnson v. Zerbst* to consent searches. To hold otherwise would be inconsistent with the Court's prior decisions concerning third party consents and would also be contrary to the community interest in encouraging consent, for the reason that the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may ensure that a wholly innocent person is not wrongly charged with a criminal offense.

This left the defendant with one final argument, namely, that the Court's decision in the *Miranda* case requires the conclusion that knowledge of a right to refuse is indispensable element of a valid consent. To this the Court responded that the considerations that led to its holding in *Miranda* are inapplicable in the present case, as there the Court concluded that "unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." By contrast, in this case there was no evidence of any inherently coercive tactics either from the nature of the police questioning or the environment in which it took place. As the Court noted, *Miranda* did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent

search, and it did not indicate that such questioning ought to be deemed inherently coercive.

Particularly in light of this latter point, it is important to note that the Supreme Court in the *Bustamonte* case carefully limited its holding to state only "that when the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, voluntariness is to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." This strongly suggests that the Court is prepared to hold otherwise in a case in which the defendant was in custody at the time the alleged consent was given, because then the reasoning which the Court used to distinguish *Miranda* would simply be inapplicable. In terms of Illinois law, it is this probable future holding of the Court which is most significant, as while the Illinois cases do indicate that a consent from one in custody requires particularly close scrutiny, there does not currently exist any requirement that the prosecution prove that the defendant was aware of his right to refuse to give the consent.

This brings me to another search and seizure case, *Cupp v. Murphy*, which, while it involved a rather unusual fact situation, established a principle of some general importance. Murphy was convicted of the second-degree murder of his wife. The victim died by strangulation in her home in Portland, Oregon, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to Murphy, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the police and voluntarily came in for questioning, Shortly after his arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on his finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial. The conviction was affirmed by the Oregon Court of Appeals, after which Murphy sought federal habeas corpus relief. The district court denied the habeas petition, but the Court of Appeals for the Ninth Circuit reversed. Although the Court of Appeals did not disagree with the conclusion reached by the trial court, the Oregon Court of Appeals, and the federal district court that the police had probable cause to arrest Murphy at the time they detained him and scraped his fingernails, the 9th Circuit held that in the absence of an arrest or other exigent circumstances the search was unconstitutional.

The Supreme Court, once again in an opinion by Justice Stewart, deemed it necessary to pass upon the constitutionality of the detention of Murphy at the police station and the search which was conducted incident to that detention. As to the detention (and once again it must be emphasized that it was merely a detention, as Murphy was not formally arrested until approximately one month later, but rather was detained briefly while the fingernail scrapings were taken), the Court quite properly noted that this detention nonetheless constituted a seizure under the Fourth Amendment. However, since all of the lower courts had agreed that the police had probable cause for an arrest at the time of the detention, the detention itself did not violate the Fourth Amendment. The Court distinguished *Davis v. Mississippi*, in which the defendant was detained for fingerprinting upon little or no evidence through the use of a dragnet procedure which also resulted in the detention of several other individuals.

The Court then turned its attention to the search of Murphy's fingernails, and concluded that that search was constitutionally permissible under the principles of *Chimel v. California*. *Chimel*, you will recall, recognized an exception to the warrant requirement when a search is incident to a valid arrest, on the ground that when an arrest is made it is reasonable for the police to expect the arrestee to use weapons he may have and to attempt to destroy an incriminating evidence then in his possession. Of course, Murphy had not been under arrest, and thus *Chimel* could not be applied automatically to the present situation. Indeed the Court observed that it was not holding that a full *Chimel* search would have been justified in the instant case, because when there is no formal arrest the person is likely to be less hostile to the police and less likely to take conspicuous steps to destroy incriminating evidence on his person. Rather, since he knows he is going to be released, he might instead be concerned with diverting attention away from himself. But, at the time Murphy was being detained at the station house, he was obviously aware of the detectives' suspicions. Though he did not have the full warnings of official suspicion that a formal arrest provides, he was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy whatever evidence he could without attracting further attention. Testimony at the trial indicated that after he refused to consent to the taking of fingernail samples, he put his hands behind his back and appeared to rub them together and then put his hand in his pockets in an apparent attempt to destroy the evidence. This being the case, the Court concluded, the rationale of *Chimel* justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails. The majority thus rejected the contention of Justice Douglas in his dissent that the police should have obtained a search warrant because there was time to get a warrant in that Murphy could have been detained while one

was sought, and the detention would have preserved the perishable evidence which the police sought.

The basic principle which thus emerges from the *Murphy* case is that it is sometimes permissible for the police to make a warrantless search of a person without an antecedent arrest. What is needed is probable cause and, in addition, evidence which is readily destructible. This I believe is significant because some of the lower court cases, including here in Illinois, had taken a somewhat narrower view prior to the *Murphy* decision. Illustrative is *People v. Todd,* 71 Ill.App.3d 617, 288 N.E.2d 512 (1972) where a blood sample was taken from a truck driver who had been involved in a collision. The driver was not under arrest at the time, although it appears there was grounds for his arrest (a police officer who investigated the accident detected a strong odor of alcohol in the truck); rather, he was at a hospital for treatment when the blood was taken. The trial court found that although the police had probable cause to search the defendant's body for evidence of intoxication, the search could occur only incident to a lawful arrest. The Court of Appeals agreed that the language of *Schmerber v. California* applies only to those cases wherein the driver is under arrest at the time the blood sample is taken. This cannot now be squared with *Murphy.* However, the alternative holding in *Todd* is still valid: Pursuant to chapter 95 1/2, section 11-501, evidence based upon a chemical analysis of blood, urine, breath or other bodily substance is not admissible unless the substance was procured and the analysis made with the consent of the person involved.

The third case I would like to discuss with you concerns the most troublesome problem of when the police may make a warrantless search of an automobile. The case is *Cady v. Dombrowski,* which unfortunately does not shed very much light on the subject. Once again, a statement of the facts is necessary to an understanding of the problem with which the Supreme Court was dealing. The defendant, a member of the Chicago police force, rented an automobile at O'Hare Field and drove up to West Bend, Wisconsin. He spent several hours in a tavern there and apparently drank quite heavily. Some time later he left the tavern and drove away from West Bend toward his brother's farm. On the way, he had an accident, with his car breaking through a guard rail and crashing into a bridge abutment. A passing motorist drove him to a nearby town, after which Dombrowski telephoned the police. Two police officers picked him up at a tavern and drove to the scene of the accident. On the way, they noticed that Dombrowski appeared to be drunk; he offered three conflicting versions of how the accident occurred. At the scene, the police investigated the accident. They concluded that Dombrowski, who had informed them that he was a Chicago police officer, was intoxicated. The investigating officers believed that Chicago police were required by regulation to carry their service revolvers at all times. Not finding the gun

on Dombrowski's person, one of the officers looked into the front seat and glove compartment of the car for the revolver, but none was found. A wrecker was called and towed Dombrowski's car to a privately owned service station approximately seven miles from the police station. It was left outside with no police guard posted. Shortly thereafter Dombrowski was taken to the police station and interviewed and then was formally arrested for drunken driving. Because of injuries sustained in the accident, he was then taken to a local hospital where he lapsed into a coma. Shortly thereafter, one of the officers drove to the garage where Dombrowski's car had been towed and searched it for Dombrowski's service revolver. No gun was found, but several blood stained items were found in the trunk of the car, and the officer removed these items to the police station. About a day later, Dombrowski was connected with a homicide which was unknown to the police at the time they made the search, and further investigation established that the blood stained items removed from his car connected him with the murder. Dombrowski was later prosecuted for murder, and among the many items of circumstantial evidence admitted against him were the items taken from his car. His conviction was affirmed by the Wisconsin Supreme Court, which rejected Dombrowski's contention that the evidence taken from his car was unconstitutionally seized. The same claim was unsuccessfully asserted before the federal district court on a writ of habeas corpus, but the Seventh Circuit Court of Appeals reversed, holding that the search was unconstitutional. The Supreme Court granted *certiorari.*

The Supreme Court, in an opinion by Mr. Justice Rehnquist, reversed the decision of the Court of Appeals. At the outset, Justice Rehnquist noted that while contact with vehicles by federal law enforcement officers usually involves the detection or investigation of crimes unrelated to the operation of a vehicle, state and local police officers have much more contact with vehicles for reasons related to the operation of vehicles themselves. This is because all states require vehicles to be registered and operators to be licensed, and states and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways. Thus, he observed, local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, maybe described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Significantly, Justice Rehnquist then said that it is this fact in addition to the ambulatory character of vehicles which has given rise to a different set of rules for the search of vehicles.

Justice Rehnquist then proceeded to characterize the facts. He concluded that the reason the police had the vehicle towed away in

the first instance was that it constituted a nuisance along the highway; and Dombrowski, being intoxicated, could not make arrangements to have the vehicle towed and stored. Thus, the towing away of the vehicle was undertaken by the police for reasons of public safety. As to the search of the trunk, he noted that this was standard procedure in that police department under these circumstances, in that the police were acting to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. Quite clearly the officers were not engaged in an investigation of the murder, because they were ignorant of the fact that any other crime had been committed at the time they conducted the search. Under these facts, concluded the Court, the warrantless search of the trunk was reasonable. Critical to that conclusion were the facts that this was a caretaking search of a vehicle that was neither in the custody nor on the premises of its owner and that had been placed where it was by virtue of lawful police action, and where the officer reasonably believed that the car contained a gun and that the car was vulnerable to intrusion by vandals. In reaching that conclusion, Justice Rehnquist relied primarily upon two prior Supreme Court decisions: *Harris v. United States*, upholding the admissability of evidence discovered while police were locking up a car impounded as evidence pursuant to the arrest of a robbery suspect, and *Cooper v. California*, holding admissible heroin found during the inventory of the contents of a car impounded for forfeiture proceedings.

The four dissenters in *Dombrowski* did not find those cases controlling. *Harris* was said to be distinguishable in that there the police inadvertently came across a piece of evidence, while *Cooper* was viewed as being distinguishable in that there the police had a right to retain custody of the automobile for forfeiture proceedings. In their view, the present case was one in which the police knew what they were looking for in advance and had ample opportunity to obtain a warrant, from which it follows that the warrantless search of the vehicle was unreasonable.

It seems to me that the *Dombrowski* decision contributes very little to resolving the existing uncertainties concerning the extent to which police may conduct a warrantless search of vehicles. To understand why this is so, it may be useful to review very briefly the various bases upon which such a search might be made. One possibility, of course, is that a vehicle may be searched incident to the arrest of the driver under the principle of the *Chimel* case. The *Chimel* rule, however, permits a search only within the areas which the arrestee might reach, so this is a very limited right of search which certainly does not extend to the entire vehicle and, it would seem, no part of the vehicle after the driver has been removed from it. The *second basis* of a search is upon probable cause which is acquired at a time in which there is not an opportunity to obtain a search warrant, as in *Chambers v. Maroney* as limited by *Coolidge v. New Hampshire*. The *third possibility*, upon which the Supreme Court has never directly passed, is an inventory of a vehicle to protect the property of an arrestee. Such inventories have in the main been upheld by lower courts, but this issue has never been passed upon directly by the United States Supreme Court. The *Harris* case, mentioned earlier, was somewhat different in that the police were merely locking up the car when the evidence was found, and, as noted earlier, the *Cooper* case is distinguishable in that the car was being held by the police for forefeiture proceedings. The majority opinion in *Dombrowski* cannot be viewed as upholding such inventories, given the fact that the Court relies heavily upon the unique facts of that case, including the fact that the police had reason to believe that there was a gun in the car which might be removed by a vandal. These unusual facts are not generally present in the typical inventory situation, However, some of the language in the majority opinion concerning the responsibilities of state and local police to deal with vehicles for purposes other than acquiring evidence might be said to support the inventory concept. As to the four man dissent in *Dombrowski*, their effort to limit *Cooper* to the forfeiture situation would seem to work against recognition of the inventory theory. On the other hand, however, the position of the dissenters in *Dombrowski* is that the police there knew what they were looking for and had ample opportunity to obtain a warrant. which is not the case in the typical inventory situation.

Now I would like to consider together the next two cases in the outline, *United States v. Dionisio* and *United States v. Mara*, both of which are concerned with the constitutional limits upon the use of grand jury subpoenas. Although I have listed these cases in the outline under the heading of search and seizure, it is appropriate to note at the outset that both Fourth and Fifth Amendment issues were considered by the Court in these cases and that therefore the discussion which follows will not be limited exclusively to the search and seizure problems which are presented. Both of the cases concern the subpoena of witnesses to appear before federal grand juries in the Northern District of Illinois. In *Dionisio*, a special grand jury was convened in February of 1971 to investigate possible violations of federal criminal statutes relating to gambling. In the course of its investigation the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders. The grand jury subpoenaed approximately 20 persons, including Dionisio, seeking to obtain from them voice exemplars for comparison with the recorded conversations that had been received in evidence. Each witness was advised that he was a potential defendant in a criminal prosecution. Dionisio and other witnesses refused to furnish the voice exemplars, asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments. The district judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. When Dionisio

persisted in his refusal to respond to the grand jury's directive, the district court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order or until the expiration of 18 months, but the Court of Appeals for the Seventh Circuit reversed.

Mara was subpoenaed to appear before the September 1971 grand jury that was investigating thefts of interstate shipments. On two separate occasions he was directed to produce handwriting and printing exemplars to the grand jury's designated agent. Each time he was advised that he was a potential defendant in the matter under investigation. On both occasions he refused to produce the exemplars. The district judge here again rejected the respondents contention that the compelled production of the exemplars would be unconstitutional, and he ordered Mara to provide them. When Mara continued to refuse to do so, he was adjudged to be in civil contempt and was committed to custody until he obeyed the court order or until the expiration of the grand jury term. The Court of Appeals for the Seventh Circuit reversed, relying on its earlier decision in the *Dionisio* case. The United States Supreme Court granted *certiorari* in both cases. The first contention made by Dionisio and Mara was that the compelled production of the voice and handwriting exemplars would violate the Fifth Amendment privilege against self-incrimination. The Court, in an opinion by Mr. Justice Stewart, disposed of this contention summarily, noting that it has long been held that the compelled display of identifiable physical characteristics infringes upon interest protected by the privilege against compulsory self-incrimination. The Court quoted from *Schmerber v. California*, where it held that the privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling communications or testimony, but that compulsion which makes a suspect or accused the source of real or physical evidence does not violate it."

The Court then turned to the more troublesome and more complex Fourth Amendment issues. The ruling of the Court of Appeals had been based upon the Fourth Amendment, for that court had held that a preliminary showing of reasonableness is required before a grand jury witness could be compelled to submit to a seizure of voice or handwriting exemplars. The Supreme Court noted that the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—first, the seizure of the person necessary to bring him into contact with government agents, and secondly, the subsequent search for and seizure of the evidence. For this reason, the Court noted, it was necessary to give separate consideration to the constitutionality of the initial compulsion of the person to appear before the grand jury, and the subsequent directive to make a

voice or handwriting exemplar. If either of these were to constitute an unreasonable seizure within the meaning of the Fourth Amendment, then Dionisio and Mara must prevail.

As to the initial compulsion of the person to appear before the grand jury, the Supreme Court held that a subpoena to appear before a grand jury is not a seizure in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. The Court referred to its language a year ago in *Branzburg v. Hayes*, where it was noted that the grand jury has a right to every man's evidence. But the Court went on to note that the compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative stop in more than civic obligation. The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court. Thus, concluded the Court, the instant cases are quite different than *Terry v. Ohio* and *Davis v. Mississippi*, where the initial seizure must be shown to be reasonable. Inasmuch as the grand jury subpoena is not itself a seizure, there is no requirement of an advance showing of cause to summon a particular witness. This conclusion was particularly significant in the *Dionisio* case, as the grand jury had summoned approximately 20 witnesses to furnish voice exemplars, and if the traditional probable cause test had been applied here this would not have been possible because the evidence then before the grand jury did not establish a probability that the voices of all these witnesses were on the tapes. In short, what had been condemned as a dragnet procedure in *Davis v. Mississippi* is permissible in the context of a grand jury investigation.

But that conclusion provided the answer to only the first part of the Fourth Amendment inquiry, as Dionisio and Mara went on to argue that the grand jury's subsequent directive to make the voice and handwriting exemplars was itself an infringement of their rights under the Fourth Amendment. But the Supreme Court rejected that argument as well. The Court began its analysis of this branch of the case by noting that it had said earlier, in *Katz v. United States*, that the Fourth Amendment provides no protection for what a person knowingly exposes to the public, even in his own home or office. Applying this test, the Court concluded in the *Dionisio* case that the physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public, and therefore no person can have a reasonable expectation that others will not know the sound of his voice, anymore than he can reasonably expect that his face will be a mystery to the world. Similarly, in *Mara*, the Court concluded that handwriting, like speech, is repeat-

edly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice. Consequently, the order to Dionisio and to Mara to give voice and handwriting exemplars did not constitute a search or seizure within the meaning of the Fourth Amendment, and therefore the government was under no obligation to make a preliminary showing of reasonableness in support of those orders.

The next case in the outline is *Almeida-Sanchez* v. *United States*. The issue presented in that case is one that arises only in the context of federal prosecutions for conduct at or near the national border, and thus no extended discussion of that case is warranted here. I would simply note that the Court held, in an opinion by Mr. Justice Stewart, that the warrantless search of the accused's automobile, made without probable cause or consent by a roving patrol of the United States Border Patrol on a highway located at least twenty miles north of the Mexican border, was not a border search or a functional equivalent thereof, and thus violated the accused's right to free of unreasonable searches and seizures.

I turn now to the next two cases in the outline, *Heller v. New York* and *Roaden v. Kentucky*, both of which concern the seizure of alleged obscene materials. With the loosening of the constitutional restraints upon obscenity prosecutions which also occurred last term, the problems presented in these two cases may come before you somewhat more frequently than they have in the past.

I begin with the *Roaden* case, which involved these facts. The sheriff of Pulaski County, Kentucky, accompanied by the district prosecutor, after observing a film in its entirety when it was shown at a local drive-in theatre, concluded that the film was obscene and that its exhibition was in violation of state statute. The sheriff, at the conclusion of the film, proceeded to the projection booth where he arrested Roaden, the manager of the theatre, on the charge of exhibiting an obscene film to the public contrary to a Kentucky statute. Concurrently with the arrest, the sheriff seized one copy of the film for use as evidence. The sheriff had no warrant when he made the arrest and seizure, there had been no prior determination by a judicial officer on the question of obscenity, and the arrest was based solely on the sheriff's observing the exhibition of the film. On the following day a grand jury indicted Roaden. Before trial, he filed a motion to suppress the film as evidence on the ground that it was improperly seized, but the motion was denied. Roaden was convicted, and on appeal the Court of Appeals of Kentucky affirmed the conviction, ruling that the film had been lawfully seized incident to Roaden's arrest.

The Supreme Court, in an opinion by the Chief Justice, reversed the conviction. The Court noted that it had previously held, on more than one occasion, that a warrant for the seizure of alleged obscene

books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene, as such a warrant lacks the safeguards demanded to assure nonobscene material the constitutional protection to which it is entitled. The Court then reached the obvious conclusion that if a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, then an officer may not make such a seizure with no warrant at all. But inasmuch as the state court had upheld the seizure on the ground that it was made incident to a lawful arrest, a proposition which had not been asserted in the earlier cases before the Court, it was necessary for the Court to speak to that point. The Chief Justice noted that the seizure of a movie film from a commercial theatre with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant, as held in the *Chimel* case. But that merely means that where there are exigent circumstances in which police action literally must be now or never to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation. Because no such "now or never" circumstances were present in the instant case, such a seizure is unreasonable, not simply because it would have been easy to secure a warrant, but also because prior restraint of the right of expression, whether of books or film, calls for a higher hurdle in the evaluation of reasonableness.

More careful procedures were followed in the *Heller* case. There, after three police officers observed a film being shown in a commercial movie theatre in the Greenich Village area of New York City, an assistant district attorney requested a judge to see a performance. A judge, after attending a performance of the film, signed a search warrant for the seizure of the film and three warrants for the arrest of the theatre manager, the projectionist, and the ticket taker. No one at the theatre was notified or consulted prior to the issuance of the warrants. The warrants were immediately executed by police officers, who seized a single copy of the film. The manager of the theatre was subsequently convicted under the state obscenity laws, and his conviction was affirmed by the New York Court of Appeals, which held that an adversary hearing was not required prior to the seizure of the film. In so holding, the court explicitly disapproved of several opinions rendered by the Federal Court of Appeals for the Second Circuit requiring an adversary hearing prior to any seizure of a movie film.

The United States Supreme Court, again in an opinion by the Chief Justice, affirmed the holding of the Court of Appeals of the State of New York. The Court noted that a single copy of the film had been seized only after an independent judicial determination of proba-

ble cause, and that the film was seized in order to preserve it as evidence. The film was not subjected to any form of final restraint, in the sense of being enjoined from exhibition or threatened with destruction. There had been no showing that the seizure of a copy of the film precluded its continued exhibition. A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. The petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue. In light of all these facts, the Court concluded, the procedure used by New York provides sufficient First Amendment safeguards.

The petitioner relied upon two prior Supreme Court decisions holding that the seizure of large quantities of books for the sole purpose of their destruction required a prior judicial determination of obscenity in an adversary proceeding. But the Chief Justice responded that those decisions were not applicable in the instant case, as seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of the film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. The Court went on to say that if such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. However, the Court went on to caution that on a showing to the trial court that other copies of the film are not available to the exhibitor, the court must permit the seized film to be copied so that a showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned. When such safeguards are followed, an adversary hearing prior to the seizure is not constitutionally required. Indeed, the Court noted, if there were a requirement of a prior adversary hearing there would be a substantial risk that the films in question could be transported out of the jurisdiction, destroyed, or altered by cutting and splicing critical parts of the film.

Thus, the *Roaden* and *Heller* cases taken together stand for the following propositions: (1) At least where a film is being shown on a regular basis, it can be seized only pursuant to a search warrant issued upon the independent assessment of a judicial officer. (2) There is no requirement of an adversary hearing in advance of the seizure. (3) In such a case, the defendant is entitled to a very prompt judicial determination of the obscenity issue. (4) Upon a showing by the exhibitor that other copies of the film are not available, he must be permitted to make a copy of the seized film or else the film must be returned to him.

This brings me to the final case in the search and seizure area, *Brown v. United States*, concerning the always troublesome problem of who has standing to challenge a search and seizure. Once again, understanding of the underlying issues necessitates a brief look at the facts of the case. Brown was the manager of a warehouse in Cincinnati owned by a wholesale clothing company, and Smith was a truck driver for the company. The company had been experiencing substantial losses attributed to pilferage, so the police set up a surveillance of the warehouse. Brown and Smith were observed removing merchandise from the warehouse into a truck. After they drove off in the truck, they were stopped by the police and placed under arrest. After being informed of their constitutional rights, both men made separate confessions to the police indicating that they had conspired with one Knuckles to steal from the warehouse, that they had stolen goods from the warehouse in the past, and that they had taken these goods, on two occasions about two months before their arrest, to Knuckles' store in Kentucky. Knuckles' store was then searched pursuant to a warrant and goods stolen from the company were discovered. Knuckles was at the store during the search, but Brown and Smith were in custody in Ohio. All three men were charged in federal court with transporting stolen goods and conspiracy to transport stolen goods in interstate commerce. They all moved to suppress the stolen merchandise found in Knuckles' store, which the prosecution conceded was obtained pursuant to a defective search warrant. The district court granted Knuckles' motion to suppress the goods, but denied the motion as to Brown and Smith on the ground that they did not have standing. The charges against Knuckles were severed for separate trial. At the trial of Brown and Smith, the stolen merchandise seized from Knuckles' store was received in evidence against them, and they were convicted. The Court of Appeals for the Sixth Circuit affirmed.

Before the Supreme Court, Brown and Smith contended that they had automatic standing to challenge the search and seizure of Knuckles' store, relying upon the 1962 decision of the Court in *Jones v. United States*, which established a rule of automatic standing to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged. The *Jones* case, you may recall, involved a seizure of contraband narcotics, a defendant who was present at the seizure (which was an alternative basis for conferring standing) and an offense in which the defendant's possession of the seized narcotics at the time of the contested search and seizure was a critical part of the government's case. The latter point was an important consideration in the *Jones* case, as Justice Frankfurter referred to the dilemma inherent in a defendant's need to allege possession in order to contest a seizure when such admission of possession could later be used against him.

The Chief Justice, writing for a unanimous Court in the *Brown* case, observed at the outset that the self-incrimination dilemma which

was central to the *Jones* decision can no longer occur under the prevailing interpretation of the constitution. This is because subsequent to the *Jones* case the Court held in *Simmons v. United States* that a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearing to establish standing to move to suppress evidence. Thus, under the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming possession of incriminating evidence. If he is granted standing on the basis of such evidence, he may then nonetheless press for its exclusion, but whether he succeeds or fails to suppress the evidence, his testimony on that score is not directly admissible against him in the trial. Thus, the Chief Justice observed, Brown and Smith in the instant case could have asserted a possessory interest in the goods at Knuckles' store without any danger of incriminating themselves, which they did not do. However, the Chief Justice went on to note that it was not necessary to the decision of the instant case to decide whether the *Jones* automatic standing rule has been rendered unnecessary by the decision in *Simmons*. That question, he noted, is reserved for a case where possession at the time of the contested search and seizure is an essential element of the offense charged, which was not the case here. In the instant case the stolen goods seized had been transported and sold by Brown and Smith to Knuckles approximately two months before the challenged search. The conspiracy and transportation alleged by the indictment were carefully limited to the period before the day of the search. Thus, the Chief Justice concluded, the instant case could be decided by simply holding that there is no standing to contest a search and seizure where, as here, the defendants (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense which includes, as an essential element of the offense charged . ssession of the seized evidence at the time of the contested search and seizure. Stated another way, the government in the present case could not be accused of taking advantage of contradictory positions by both alleging and denying possession in the defendants. In effect, therefore, the Court ruled that there is no need to confer the automatic standing of the *Jones* case where neither the risk of defendants' self-incrimination nor prosecutorial self-contradiction exists.

I turn now to the subject of self-incrimination and the one case in this category, *Couch v. United States*, which, like *Dionisio* and *Mara*, concerns the constitutional limits upon the subpoena power of the government. The government filed a petition in the District Court for the Western District of Virginia seeking enforcement of an internal revenue summons in connection with an investigation of the petitioner's tax liability from 1964 through 1968. The summons was directed to the petitioner's accountant for the production of all books, records, bank

statements, cancelled checks, deposit ticket copies, work papers and all other pertinent documents pertaining to the tax liability of the above taxpayer. Couch invoked her Fifth Amendment privilege against compulsory self-incrimination in order to prevent the production of her business and tax records in the possession of her accountant. Both the district court and the Court of Appeals for the Fourth Circuit held that the privilege was unavailable on the facts of this case. The Supreme Court granted *certiorari*, and affirmed.

The Supreme Court, in an opinion by Mr. Justice Powell, noted that the privilege against compulsory self-incrimination is by its very nature an intimate and personal right intended to protect against the state compelling incriminating evidence from one's own mouth. Again, the privilege is a personal privilege; it adheres basically to the person, not to information which may incriminate him. A party is privileged from producing the evidence, but not from its production. The constitution explicitly prohibits compelling an accused to bear witness "against himself"; it necessarily did not proscribe incriminating statements illicited from another person.

The Court then noted that in the instant case the ingredient of personal compulsion against an accused is lacking. The summons and the order of the district court enforcing it were directed against the accountant. He, not the taxpayer, is the only one compelled to do anything. And the accountant made no claim that he may tend to be incriminated by the production.

Petitioner relied upon some language in an early Supreme Court case, *Boyd v. United States*, where it was said that "any forceable and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime," violated the Fourth and Fifth Amendments. Couch argued that the *Boyd* case should be read to mark ownership, not possession, as the bounds of the privilege. To this, Justice Powell responded that to tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. In the instant case, it would mean that the business records which Couch actually owned would be protected in the hands of her accountant, while business information communicated to accountant by letter, conversations in which the accountant took notes, in addition to the accountant's own work papers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections. But Justice Powell went on to note that while actual possession of documents bears the most significant relationship of Fifth Amendment protections against state compulsions upon the individual accused of

crime, situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially in tact. But the Court hastened to note that such was not the case before it, as there was no mere fleeting divestment of possession: The records had been given to this accountant regularly since 1955 and remained in his continuous possession until the summer of 1968 when the summons was issued. Moreover, the accountant himself worked neither in petitioner's office nor as her employee. The length of his possession of the petitioner's records and his independent status, the Court concluded, confirmed the belief that the petitioner's divestment of possession was of such a character as to disqualify her entirely as an object of any impermissible Fifth Amendment compulsion. As to the petitioner's further contention that the confidential nature of the accountant-client relationship and her resulting expectation of privacy in delivering the records protect her under the Fourth and Fifth Amendments, the Court responded by noting that there in fact can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return and where the accountant's own need for self-protection would often require the right to disclose the information given to him. Thus, the holding in the *Couch* case may be summed up as follows: No Fourth or Fifth Amendment claim can prevail where, as in the instant case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused.

I turn now to my final subject, namely, the constitutional limits upon the obtaining of identification testimony. In this area, the most important case is that of *United States v. Ash*, concerning pretrial identification through the use of photographs. In August of 1965 two men wearing stocking masks entered a bank in Washington, D.C., and committed an armed robbery. Several months later, a government informer told the authorities that he had discussed the robbery with one Ash. Acting on this information, an FBI agent showed five black and white mug shots of males of generally the same age, height, and weight, one of which was Ash, to four witnesses. All four made uncertain identifications of Ash's picture. At this time Ash was not in custody and had not been charged. A month or so later an indictment was returned charging Ash and a codefendant, Bailey, in five counts related to this bank robbery. Trial was finally set for May 1968, almost three years after the crime. In preparing for trial, the prosecutor decided to use a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. Shortly before trial, an FBI agent and the prosecutor showed five color photographs to the four witnesses who previously had tentatively identified the photographs of Ash. Three of the witnesses selected the

picture of Ash, but one was unable to make any selection. The trial judge held a hearing on the suggestive nature of the pretrial photographic displays, holding that the government had demonstrated by clear and convincing evidence that the in-court identifications would be based on observation of the suspect other than the intervening observation. At trial, the three witnesses who had been inside the bank identified Ash as the gunman, but they were unwilling to state they were certain of their identifications. The fourth witness, who had been in a car outside the bank, made positive in-court identifications of both Ash and Bailey. Bailey's counsel then sought to impeach this in-court identification by calling the FBI agent who had shown the color photographs to the witnesses immediately before trial. Bailey's counsel demonstrated that the witness who had identified Bailey in court had failed to identify a color photograph of Bailey. During the course of the examination, Bailey's counsel also, before the jury, brought out the fact that this witness had selected another man as one of the robbers. At this point the prosecutor became concerned that the jury might believe that the witness had selected a third person when, in fact, the witness had selected a photograph of Ash. After a conference at the bench, the trial judge ruled that all five color photographs would be admitted into evidence. The jury convicted Ash on all counts, but was unable to reach a verdict on the charges against Bailey, and his motion for acquittal was granted. On appeal to the United States Court of Appeals for the District of Columbia Circuit, Ash's conviction was reversed. The member majority of the court held that Ash's right to counsel, guaranteed by the Sixth Amendment, was violated when his attorney was not given the opportunity to be present at the photographic displays conducted in May 1968 before the trial. The majority relied upon the Supreme Court's lineup cases, *Wade, Gilbert*, and *Stovall*. Because that holding was inconsistent with the decisions of the Courts of Appeals of nine other circuits, the Supreme Court granted *certiorari* to resolve the conflict. Parenthetically, it might be noted that a contrary conclusion had also been reached by many state courts, including the Illinois case of *People v. Holiday*, 47 Ill.2d 300, 265 N.E.2d 634 (1970).

The Supreme Court, in an opinion delivered by Mr. Justice Blackmun, reversed and remanded. Because the Court of Appeals had relied exclusively on that portion of the Sixth Amendment which provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense, Justice Blackmun proceeded to reexamine the history of that particular provision. This historical background, he noted, suggests that the core purpose of the counsel guarantee was to assure assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. However, later developments led the Court to recognize that assistance would be less than meaningful if it were lim-

ited to the formal trial itself. Thus, in *Hamilton v. Alabama* and *White v. Maryland*, the Court held that there was a right to counsel when the accused was called upon to enter a plea; and in *Massiah*, the accused was held to be entitled to counsel when an attempt was made to obtain by ruse incriminating statements from the defendant following his indictment; while in *Coleman v. Alabama* the Court held that a preliminary hearing was a critical stage for right to counsel purposes. But in all of these cases, noted Justice Blackmun, counsel has been viewed as a spokesman for or advisor to the accused. He went on to note that the same is true of the lineup cases, *Wade* and *Gilbert*. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused, and counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and better able to reconstruct the events at trial. Justice Blackmun thus concluded that the test that has been utilized by the Supreme Court in the past in determining which pretrial stages are critical for right-to-counsel purposes calls for examination of the particular event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.

Applying that traditional test to the instant case, Justice Blackmun concluded that post-indictment photographic identification was not a critical stage. This is because the accused himself is not present at the time of the photographic display, and has no right to be present, so that no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. As for the conclusion of the Court of Appeals that affording counsel at photographic identification would minimize the risks of misidentification, a factor which was stressed by the Supreme Court in the *Wade* case, Justice Blackmun responded that photographic identification is closely tied up with the prosecutor's authority to interview witnesses before trial, as to which quite clearly there is no right to counsel, as the traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

The other identification testimony case is *Neil v. Biggers*, which involves an application of the rule announced by the Supreme Court in *Stovall v. Denno* in 1967. In *Stovall* the Court held that a defendant could claim that pretrial identification procedures were so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. In *Stovall*, the Court indicated generally that the use of one-man showup rather than a lineup was suggestive, but concluded that the procedure was not unnecessary in view of the fact that the sole witness was in critical condition in a hospital. In the instant case, Biggers claimed a *Stovall* violation had occurred in that he was displayed to the rape victim in a one-man showup rather than a lineup; and no justification for this suggestive procedure was given other than that the police did not have available any other persons who fit Biggers' general description.

In assessing this claim, the Supreme Court, in an opinion by Mr. Justice Powell, reviewed its prior cases applying the *Stovall* doctrine. From that review, Justice Powell noted, some general guidelines emerge as to the relationship between suggestiveness and misidentification. First of all, the primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." He observed that while that phrase was coined as a standard for determining whether an in-court identification would be admissable in the wake of a suggestive out-of-court identification, with the deletion of the word "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. This is because it is the likelihood of misidentification which violates a defendant's right to due process.

However, Justice Powell found it to be less than clear from the Supreme Court's prior cases whether unnecessary suggestiveness alone requires the exclusion of evidence. That, Justice Powell concluded, is an issue that must be resolved in the instant case, as it appeared that the police did not exhaust all possibilities in seeking persons physically comparable to Biggers. The purpose of such a strict rule barring evidence of unnecessarily suggestive confrontation would be to deter the police from using a less reliable procedure where a more reliable one may be available, not because in every instance the admission of evidence of such a confrontation offends due process. Such a rule, Justice Powell concluded, would have no place in the instant case, since both the confrontation and trial preceded the decision in *Stovall* v. *Denno*, where the Supreme Court first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury. Note that the Court has therefore left open the possibility of applying that stricter rule to cases arising after *Stovall*.

Justice Powell then turned to the central question, whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was unnecessarily suggestive. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, the Court concluded that the identification was reliable in the present case. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately.

She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, was more than ordinarily thorough. She had no doubt that respondent was the person who raped her. While there was a lapse of seven months between the rape and the confrontation, which would be a seriously negative factor in most cases, here it is also relevant that the victim made no previous identification at any of the showups, lineups, or photographic showings conducted before her identification of Biggers. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Thus, there was no substantial likelihood of misidentification and the evidence was properly allowed to go to the jury.

Thank you for your attention.

C. Lecture by Professor Stone

Gentlemen, I am Professor Geoffrey R. Stone of the University of Chicago Law School. As you already know, Professor Charles Bowman was originally scheduled to deliver this portion of the lecture but, unfortunately, he is unable to be with us today. I am, therefore, sort of a last minute stand-in. Nevertheless, having served as law clerk to Mr. Justice William J. Brennan, Jr., during the Court's 1972 term, I have, I believe, a rather unique perspective on the decisions I will discuss today.

The second portion of the lecture outline, beginning with Topic "D", "Fair Trail", was prepared by Professor Bowman. Although I intend to discuss all of the cases included in the outline, I have taken the liberty of rearranging them to some extent in this presentation. I hope that this will not cause you any significant inconvenience.

The first topic I will address is that of the need for impartiality of both judge and jury in a criminal prosecution. *Ward v. Village of Monroeville*, one of the first cases decided during the Court's 1972 term, dealt with the need for judicial impartiality. Under Ohio law, mayors are authorized to sit as judges in cases of ordinance violations and certain traffic offenses. In *Ward*, the mayor of Monroeville, Ohio, acting pursuant to this statutory authorization, convicted Ward of two traffic offenses and fined him a total of $100.

In challenging the constitutionality of these convictions, Ward pointed out that the mayor of Monroeville possessed broad executive authority over the village government, and was directly responsible for village finances and revenue production. Moreover, in prior years, approximately 40% of all village revenues derived directly from the fines, forfeitures, costs and fees imposed by the mayor in his judicial

capacity. With these considerations in mind, Ward contended that this system deprived him of his right to a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment. The Supreme Court agreed.

The touchstone of the Court's analysis was its 1927 decision in *Tumey v. Ohio*, which can be found at 273 U.S. 510. *Tumey* involved a situation somewhat similar to the one involved in *Ward*, but in *Tumey* the mayor's personal salary was directly dependent upon the costs and fees levied by him in his judicial capacity. Under those circumstances, the *Tumey* Court held that the defendant's rights under the Due Process Clause were violated because the judge had "a direct, personal, substantial pecumary interest in reaching a conclusion against him in his case." 273 U.S., at 523.

Building upon *Tumey*, the Court in *Ward* stated that the applicable test of judicial impartiality is whether the judge's "situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or 'which might lead him not to hold the balance nice, clear, and fine between the state and the accused...'" 93 S. Ct., at 83, quoting *Tumey, supra*, at 532.

Applying this objective test to the facts of *Ward*, the Court concluded that the mayor's executive responsibility for village finances provided too great a temptation to be partisan to withstand scrutiny under the Due Process Clause. The Court therefore held that Ward had been denied his right to a disinterested and impartial judicial officer.

Finally, the village maintained that any unfairness in the trial before the mayor was harmless because, under Ohio law, Ward was entitled to a trial *de novo* in a separate court. In rejecting this contention, the Court made clear that Ward was "entitled to a neutral and detached judge in the first instance," and the otherwise unconstitutional aspect of the trial in the mayor's court could not therefore be "deemed constitutionally acceptable simply because the state eventually offers [Ward] an impartial adjudication." 93 S. Ct., at 84.

The *Ward* decision is a potentially significant one in at least three respects. The first two are largely irrelevant in Illinois. First, the decision directly bans the use of mayor's courts, at least in situations comparable to the one involved in *Ward*, in all seventeen states that have adopted that system.

Second, *Ward* raises serious questions as to the constitutionality of the "two-tier" system of judicial administration presently existing in almost half the states. Under that system, the defendant is tried first in an inferior court, and if he is dissatisfied with the result, he is entitled to a trial *de novo* in a court of general jurisdiction. Although the

first trial under this system frequently takes place in the absence of many constitutionally mandated procedural safeguards, it was generally thought prior to *Ward* that the absence of such safeguards was permissible because of the defendant's right to a trial *de novo* at which he would be accorded all of his rights. Indeed, in the *Colton* decision, cited in the outline, the Court at least implied that the absence of traditional procedural safeguards in the first step of the two-tier system was not violative of the constitution. *Ward*, however, by holding that the impartiality of the judge in the initial proceeding could not be "deemed constitutionally acceptable simply because the state eventually offers...an impartial adjudication" at the trial *de novo*, casts considerable doubt upon the continued validity of the absence of full constitutional protections in the first stage of the two-tier system.

Third, although *Ward* involved only one aspect of the need of judicial impartiality, the decision itself reflects an increased concern over the problem. Prior to *Ward*, the question of judicial impartiality has, except on rare occasions, been left generally to the discretion of the individual judge involved. But the Court's emphasis on the objective rather than subjective evaluation of judicial impartiality, when coupled with the heightened awareness of the constitutional implications, may lead the Supreme Court, and the judicial system generally, to examine the problem more vigorously on a case-by-case basis. And the determination whether a judge must excuse himself in any particular case need not be left solely to his own discretion, but, rather, may be reviewed subject to the "average man as a judge" test set forth in *Ward*.

The second of the Court's decisions this term dealing with the need for impartiality is *Ham v. South Carolina*, listed as number 16 on the outline. Unlike *Ward*, which involved judicial impartiality, the *Ham* decision concerned the defendant's right to an impartial jury. In a unanimous decision, the Court held in *Ham*, that under the Due Process Clause of the Fourteenth Amendment a trial judge in a criminal prosecution must permit interrogation of prospective jurors on *voir dire* on the subject of racial prejudice. The Court made clear that an abstract question as to bias generally is not an adequate substitute for specific questioning as to racial bias. The Court emphasized, however, that the particular phraseology of the questions, and the number of questions to be asked, must be left in the first instance to the reasonable discretion of the trial judge. As a general guideline, however, the Court pointed out that the questions asked must, at the very least, be "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain." 93 S. Ct., at 851. The Court then suggested that a question such as, "Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?" would appear to satisfy the demands of due process.

The Court also held in *Ham*, this time by a vote of 7 to 2, that so long as the trial judge inquires into bias generally, he is not constitutionally required to permit specific interrogation of prospective jurors as to possible bias against the defendant because he wears a beard. Although admitting that prejudice against persons who wear beards may in fact exist, the Court noted that it is impossible "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices." 93 S. Ct., at 851. The Court explained that the inquiry as to racial bias derives its special constitutional stature primarily from the purposes underlying the Fourteenth Amendment.

The third, and final, decision during the 1972 term dealing at least in part with the need for impartiality is *Chaffin v. Stynchcombe*, listed as number 18 on your outline. In *Chaffin*, the defendant was convicted in a Georgia court of robbery by open force or violence, and was sentenced by the jury to 15 years in prison. Chaffin later succeeded in overturning this conviction, and upon retrial was again convicted and sentenced by the jury—this time to life imprisonment. Chaffin contended that the rendition of a higher sentence on retrial was unconstitutional. Three arguments were advanced in support of this contention, only the last of which dealt specifically with the need for impartiality.

First, Chaffin argued that the Fifth Amendment guarantee against double jeopardy barred the imposition of a higher sentence after conviction upon retrial when, either by direct review or collateral attack, the defendant has successfully challenged the initial conviction. In rejecting this argument, the Court noted that it was well-settled that by successfully challenging his initial conviction, the defendant had himself rendered the prior conviction a nullity and had, in practical effect, wiped the slate clean. Thus, except for any part of the initial sentence already served, neither the retrial itself nor the increased sentence constituted a violation of the Double Jeopardy Clause.

Second, Chaffin argued that the threat of a harsher sentence on retrial has a substantial "chilling effect" on the exercise of the convicted defendant's right to challenge his first conviction. In evaluating this claim, the Court conceded that, in at least some instances, the decision as to whether or not to challenge the initial conviction may indeed be a difficult one. Nevertheless, the Court held that such decisions, although difficult, are essentially tactical in nature, and the need to make them does not in and of itself place an impermissible burden on the right of the defendant to appeal or to collaterally attack his conviction.

Chaffin's third argument brings us back to the problem of impartiality. In *North Carolina v. Pearce,* which is cited in the outline, the

Supreme Court declared that vindictiveness, manifesting itself in the form of increased sentences upon conviction after retrials, can have no place in the resentencing process. Finding that, at least in the context of resentencing by a judge, the legitimate fear of retaliation may deter many defendants from exercising their right to challenge their convictions, the *Pearce* Court held that, in order to satisfy the demands of due process, whenever a judge imposes a more severe sentence after retrial, he must specifically state his reasons for the harsher sentence, and those reasons must "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S., at 726.

In *Chaffin*, the defendant argued that these same rules should apply when resentencing is performed by the jury. In a 5-4 decision, the Supreme Court disagreed. In reaching this result, the *Chaffin* Court reasoned that, when compared to the risks inherent in judicial resentencing, the potential for retaliatory abuse of the resentencing process when performed by the jury is essentially *de minimis*. This is true, the Court explained, because the jury generally will have no knowledge of the prior sentence. Moreover, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and therefore no motivation to engage in self-vindication. Finally, the jury is unlikely to be sensitive to the institutional interests that might occasion harsher sentences by a judge desirous of discouraging what he perceives to be meritless appeals. For these reasons, then, the Court held that, where resentencing is performed by the jury, there is no need for a prophylactic rule similar to that adopted in *Pearce* for judicial resentencing. The problem of vindictiveness in the context of jury resentencing, the Court concluded, must be examined on a case-by-case basis, and the imposition by a jury of a harsher sentence on retrial does not "offend the Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness." 93 S. Ct., at 1987.

The *Chaffin* decision is, of course, largely irrelevant in Illinois, since in this State virtually all sentencing is performed by the judge. The *Pearce* decision, on the other hand, had, as you know, a very definite impact on Illinois sentencing procedures. For in response to *Pearce*, the legislature enacted §1005-5-4 of chapter 38, which became effective on January 1, 1973. (Ill.Rev.Stat., 1972 Supp., ch. 38, §1005-5-4). That section now provides that, "Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing."

Thus, under both *Pearce* and §1005-5-4, two considerations must be taken into account in determining the validity of a sentence imposed after retrial. First, is the second sentence more severe than the one initially imposed? Second, if the sentence imposed after retrial is in fact more severe, can it be justified by reference to conduct on the part of the defendant occurring after the initial sentencing?

Let us assume, for example, that a defendant is convicted of robbery and sentenced to ten years imprisonment. If he successfully appeals or collaterally attacks the conviction, and is then retried and reconvicted, can he again be given a ten-year sentence? The answer depends upon whether the defendant has previously served any part of the initial sentence. If not, then a new ten-year sentence would be *per se* permissible, since it would be no harsher than the sentence initially given. But if the defendant has already served one year of the initial sentence, the imposition of an additional ten-year sentence would be tantamount to sentencing the defendant to an eleven-year term of imprisonment. Since that would constitute a more severe sentence than the one initially imposed, it would be prohibited under both *Pearce* and §1005-5-4 *unless* the court can offer acceptable justifications for the harsher sentence.

With respect to these "acceptable justifications," at least one point must be emphasized. Suppose that the judge learns during retrial that the defendant has three prior convictions, and this fact was unknown at the time of the initial sentencing. Would this new information justify a more severe sentence on retrial? The answer clearly is "No." For under both *Pearce* and §1005-5-4, a harsher sentence can be justified only if "based upon *conduct* on the part of the defendant occurring *after* the initial sentencing."

Since these prior convictions occurred *before* the initial sentencing, they cannot be relied upon to justify a harsher sentence on retrial *even though* the court was unaware of them at the time of the initial sentencing.

Turning our attention from the problem of impartiality, we will focus now on three decisions during the 1972 term dealing generally with what might be termed the defendant's right to present a meaningful defense. In the first of these cases, *Webb v. Texas*, Webb was convicted of burglary in a Texas criminal court. During the course of trial, and after the prosecution rested, the defendant called his only witness. Out of the presence of the jury, the trial judge, on his own initiative, warned the prospective witness of his right to refuse to testify. Moreover, strongly suggesting that he expected the witness to perjure himself, the trial judge admonished the witness at great length that if he lied he would be prosecuted and probably convicted of perjury, that sentence for that conviction would probably be added to the sentence he was presently serving, and that this would necessarily impair

his chances for parole. As a result of this admonition, the witness refused to testify.

Webb argued that the judge's conduct, by driving his sole witness off the witness stand, effectively deprived him of his right to present witnesses in his own defense. The Supreme Court agreed. The Court conceded, of course, that a judge may properly warn a witness of his right to refuse to testify and of the need to tell the truth. The Court held, however, that the judge's admonitions in *Webb* exceeded the bounds of propriety, and may well "have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." 93 S. Ct., at 353.

In so holding, the Court by no means meant to suggest that a defendant in a criminal case has a constitutional right to present perjured testimony. Rather, the Court was concerned that the severity of the judge's warnings might have persuaded the witness not to testify *even though* he intended to tell the *truth*. And insofar as that may in fact have been the consequence of the judge's admonitions, the defendant's right to present a meaningful defense was clearly compromised. Thus, the lesson to be derived from *Webb* is simply that, where a question arises as to a defense witness' credibility, the power of the trial judge is limited to cautioning the witness briefly as to the need to tell the truth. The judge cannot attempt, directly or indirectly, to drive the witness from the stand, for the witness must be permitted to make a free and voluntary decision whether or not to testify, and, if he chooses to testify, the credibility of his testimony must ultimately be determined by the trier of fact.

In *Cool v. United States*, the second of the decisions dealing with the defendant's right to present a meaningful defense, the defendant was convicted in federal court of possessing counterfeit obligations. At trial, one Robert Voyles, who had been arrested with the defendant, but had already pleaded guilty, testified for the defense. Voyles testified that the defendant had no knowledge prior to the arrest that he (Voyles) was passing counterfeit bills or that the bills were hidden in the car in which they were riding at the time of arrest.

At the close of trial, the trial judge warned the jury that an accomplice's testimony is "open to suspicion," and instructed the jury that in evaluating the credibility of Voyles' testimony, "[if] the testimony carries conviction and you are convinced it is true beyond a reasonable doubt, [you] should give it the same effect you would to a witness not in any respect implicated in the alleged crime...". The Supreme Court held that this instruction impermissibly burdened the defendant's constitutional right to call witnesses in his own defense.

At the outset, the Court observed that, in *Washington v. Texas*, which is cited in the outline, it had held that a state could not constitutionally prevent a defendant in a criminal prosecution from presenting exculpatory testimony of an accomplice to the jury. The principles underlying the *Washington* decision, it might be noted, were quite similar to the ones previously discussed with reference to the *Webb* decision. That is, where the state has doubts about the credibility of a defense witness, the defendant must be permitted to present the testimony, and it must be left to the jury to determine the witness' credibility.

In *Cool*, however, and unlike the situations presented in *Webb* and *Washington*, the trial judge did not attempt to prevent the witness from testifying. Instead, he allowed the evidence to be introduced, and then instructed the jury to disregard it unless they were "convinced it is true beyond a reasonable doubt." With *Webb* and *Washington* in mind, the Court held that this instruction "watered down" the defendant's right to call witnesses for his defense to such an extent as to violate the constitution.

The Court also pointed out, as an alternative ground for decision, that the challenged instruction operated in such a way as to unconstitutionally reduce the government's burden of proof. In *In re Winship*, which is cited in the outline, the Court had held that, in a criminal prosecution, the constitution requires the state to prove the defendant's guilt beyond a reasonable doubt. Under the *Cool* instruction, it was possible that Voyles' testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt. Thus, the challenged instruction violated the strictures of the *Winship* decision.

The *Cool* decision creates numerous possible pitfalls for the unwary trial judge. At the outset, it should be noted that the accomplice instruction is well-recognized and its use has been consistently upheld under *appropriate* circumstances. Those circumstances are present when the accomplice is testifying for the prosecution. As the Court observed in *Cool*, an instruction to the jury to receive the prosecution's accomplice testimony "with care and caution," 93 S. Ct., at 357, represents "no more than a common sense recognition that an accomplice may have a special interest in testifying [for the prosecution], thus casting doubt upon his veracity." *Id.* As a result, the use of the accomplice instruction under those circumstances is perfectly proper and "[n]o constitutional problem is posed..."*

In *Cool*, however, the instruction was used where the accomplice was testifying, not for the prosecution, but for the defense. In that situation, the trial judge must proceed with particular care. This is especially true because it is unclear whether *Cool* forbade the use of *any*

*See Illinois Pattern Jury Instructions (Criminal) 3.17

accomplice instruction where the accomplice offers exculpatory testimony, or, more narrowly, whether the Court intended to forbid only the extreme form of the instruction used in *Cool*. The incentive for an accomplice to testify falsely in favor of the defendant would seem to be no greater than the incentive of any friend of the defendant to so testify. And since a cautionary instruction ordinarily is not given when the witness is simply a friend of the accused, the safest course to follow, particularly after *Cool*, would probably be to treat the accomplice testifying in favor of the accused no differently than any other friendly witness is treated.

The most difficult situation, however, arises when the accomplice's testimony is *both* inculpatory *and* exculpatory. For example, certain aspects of the accomplice's testimony may corroborate portions of the prosecution's case, while other aspects of his testimony may tend to support parts of the defense. In this situation, the trial judge is caught in a double-bind. If no cautionary instruction is given, the jury may put too much credence in the inculpatory aspects of the accomplice's testimony. Yet if an instruction is given, the accused's rights may be violated with respect to the jury's evaluation of the exculpatory portion of the testimony. Since any effort to bifurcate the instruction would almost inevitably cause more confusion than it would prevent, probably the safest course to follow under these circumstances would be simply to accept the defendant's request as to whether or not the instruction should be used. In any case, it seems clear that, after *Cool*, the trial judge should be particularly wary whenever he is called upon to instruct the jury with respect to the credibility of a defense witness.

The third, and final, decision dealing with the defendant's right to present a meaningful defense is *Chambers v. Mississippi*. Chambers was tried and convicted in a Mississippi court of murdering a policeman. At trial, Chambers attempted to show that one Gable McDonald had in fact shot the officer. At least one eyewitness claimed to have seen McDonald shoot the policeman. In addition, McDonald had orally confessed the murder to three separate persons on three separate occasions, and had signed a written confession which he later repudiated.

Chambers' efforts to present this aspect of his defense were thwarted, however, by the strict application of certain Mississippi rules of evidence. Due to the operation of Mississippi's "voucher rule," under which a party who calls a witness "vouches for his credibility," Chambers was denied an opportunity to cross-examine McDonald with respect to the nature and circumstances of the confessions and with respect to his whereabouts at the time of the murder. Moreover, since Mississippi, unlike Illinois, does not recognize the "declaration against penal interest" exception to the hearsay rule, Chambers was unable to introduce evidence of McDonald's three oral confessions.

The Supreme Court held that the application of these evidentiary rules in the context of this case constituted a deprivation of Chambers' right to a fair trial. Turning first to the "voucher" rule, the Court noted that any "denial or significant diminution" of the right of cross-examination "calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interests be closely examined." 93 S. Ct., at 1046. The Court then pointed out that the "voucher" rule "has been condemned as archaic, irrational, and potentially destructive of the truth gathering process." 93 S. Ct., at 1046 n. 8. The Court therefore concluded that the "voucher" rule "plainly interfered with Chambers' right to defend against the state's charges." 93 S. Ct., at 1047.

With respect to the exclusion of Chambers' evidence as to McDonald's three oral confessions, the Court noted that, unlike the "voucher" rule, the hearsay rule "has long been recognized and respected by every state" and is supported by legitimate concerns involving the untrustworthiness of certain types of evidence. The Court also observed, however, that "[a] number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability" despite the hearsay nature of the testimony. 93 S. Ct., at 1047. After examining the facts of this particular case, and specifically noting that McDonald's confessions were made soon after the murder occurred, that there was independent evidence tending to corroborate the confessions, and that McDonald was available for cross-examination by the state, the Court concluded that McDonald's oral confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." 93 S. Ct., at 1048. This being so, the Court held that the state's interest in mechanistically enforcing its hearsay rule could not, under the facts of this case, override Chambers' constitutional right to present witnesses in his own defense.

It must be emphasized that, in reaching this result, the Court did *not* hold that a hearsay exception for declarations against penal interest is constitutionally required whenever the absence of such an exception would disadvantage the defense. Rather, as we have seen, the Court specifically tied its holding that Chambers' evidence was too reliable to be excluded to the facts of this particular case.

The narrowness of this holding does not, however, rob the *Chambers* decision of its significance. On the contrary, *Chambers* apparently represents the first Supreme Court decision holding the application of a traditional evidentiary principle to be violative of the defendant's right to present witnesses in his own defense. This being so, the decision obviously raises questions as to the continued validity of many evidentiary rules. For example, suppose X is being tried for the murder of Y, and, at his trial, X wishes to introduce evidence that, on his

deathbed, Z confessed to the murder. Under traditional rules of evidence, this confession would be inadmissible. It does not satisfy the declaration against penal interest exception because Z knew he could not be prosecuted. Similarly, it fails to satisfy the artificial requirements of the dying declaration exception because X is not charged with murdering Z. After *Chambers*, however, the evidence would seem clearly to be admissible, particularly if there is any evidence tending to corroborate Z's confession.

Although many other examples could easily be offered, the important thing to remember about *Chambers* is its clear warning that, at least insofar of the defendant's right to present a meaningful defense is concerned, the rules of evidence "may not be applied mechanistically to defeat the ends of justice." 93 S. Ct., at 1049.

This, then, brings us to the next topic on the outline—Double Jeopardy. Since we've already discussed the *Chaffin* decision, we'll begin here with *One Lot Emerald Cut Stones and One Ring v. United States*, listed as number 19 on the outline. After a trial in federal court, Francisco Klementova was acquitted of charges that, in violation of 18 U.S.C. 545, he had willfully and knowingly, with intent to defraud the United States, smuggled one lot of emerald cut stones and one ring into the United States without submitting to the required customs procedures. Following acquittal, the government instituted a forfeiture proceeding. Klementova argued that his acquittal in the criminal prosecution barred the forfeiture on grounds of both collateral estoppel and double jeopardy.

In rejecting the collateral estoppel argument, the Court pointed out that, unlike forfeiture, a conviction for the criminal offense requires proof of specific intent. Since the acquittal in the criminal prosecution may have been due to the government's failure to prove that intent, the acquittal could not necessarily be said to have resolved the issues involved in the forfeiture. As a second basis for rejecting the collateral estoppel argument, the Court noted that, unlike the criminal prosecution, in which the government must prove its case beyond a reasonable doubt, the forfeiture proceeding requires the government to satisfy only a preponderance of the evidence standard. Thus, the government's failure to prove its case in the criminal prosecution—where it must carry a higher burden of proof—cannot collaterally estop the forfeiture.

The Court also rejected Klementova's contention that the forfeiture constituted double jeopardy. At the outset, the Court made clear that the legislature "may impose both criminal and a civil sanction in respect to the same act or omission" without running afoul of the Double Jeopardy Clause. The difficult question, however, is whether, in any given case, the forfeiture should be treated as civil or criminal. A close reading of the Court's opinion reveals that this determination

turns on three factors. First, if the forfeiture is "by reason of a criminal offense," it must be treated as criminal in nature. Second, the court must seek to ascertain the legislative intent, for if the forfeiture was intended to be punitive, it must be treated as such for the purposes of the Double Jeopardy Clause. And, third, even if forfeiture was intended to be civil rather than criminal, the court must determine whether "the measure of recovery [in the forfeiture proceeding] is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty." 93 S. Ct., at 493.

Applying these tests to the forfeiture statute before it, the Court held that the forfeiture in this case was civil in nature, and was therefore not barred by the Double Jeopardy Clause.

Before turning our attention to the next decision, there is an interesting twist with respect to the problem of collateral estoppel that should probably be mentioned. In *Emerald Cut Stones*, the Court held that a prior acquittal in a criminal prosecution would not collaterally estop a subsequent forfeiture. It is interesting to note, however, that if the government brought the forfeiture proceeding first, and was unsuccessful, a subsequent criminal prosecution would be barred by collateral estoppel. Using the statutes involved in *Emerald Cut Stones* for the purposes of illustration, it is clear that, in order to succeed in the forfeiture proceedings, the government need only prove that the goods were brought into the United States without the requisite customs declarations. Since that is also a necessary element of the criminal offense, the government's failure of proof in the forfeiture proceeding would bar a subsequent prosecution. And the fact that the government's burden of proof is *lower* in the forfeiture could not, of course, avoid the estoppel.

The Court's decision in *Illinois v. Somerville* is particularly instructive with respect to the relationship between mistrials and the Double Jeopardy Clause. Somerville was indicted by an Illinois grand jury on a charge of theft. After the jury had been impaneled and sworn, but before any evidence had been presented, the prosecuting attorney realized that the indictment was fatally deficient under Illinois law because it failed to allege a crucial element of the crime. As you well know, under Illinois law such a defect in the indictment is jurisdictional in nature. It cannot be waived by the accused's failure to object, and can be asserted at any time on appeal or in a collateral proceeding to overturn a final judjment of conviction. Faced with this dilemma, the trial judge, over Somerville's objection, granted the state's motion for a mistrial. After a short delay, Somerville was reindicted, tried and convicted of the offense.

In a 5-4 decision, the Supreme Court held that the second prosecution did not constitute double jeopardy contrary to the pronibitions of the Fifth and Fourteenth Amendments. This decision provides a

useful framework within which to explore the complex problem of when a declaration of mistrial, followed by a second prosecution, constitutes a violation of the Double Jeopardy Clause.

At the outset, it seems clear that the determination whether a particular declaration of mistrial constitutes "jeopardy" for the purposes of the prohibition involves a two-step inquiry. First, it must be determined whether jeopardy has "attached" prior to the declaration of mistrial. The Supreme Court has never determined at precisely what point in the criminal process jeopardy first "attaches." It is settled, however, that once the jury is impaneled and sworn, as was the case in *Somerville*, jeopardy has "attached."

What, then, is the significance of the "attachment" of jeopardy? Quite simply, if the prosecution is terminated prior to "attachment," there has been no "jeopardy" and a subsequent prosecution is *never* barred by the Double Jeopardy Clause.

Once jeopardy has "attached," however, as in *Somerville*, any termination of the prosecution by mistrial or otherwise, over the objection of the defense, will automatically bar retrial unless the termination was required by "manifest necessity" or the "ends of public justice." This, then, brings us to the second part of the inquiry. That is, under what circumstances is a declaration of mistrial justified by "manifest necessity" or the "ends of public justice." Regrettably, these phrases remain almost as ambiguous today as they were when first set forth by Mr. Justice Story 150 years ago. However, *Somerville* and several Supreme Court decisions preceding it, do provide us with at least some guidelines.

First, and not surprisingly, it is well-settled that a declaration of mistrial arising out of prosecutorial misconduct will always constitute "jeopardy" for the purposes of the prohibition. To take an extreme example, a prosecutor realizing that a trial is not developing as expected, might make constant prejudicial remarks in an effort to compel the judge to declare a mistrial. Under those circumstances, a declaration of mistrial would automatically bar re-prosecution.

Second, for a declaration of mistrial to satisfy the "manifest necessity" or "ends of public justice" tests, it must be the only reasonable alternative available to the judge. For example, if there is a defect in the indictment which can be cured by amendment, the trial judge's decision to declare a mistrial rather than to allow amendment of the the indictment would automatically bar a second prosecution. Indeed, the result in *Somerville* turned specifically on the fact that, under Illinois law, the defect in the indictment could *not* be cured by amendment. The application of this principle can also be seen in the Supreme Court's 1971 decision in *Jorn v. United States*, which can be found at 400 U.S. 470. In *Jorn*, the Court held that the failure of a

trial judge to utilize a continuance instead of a mistrial barred a subsequent prosecution.

Turning now to *Somerville*, it was clear that, since the defect in the indictment could not be cured by amendment, the trial judge had available to him only two possible alternatives. First, the judge could have allowed the trial to be completed. If Somerville were acquitted, nothing would be lost. However, if the trial ended in conviction, the jurisdictional nature of the defect in the indictment would allow Somerville to have the conviction overturned. Rather than allow the trial to continue under these circumstances, the judge chose the second alternative—to declare a mistrial.

In holding that the continuation of the trial did not constitute a reasonable alternative, and that the declaration of mistrial did not bar a second prosecution, the Court declared that "[a]trial judge properly exercises his discretion to declare a mistrial...if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require the government to proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." 93 S. Ct., at 1070.

Robinson v. Neil, the last of the Court's decisions during the 1972 term dealing with double jeopardy, merits only brief mention. In *Waller v. Florida*, which is cited in the outline, the Supreme Court held that the scope of the constitutional guarantee against double jeopardy precludes recognition of the "dual sovereignty" doctrine with respect to separate state and municipal prosecutions. As a result, the Double Jeopardy Clause forbids prosecution of an individual in *both* state and municipal courts for the same offense. In a unanimous decision, the Court held in *Robinson* that *Waller* must be accorded full retroactive effect.

This, then, concludes our discussion of double jeopardy, and brings us to the Supreme Court's decision in *Strunk v. United States* dealing with the defendant's Sixth Amendment right to a speedy trial. In *Strunk*, a federal Court of Appeals held that Strunk had been denied a speedy trial. However, rather than dismissing the indictment, the Court of Appeals simply ordered that Strunk's sentence be reduced by the length of time his trial has been unconstitutionally delayed. Strunk argued that the exclusive remedy for violation of the speedy trial right is dismissal of the indictment. The Supreme Court agreed.

At the outset, the Court noted that the speedy trial guarantee is intended to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibility that long delay would impair the ability of an

accused to defend himself. Speaking through Chief Justice Burger, a unanimous Court held that, "[i] n light of the policies which underlie the right to speedy trial, dismissal must remain ...'the only possible remedy.'" 93 S. Ct., at 2263. The Chief Justice concluded that, although this may mean that "a defendant who may be guilty of a serious crime will go free, ...such severe remedies are not unique in the application of constitutional standards." *Id.*

In the next case on the outline, *Wardius v. Oregon*, the Court addressed the complex and difficult question of the extent to which a defendant can constitutionally be compelled to disclose his defense to the state through pretrial discovery. The Court had faced this problem once previously, in its 1970 decision in *Williams v. Florida*, which can be found at 399 U.S. 78. *Williams* involved the constitutionality of a Florida discovery rule requiring the accused to give notice to the prosecution of his intent to present an alibi defense. The defendant was also required to furnish information as to the place where he claimed to be at the time of the offense and the names and addresses of the alibi witnesses he intended to call. In return for this information, the prosecution was required by the Florida rule to notify the defendant of the names and addresses of any witnesses it proposed to offer in rebuttal to the alibi defense. The Court held in *Williams* that this rule did not violate the defendant's rights under either the Due Process or Self-Incrimination Clauses of the constitution.

The Oregon rule challenged in *Wardins* was, in many respects, quite similar to the Florida procedures upheld in *Williams*. There was, however, one important difference. For unlike the Florida rule, the Oregon rule did not provide for reciprocal discovery by the defendant. Although once again approving the state's right to obtain information from the defense prior to trial, the Court held, in a unanimous decision, that "in the absence of a strong showing of state interest to the contrary, discovery must be a two-way street." 93 S. Ct., at 2212. Finding that no such interests were served by the absence of reciprocal discovery under the Oregon procedures, the Court held those procedures unconstitutional under the Due Process Clause.

As you know, the procedures for pre-trial discovery in criminal cases in Illinois are set forth in Supreme Court Rules 412 and 413 (Ill. Rev. Stat. 1971, ch. 110A, §§ 412, 413). These rules provide for liberal discovery for both the State and the accused. Rule 413(d), covering disclosure by the defense, provides that, "subject to constitutional limitations," and upon the filing of a written motion by the State, defense counsel must inform the State of any defenses he intends to present and must furnish the names and addresses of all persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda summarizing their oral statements and any record of prior criminal convictions known to him. In addition, he must disclose any documents, photographs or other tangible evidence

he intends to use at trial either as substantive evidence or for the purposes of impeachment. The defense attorney need not, however, disclose any of his work product, insofar as it concerns his legal theories or conclusions respecting the case.

These disclosure requirements do not seem to violate the "two-way street" test laid down in *Wardius*. For Rule 412 places almost the identical burden of disclosure upon the prosecution that Rule 413 imposes upon the defense. There is, however, at least one potentially serious constitutional question concerning the Illinois discovery procedures. Under both the Florida and Oregon rules, involved in *Williams* and *Wardius* respectively, the defendant was required only to give notice of his intention to claim the defense, and to furnish the names and addresses of the persons he intended to call as witnesses. In upholding this requirement, the *Williams* Court specifically noted that, since the defendant intended to "disclose" all of this information at trial, the requirement that he disclose it in advance of trial amounted to no more than a minor interference with his constitutional rights. This rationale would seem also to justify compelled disclosure of most of the information covered by the Illinois procedures. A serious problem may arise, however, with respect to the Illinois requirement that the defendant disclose all prior criminal convictions of his prospective witnesses. The defendant obviously has no intention whatever of revealing that information at trial. As a result, the compelled disclosure of that information constitutes a more severe interference with the defendant's rights, and cannot be justified under the *Williams* rationale.

One final point that should be made in this regard concerns the types of sanctions the State may impose upon the defendant who refuses to comply with an order to disclose information. Rule 415(g) provides that, whenever a party refuses to comply with the requirements of Rules 412 or 413, the court may "order such party to permit the discovery, ... grant a continuance, *exclude such evidence*, or enter such other order as it deems just under the circumstances." With respect to the "exclusion of evidence" remedy, the committee comments to Rule 415(g) specifically note that "some problems may arise in applying it against the accused." And although the Supreme Court did not rule on the constitutionality of this sanction in either *Williams* or *Wardius*, it went out of its way in both decisions to point out that the exclusion of such evidence would, at the very least, raise serious questions under both the Fifth and Sixth Amendments. The reason for this concern is, of course, quite similar to the concern expressed by the Court in the *Webb*, *Cool* and *Chambers* decisions. For the exclusion of the defendant's own testimony, and the exclusion of other defense witnesses or evidence, obviously impairs the defendant's right to present a meaningful defense. In light of these considerations, the exclusion remedy should be used, if at all, only with a full appreciation of the constitutional implications.

Tollett v. Henderson, listed as number 24 on the outline, concerned the problem of guilty pleas. Some twenty-five years ago, Henderson, acting upon the advice of counsel, pleaded guilty in a Tennessee court to a charge of first-degree murder. In 1971, he filed this habeas corpus action in federal court seeking to set aside his conviction on the ground that the grand jury that had indicted him had been selected in such a manner as to exclude black jurors. For all practical purposes, the state conceded that such systematic exclusion of blacks in violation of Henderson's constitutional rights had in fact occurred. Moreover, at the time of Henderson's guilty plea, neither he nor his attorney had any knowledge of this fact, nor had they ever considered the possibility of raising the issue.

The Supreme Court held, in a 6-3 decision, that where a state criminal defendant, on the advice of counsel, pleads guilty to a criminal offense, he cannot, in a federal habeas corpus proceeding, set aside the conviction because of a deprivation of his constitutional rights that antedated the plea, unless he can prove that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. Prior to *Tollett*, the Court had approached cases such as this under a "waiver" theory. That is, in the words of the *Brady* decision, which is cited in the outline, in order to be barred on collateral attack from raising antecedent violations of his constitutional rights, the defendant's waiver of those rights, implicit in the guilty plea, must have been a "knowing and intelligent [act]..." 397 U.S., at 748. The "knowingly" component of the waiver meant simply that the defendant must have been aware that he was waiving a constitutional right.

Insofar as the defendant's guilty plea was based upon the advice of counsel, the "intelligently" aspect of the waiver meant that the advice must have been competent.

If this standard had been applied in *Tollett*, Henderson clearly would have been successful. Since neither he nor his attorney had any knowledge of the constitutional violation at the time of the plea, Henderson could not be said to have "knowingly" waived his rights. In *Tollett*, however, the Court apparently rejected the waiver theory, and with it the "knowingly" requirement, in favor of an "incompetence of counsel" rationale.

The final case to be discussed today, *Gagnon v. Scarpelli*, required the Court to decide whether a previously sentenced probationer is constitutionally entitled to a hearing when his probation is revoked and, if so, whether he is entitled to be represented by appointed counsel at such a hearing. At the outset, the Court noted that since revocation of probation is not technically a part of the criminal prosecution, the probationer is not entitled to the full panoply of constitutional rights that must be accorded a defendant at trial. Nevertheless, because the loss of liberty entailed in revocation of probation is a serious deprivation, the probationer must be accorded due process.

The Court then held that, since revocation of probation is virtually indistinguishable from revocation of parole in terms of the due process guarantee, the probation revocation process must be governed by the same procedural safeguards held applicable to parole revocation in the 1971 decision in *Morrissey v. Brewer*, cited in the outline. Thus, after *Gagnon*, it is now clear that both the probationer and parolee must be accorded the following rights whenever probation or parole is revoked: As promptly as possible after arrest, there must be a preliminary hearing to determine whether there is probable cause to believe that the arrested person has committed acts which would constitute a violation of the conditions of his probation or parole. At this preliminary hearing, the "probationer or parolee is entitled to notice of the alleged violations, ... an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." 93 S. Ct., at 1756.

In addition, there must also be an opportunity for a hearing prior to the final decision on revocation. This hearing must take place within a reasonable time after the probationer or parolee is taken into custody. At the final hearing, the probationer or parolee is entitled to written notice of the alleged violations, disclosure of the evidence against him, an opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the fact-finders as to the evidence relied on and reasons for the revocation.

The Court then turned to the question, left open in *Morrissey*, whether the probationer or parolee is entitled to be represented by appointed counsel at these hearings. After examining the nature of parole and probation revocation in terms of the need for the assistance of counsel, the Court declined to hold that a right to appointed counsel attached at all revocation hearings.

Rather, the Court concluded that the need for appointed counsel should be determined on a case-by-case basis. The Court then set forth several guidelines to govern that determination. First, the Court held that counsel should be provided whenever the parolee or probationer raises a colorable claim that he has not committed the alleged violation. Second, even where the violation is undisputed, counsel should be provided whenever the probationer or parolee raises a colorable claim that there were substantial reasons which justified or mitigated the violation and these reasons are complex or otherwise difficult to develop or present. Third, counsel should be provided whenever it appears that the probationer or parolee is incapable of speaking effec-

tively for himself. Finally, the Court held that whenever a request for counsel at either a preliminary or final hearing is denied, the grounds for refusal must be stated in the record.

As you know, Illinois has recently adopted new rules, which became effective on January 1, 1973, governing revocation of probation and parole. The probation revocation provision is § 1005-6-4 of chapter 38 (Ill. Rev. Stat., 1972 Supp., ch. 38, § 1005-6-4) and the new parole revocation provision is § 1003-3-9 (Ill. Rev. Stat., 1972 Supp., ch. 38, § 1003-3-9). Although these provisions were intended to guarantee additional procedural safeguards for both parole and probation revocation, neither provision meets all of the constitutional requirements set out in *Gagnon* and *Morrissey*. As a result, the operation of those provisions will have to be modified to satisfy the new constitutional standards enunciated in those decisions.

Thank you.

Topic III—SENTENCING

Hon. Richard J. Fitzgerald
Chairman and Discussion Leader

Hon. William R. Nash
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

I. Sentencing

a. Haddad, *Sentencing Under The Code of Corrections*, supra, pp. 54-64

b. Pusateri and Scott, *Illinois' New Unified Code of Corrections*, 61 Ill. Bar Journal 62 (October, 1972)

c. Presentence Investigation Forms in use in the Second Judicial Circuit, Hamilton County

II. Probation

A.B.A., *Standards Relating To Probation*, Approved Draft (1970)

III. Bibliography

B. Reference Material

Classification of Offenses prepared by the Administrative Office of the Illinois Courts, supra, pp. 36-46

C. Summary of Discussions

Report of Professor Robert Emmett Burns

The reporter wishes to acknowledge the great assistance in coverage, question and direction by the Honorable Richard J. Fitzgerald, chairman, and the Honorable Louis A. Garippo.

DISCUSSION

The format of the seminar was a lecture coverage overview of the new sentencing Code (Ill. Rev. Stat., 1972 Supp., ch. 38, secs. 1005-1-1 through 1005-9-3) followed by a discussion of questions, objections and views. Every group was polled for consensus on important questions. A modified lecture form to provide for constant interruption by discussion worked out best.

There was an unmistakable undercurrent of dissatisfaction with

the sentencing provisions of the Unified Code of Corrections. Many of the judges thought the sentencing portion of the Code was unclear and needed redrafting. The words "shall" and "may" were a source of some confusion. It was apparent that some of the Code provisions have already had a very bad impact not at all envisioned by its drafters. For instance, probation credit in misdemeanor cases has, in revocation situations, led to downright embarrassment for a trial judge who cannot give any real meaningful sentence as a result of the new credit provisions.

There was very apparent dissatisfaction with many of the substantive provisions of the Code. Some of the judges confessed outright misuse of periodic imprisonment to accomplish the split-probation-prison sentence that Illinois courts were formerly, under the old practice, allowed.

Some of the judges were very critical of e mandatory provisions which, in some instances, (such as the mandatory sec. 1005-4-1 sentencing hearing) did not account for the realities of plea practice.

A lively discussion ensued on the desirability of detailed findings versus statutory language recitals in those instances where the new Code required, or expected, findings; i.e., imposition of higher minimums or the extended term.

A good number of judges complained that the Department of Corrections failed to certify that it could examine convicted defendants in presentence commitment situations (sec. 1005-3-3), though the language of the extended term section (1005-8-2) clearly requires a commitment for examination and report before an extended term sentence can be authorized.

A number of judges pointed out that certain restrictions of the new Code rendered practically nil a stated option in sentencing. See sec. 1005-8-4 (c).

A number of judges manifested their fear of appellate review and reversal by marked strict construction and a "don't say much" attitude toward new provisions, such as sec. 1005-4-1 (d) (2) (statement by the court of the basis for imposing the sentence), though the purpose for inclusion in the Code was to provide guidance and direction to the Department of Corrections.

RECOMMENDATIONS FOR EXECUTIVE COMMITTEE ACTION

1. That the Illinois Supreme Court appoint a committee to review the Code of Corrections by articles with a view toward reform. (Majority approval)

2. That the Code be amended to restore to the trial judge the prior prerogative to impose a term of imprisonment with probation (sec. 1005-6-4) (the so-called split sentence). (Overwhelming approval)

3. That the Code be amended to abolish credit for probation revocation (sec. 1005-6-4 (h)); i.e., probation-time-on-the-street credit. (Overwhelming approval. Nearly unanimous approval *especially in misdemeanor cases*)

4. That the Code be amended to abolish the maximum-minimum aggregate restrictions on consecutive sentences (sec. 1005-8-4 (c)). (Overwhelming approval)

5. That the Code be amended to provide for trial court dispositions of concurrent sentences with foreign (other than with the federal courts) or sister states. (Overwhelming approval)

6. That the Code clarify and authorize trial court orders of "supervision," a disposition not recognized in the Code. (Substantial approval)

7. That appellate courts, which find that a trial court sentence violates a statutory minimum, split or aggregate as *sole* grounds of error, decline to reverse and remand, but instead, reduce the sentence to statutory minimums by appropriate order. (Substantial approval)

8. That sec. 1005-2-2 (c) be amended to provide that the confined unfit individual, who (after maximum confinement) still presents a public danger, ought to be involuntarily committed to the Department of Mental Health.

Report of Professor Thomas A. Lockyear

This is the report of the three seminar sessions conducted by the Hon. John F. Hechinger and the Hon. John L. Poole. Judge Hechinger acted as chairman and moderator. The format of the sessions was an informal lecture and discussion with the committee calling attention to areas of change and potential confusion under the sentencing chapter of the new Illinois Unified Code of Corrections (Ill. Rev. Stats., 1972 Supp., ch. 38, secs. 1005-1-1 through 1005-9-3). The judges in attendance participated in a discussion of the points raised and presented problems and questions of their own for discussion.

There is a general feeling of dissatisfaction with the new Code. The judges accepted that the legislative intent of the new Code was to clearly and concisely set forth in a single section of the statutes, provisions for the protection of society and for the rehabilitation of offenders. The feeling was unmistakable, however, that the Code as it now

stands, provides insufficient classifications, and it evidences little appreciation for the problems of the judiciary of Illinois in sentencing criminal offenders.

Three recommendations for change in the Code received near unanimous support. First, the judges were in favor of restoration of the so-called "split sentence," which was eliminated by section 1005-6-3 (d). The judges expressed the need for the restoration of a sentence that would provide a period of imprisonment in an institution other than the penitentiary and still provide for an additional period of community supervision. In restricting probation strictly to in-community supervision, the judges felt that the section imposes sharp-edged black and white alternatives on sentencing in an area where individualization and the needs of each particular offender have long been urged as the proper decision criteria.

The periodic imprisonment provisions of the new Code do not, in the opinion of the judges, provide sufficient flexibility either in sentence or in subsequent supervision, to make up for the loss of the "split sentence." Further, some judges indicated that periodic imprisonment presented almost impossible administration demands on the local sheriffs, making the judges hesitant to use this sentencing alternative.

Second, the judges questioned the implementation of the one-third limitation in the minimum-maximum sentence spread for certain felonies - sections 1005-8-1 (c) (3) and (4). The judges were uncertain as to why this provision was not considered desirable for all felonies. It would seem that an adequate sentence spread for effective professional parole operations would be at least as important for Class 1 felonies as for other felonies. See section 1005-8-1 (c) (2) which does not require the spread when sentencing for a Class 1 felony. Further a strict construction of the language of sections 1005-8-1 (c) (3) and (4) would apply the one-third spread limitation to Class 2 and Class 3 felony sentences only when the minimum sentence actually imposed by the court exceeds the statutorily prescribed minimum contained in the sections. This is certainly a curious provision and it is difficult to understand the reasoning behind it.

The judges find themselves confronting a problem apart from the confusing language and unclear legislative purpose when sentencing under the provisions of sections 1005-8-1 (c) (3) and (4). For example, they are being presented with negotiated pleas which anticipate a sentence not in conformity with the statute's one-third spread requirements. They report both prosecutor and defendant dissatisfaction with not being able to agree on a sentence found mutually acceptable; and some judges report trials in cases where pleas in conflict with the one-third spread limitation were offered but could not be accepted by the court. While this problem may be simply a matter of education of all

parties concerned, a clarification of the statute sections in question would greatly aid the direction and conformity of this education.

Finally, the judges felt that section 1005-8-4 (a) providing for concurrent sentences with other sentences imposed by Illinois courts or by the United States District Court, should also include concurrency with sentences from other states.

Other problems with the Code were offered and discussed. It was suggested that the provisions of section 1005-3-2 (a) (1) providing that the pre-sentence report should contain the defendant's history of delinquency and criminality, should be changed to limit the matters included to those which resulted in convictions. There was a fairly evenly mixed reaction to this suggestion.

It was also pointed out that the new Code failed to provide any direct assistance to the judge: The sentence imposed remains the decision of the individual judge. There was some discussion of sentencing councils and other decision making alternatives. Stemming from this discussion and expressions of a general public feeling of a Cook County - downstate sentencing disparity, each session of the seminar was presented with a brief pre-sentence report and the individual judges were asked to sentence the offender involved. The results were completely lacking in the suggested disparity. Indeed the response of this rather broad cross-section of judges fell within a surprisingly narrow range.

An apparently Cook County confined problem was raised: The difficulty with security of persons found unfit to stand trial and committed under the provisions of section 1005-2-2. The judges report that such persons, charged with serious crimes, are in some instances walking away from institutions which are designed without custody or security considerations. Legislation to insure proper security for such persons is recommended.

It was pointed out that Ill. Rev. Stat. 1971, ch.38, sec. 12-4 (b) (9) includes, apparently as a result of revision over-sight, a specific sentence of one to five years. Sub-section (d) of the statute classifies aggravated battery as a Class 3 felony, suggesting that the sub-section (d) (9) inclusion is an over-sight. Prompt correction to minimize confusion is recommended.

Finally, the confusing language of section 1005-8-1 (e) was highlighted. This sub-section provides that each indeterminate sentence under the Code shall include a parole term, as set forth in the sub-section, *in addition* to the term of imprisonment imposed. While the language of the sub-section is unclear and must ultimately await judicial interpretation, it appears that the intent is to increase the maximum sentence imposed by the parole term provided for the particular class of felony involved. In this event judicial determination of an intelli-

gent and understanding plea of guilty will have to include establishing the defendant's awareness and understanding of the additional parole term provision.

Addendum to Prof. Lockyear's Report

[The following text is taken from Professor Lockyear's September 26, 1973 letter to the Secretariat of the Judicial Conference, the Administrative Office.]

The information on section 1005-8-1(e) that I promised is as follows. My source is Lawrence X. Pusateri, chairman of the Illinois Council on the Diagnosis and Evaluation of Criminal Defendants. The section is intended to *add* the prescribed parole term to any sentence imposed under the section. Mr. Pusateri said, "Increase the sentence by the parole term." As discussed, this interpretation would seem to require that a judge make sure that a defendant understands this "increased sentence" provision before he accepts a plea of guilty under the provisions of Supreme Court Rule 402.

The problem, it seems to me, is: What does the "increase" really mean? For example, if an offender is sentenced to 4 to 12 years for a Class 1 felony, his "additional" parole term is 5 years. That could potentially mean a 17 year sentence - 12 years plus a 5 year parole term. More realistically, however, we need to consider the defendant who will be paroled before he has served the maximum of his court imposed sentence. If the offender is paroled after serving six years and commits no further offense or violations of parole, he will apparently be discharged from all supervision no later than the end of his fifth year on parole, or after a total of 11 years. (See sections 1005-8-1(e) and 1003-3-8(a) and Council Comments.) On the other hand, the sections could be interpreted as providing for the original maximum sentence (in the example, 17 years) and requiring that an offender who is paroled after 6 years, spend 11 more years on parole, if not discharged sooner. I personally doubt that the latter interpretation was intended, but then I did not think subsection (e) was meant to extend the judicially imposed maximum sentence either.

If the interpretation is the latter, then there is no problem - the judge simply informs the defendant of the additional parole term and the new total possible term. If the interpretation is the former, things are more complicated. Then the *actual* maximum sentence may be anything between the minimum sentence less good time plus the parole term to the new total possible term - somewhere between about 8 (depending on the exact minimum parole eligibility plus 5 years) and 17 years.

Maybe there is nothing wrong with this system in theory, but there has to be a better way to state it in the statute. Also, the judges who are sentencing and accepting pleas, should understand what they are doing if the system is to have any meaning at all.

Topic IV—TORTS

Hon. Joseph J. Butler
Chairman and Discussion Leader

Hon. Paul C. Verticchio
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

I. Product Liability

a. *Outline of Problems to be Discussed*, taken from the 1968 Illinois Judicial Conference Report, pages 177, 178 and 179

b. *Williams* v. *Brown Manufacturing Company*, 45 Ill.2d 418, 261 N.E.2d 305 (1970)

c. *Mieher* v. *Brown*, ___ Ill.2d ___, 301 N.E.2d 307 (1973)

d. *Reese* v. *Chicago, Burlington & Quincy Railroad Company* (No. 45293), ___ Ill.2d ___ (1973). (Slip opinion filed in June 1973)

e. Illinois Digest, *Torts*, Vol. 30A, Sec. 14.1 (1972 pocket part)

II. Structural Work Act

a. *Crafton* v. *Knight & Associates, Inc.*, 46 Ill.2d 533, 263 N.E.2d 817 (1970)

b. *Assise* v. *Dawe's Laboratories, Inc.*, 7 Ill.App.3d 1045, 288 N.E.2d 641 (1972)

c. *St. John et al* v. *R.R. Donnelley & Sons Co., Inc.*, ___ Ill.2d ___, 296 N.E.2d 740 (1973)

B. Reference Material

Burke v. *Sky Climber, Inc.*, ___ Ill.App.3d ___, 301 N.E.2d 41 (1973)

C. Summary of Discussions

Report of Professors Leigh H. Taylor and Vincent F. Vitullo

In preparing for the 1973 Judicial Conference, the committee on Torts decided to confine its discussion to the general area of minimal liability in tort law, specifically including recent developments in strict product liability and problems arising under the Structural Work

Act. Because the topic of strict liability had been the subject of the 1966 and 1968 Judicial Conferences, the committee determined that that area should only include a survey of developments since the 1968 Conference. Materials consisted of:

Williams v. *Brown Manufacturing Company*, 45 Ill.2d 418, 261 N.E.2d 305 (1970);

Mieher v. *Brown*, ___ Ill.2d ___, 301 N.E.2d 307 (1973);

Reese v. *C. B. & Q. R.R. Co.* (No. 45293), ___ Ill.2d ___ (Slip opinion filed in June 1973);

Crafton v. *Knight & Associates*, 46 Ill.2d 533, 263 N.E.2d 817 (1970);

Assise v. *Dawe's Laboratories*, 7 Ill.App.3d 1045, 288 N.E.2d 641 (1972);

St. John v. *R. R. Donnelley & Sons*, ___ Ill.2d ___, 296 N.E.2d 740 (1973).

This term, the Illinois Supreme Court decided the case, *Mieher* v. *Brown*, which had presented the Court with the intriguing question of whether a non-user could proceed in negligence against a manufacturer for injuries received when the non-user was injured by the product because of a collision with the product. The non-user and second collision questions were not decided by the Court, which seemed to indicate only that the plaintiff had failed to state a cause of action. Because of the interesting, though unresolved, problems presented in *Mieher*, as well as the difficulty in deciphering the Court's opinion, discussion necessarily focused upon the problems presented in *Mieher*.

Following a review of the general elements of a cause of action in strict liability, the following questions were discussed:

1. Does a non-user have a cause of action in strict liability?

   It was assumed that the non-user clearly had an action when injury resulted from a product defect.

2. Since it is clear that contributory negligence is not a defense in a product liability action, what defenses are available in an action brought by a non-user (i.e., what conduct of the user or non-user will bar relief)?

   It was agreed, after some discussion that "misuse", while classified as an affirmative defense against the user, is also a necessary aspect of the user's cause of action; and while the plaintiff-user need not necessarily present and prove freedom from misuse, it is apparent that in order to state a *prima facie* case, the plaintiff-user's evidence will tend to show whether or not there has been misuse. Thus, the misuse doctrine can be viewed as both an aspect of the plaintiff's case in chief or as an affirmative defense. This characterization was only felt to be significant in terms of which attorney would be permitted to argue that the other party carried the burden on the misuse question.

Mieher v. *Brown*, clearly states that assumption of risk is an affirmative defense which will bar recovery in a strict liability action. Thus, when misuse occurs or when the user is aware that a risk exists and nevertheless continues to use the product, the policy considerations articulated in *Suvada* v. *White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), which required that liability be borne by the manufacturer, are negated and the plaintiff-user should incur the economic consequences of the injury or loss.

Assuming that the user would be barred by misuse or assumption of risk, there was difficulty in determining whether the same defenses were available if the action were brought by a non-user. It was felt that, if the non-user knew of the defect or knew of the risk created by the defect, then the defense would lie against the non-user plaintiff. With respect to misuse, there was no general agreement, some arguing that the non-user would only have an action against the use for the user's negligent misuse of the product. The alternative theory was that since the user will often be unable to bear the economic loss, that unless the misuse was gross, the non-user should not be barred from recovery.

3. When is the product defective?

   With respect to manufacturing defects, a product is defective whenever it fails to perform as it was intended to perform (i.e., that the product while meeting the manufacturers' specifications, failed due to some faulty characteristics of the product).

With respect to design defects, there exists the difficulty that no product can be designed absolutely safe, and in order to determine whether there is a defective design, it is necessary to determine whether the design was a reasonable design, imposing upon the designer the standard of an expert, and comparing the design to the design of others. This type of analysis, whether the design was reasonable, appears to be similar to the analysis of conduct in a cause of action based on negligence and this similarity necessarily causes confusion. It was agreed, however, that the standards merge in an action in strict liability even though such an action deals with the question of the reasonableness.

Some concern was expressed over the impact of loan agreements which were approved this term by the Supreme Court in *Reese* v. *C.*

B. & Q. R.R. Co. The agreement which was upheld was between the plaintiff and a potential joint tort-feasor. Discussion focused upon the effect of the loan agreement on the "no-contribution rule"; but the greatest interest was expressed concerning the effect such agreements would have upon the adversary process where, in effect, opposing parties may be joining forces to turn on a specific defendant.

The following questions were dealt with under the Illinois Structural Work Act (Ill.Rev.Stat. 1971, ch. 48, § 60 *et seq.*):

1. What are "scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances" within the meaning of the Structural Work Act?

   There was agreement that anything was a scaffold, including a hole in the ground or a completed structure depending upon the determination of the question of whether it was being used as contemplated by the Act. Given this approach, there is little difficulty in dealing with a case such as *Crafton* v. *Knight & Associates*, which involved an injury caused when the plaintiff fell from a tractor on a construction site; or a case such as *St. John* v. *Donnelley* where plaintiff's decedent was killed when he fell through a hole in the roof of the building under construction.

2. Who is covered by the Structural Work Act?

   Since the Structural Work Act was not intended to cover all construction activities and injuries resulting from construction activities, it was agreed that only those individuals involved in the extra-hazardous activities contemplated in the Act are covered.

In concluding, there was no clear consensus or recommendation by the participants due primarily to the lack of clear direction by the reviewing courts in these areas. Despite the principal theme of minimal liability, many of the judges continue to strongly embrace traditional tort concepts of responsibility and causation, and they seem to reject the policy considerations which underlie liability in these areas. This reluctance is best demonstrated by the characterization of the defendant as an "insurer" of a product or structure's safety.

Topic V—FUNCTION OF THE TRIAL JUDGE

Hon. Caswell J. Crebs
Chairman and Discussion Leader

Hon. L. Sheldon Brown
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

I. Disciplinary Measures for Attorney Misconduct
Excerpts from *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 1952 Colum.L.Rev. 1039

II. The Inherent Power of the Court to Supervise The Disciplinary Process

a. Excerpts from A.B.A., *Problems and Recommendations in Disciplinary Enforcement*, prepared by the Committee on Evaluation of Disciplinary Enforcement, Final Draft, June 1970.

b. Ill.Rev.Stat. 1971, ch. 110A, § 61(c)(10)

III. Managing The Courts: The Problem

Excerpts from E. Friesen, E. Gallas and N. Gallas, *Managing The Courts*, pp. 163-166 (1971)

IV. Standards on the Function of the Trial Judge

Excerpts from A.B.A., *Standards Relating To The Function of the Trial Judge*, Approved Draft, 1972. Standard 6.5

V. Problem Areas

a. Excerpts from A.B.A., *Problems and Recommendations in Disciplinary Enforcement*. Cited supra.

b. *In re Henning*, 201 N.W.2d 208 (Minn.S.Ct. 1972)

c. A. Geller, *Unreasonable Refusal To Settle and Calendar Congestion—Suggested Remedy*, 34 N.Y.S.B.J. 477 (1962)

d. Ill.Rev.Stat. 1971, ch. 110, § 41

e. *Brokaw Hospital* v. *Circuit Court*, 52 Ill.2d 182, 287 N.E.2d 472 (1972)

f. Ill.Rev.Stat. 1971, ch. 110A, §103(b)

g. Ill.Rev.Stat. 1971, ch. 110, § 59

h. *Galvan* v. *Morales*, ___ Ill.App.3rd ___, 292 N.E.2d 36 (1972)

i. *Danforth* v. *Checker Taxi Co.*, 114 Ill.App.2d 471, 253 N.E.2d 114 (1969)

j. Excerpts from, *An Attorney Fine: A Sanction To Ensure Compliance With Court Calendar Orders*, 30 U.Chi.L.Rev. 382 (1963)

k. *People* v. *Pincham*, 3 Ill.App.3d 295, 279 N.E.2d 108 (1971)

l. Summary of *In re Niblack*, 13 Cr.L. 2037 (C.A. D.C., March 8, 1973)

m. Summary of *In re Lamson*, 12 Cr.L. 2130, 468 F.2d 551 (C.A.1, 1972)

B. Summary of Discussions

Report of Professors Richard C. Groll and Donald H. J. Hermann

The reporters wish to acknowledge the effective leadership given to the conducting of this seminar by the Honorable Caswell J. Crebs, chairman, and the Honorable L. Sheldon Brown, vice-chairman. The committee was divided into two panels. One was chaired by Judge Crebs, as accompanied by Richard C. Groll; and the other was chaired by Judge Brown, as accompanied by Donald H. J. Hermann. In each session, there was a discussion of problems which had been drafted by the professor-reporters. The following represents the discussions which ensued.

Problem #1:

A hearing on a contested divorce has been set for 9:00 a.m., Tuesday morning, July 10, 1973, in your court. You ask your bailiff to see if attorneys and their clients are prepared; he reports during the next forty-five minutes that one attorney is not yet present. At 9:45 a.m., you assume the bench and decide to proceed with petitioner's argument. Is this proper? At 10:30 a.m., respondent's attorney appears. What can you do?

Commentary:

In the first instance, the assembled judges said that they were customarily faced with the problem of attorneys not appearing in their court at the designated hour. Many of them expressed the view that those who tended to be late or who disregard assigned times tend to be extremely repetitive in their conduct. It was generally agreed that if an attorney failed to show promptly, the judge should call the attorney's office to determine whether or not there was a reasonable excuse and also to determine whether something had legitimately precluded the attorney from making an appearance at all. "Making a record" was clearly emphasized by the judges in attendance and especially by the judges of the Illinois Appellate Court who suggested that a trial judge was on weak ground if he did not let the record show the failure of the attorney to appear promptly and also record any conduct of a repetitive nature.

Where the attorney merely failed to show for one-half hour or an hour, it was universally agreed that the case ought to proceed but the judges were concerned as to the time lag before the case went to trial. There was a general feeling that the sanction should be meted out against the attorney as it represented a breach of the attorney's responsibility to the court. The judges were most reluctant to penalize the litigant because of his attorney's misconduct. A lively discussion ensued in each seminar session as to various approaches to be taken. Some expressed the view that the client should be admonished as to the effect upon the proceeding and that the litigant should be given the opportunity to choose alternate counsel if he desires.

Where judges indicated a desire to proceed where the lawyer did not appear and could not be located, the hearing would be held ex *parte* and the judges would question witnesses presented by the party present. In some counties a reporter is not present to record the questioning which can create a problem if the judge later decides the attorney to have a good excuse for his absence. In a criminal case, some judges indicated a willingness to impound the jury and then wait for the appearance of counsel from whom an explanation would be demanded. In any case, the judges would demand an explanation from counsel in the case of tardiness. Most judges would not make an independent attempt to verify the excuse, but all said where the judge became aware of the untruthfulness of the excuse, the lawyer should be held in contempt.

A reluctance to proceed in this case was expressed by many since the client is being penalized on the merits of his case for his attorney's conduct. It was noted, however, that a client has hired his attorney who is his agent, and that in many cases, the attorney and client have agreed on a dilatory strategy.

Problem #2:

A date is set for the argument of a motion or trial and one of the attorneys just doesn't appear. What course of action is open to the trial judge? Can the trial judge issue an arrest warrant? Impose a fine? Dismiss the action?

Commentary:

In most discussion sessions, both problems 1 and 2 were discussed *simultaneously*. As to the attorney who failed to appear, the judges were uniform in feeling that there should be an assessment of cost against the attorney and the cost should include opposing counsel's fee plus witness fees for the time which they spent waiting. Once again, emphasis was clearly placed on full disclosure on the record of the attorney's conduct.

The next most appropriate step advocated was issuance of a "rule to show cause" why the attorney should not be held in contempt. There was some misunderstanding as to the procedural aspects preceding a contempt citation. Several judges present indicated that when an attorney failed to appear, then a bench warrant should be immediately issued. While this may violate the concept of due process, it is preferable that a rule to show cause be brought and an opportunity be given to the attorney at a hearing to present arguments mitigating against a finding of contempt. Both as to the instances of why the attorney arrived late or did not appear, it was the sentiment of the judges that admonitions should be more regularly given out. The idea being that the warning often has beneficial result and when it does not, a record is made which forms a better basis for an ultimate contempt citation in proper circumstances.

In many civil cases, it may be proper where plaintiff is absent or the moving party doesn't appear to dismiss for want of prosecution and then consider all excuses and explanations at the time of a hearing on a motion to vacate the dismissal order. There is a penalty of a filing fee in cases involving a motion to vacate the order. Moreover, there is some possibility of placing the attorney in the position of being charged with malpractice where dismissal has occurred as a consequence of his failure to appear, and many judges are reluctant to place themselves in a position of being responsible in any way for such liability. After thirty days, section 72 of the Civil Practice Act places a much heavier burden on counsel who is attempting to vacate.

The use of the contempt power was felt to be reserved for extreme circumstances. Moreover, there was some suggestion that failure to appear would not be direct contempt in the presence of a trial judge, thus eliminating the use of summary contempt proceedings. It was felt that to sustain a contempt citation, one had to have a record fully documented.

Use of a fine was felt to require, preliminary, the establishing of a contempt with all the attendant problems of record and prospects of appellate review which was thought, however, to be less likely in the case of a fine than in the case of a contempt citation.

Problem #3:

You have issued an *ex parte* restraining order in a case involving a complaint by the state's attorney involving a movie which is allegedly obscene. You set a hearing for Monday morning on the issue of whether a temporary injunction should issue. Notice of this hearing has been presented to the attorney for the theatre. Attorney for the theatre appears before you asking for dismissal and argues that the allegedly obscene movie is not and has not been shown in his client's theatre. You take this matter under advisement. Your independent examination of the theatre's newspaper advertisement and the theatre's marquee reveals that the movie is being shown at the theatre named by the state's attorney. What should you do?

Commentary:

This fact setting and those that were analogously drawn by participants created considerable discussion. A fair amount of the judges present felt that a trial judge should exercise no independent action but wait for opposing counsel to raise the issue of any falsification by an attorney involved before him. A majority of the judges, however, felt that if evidence was independently presented to a trial judge and it is a matter or record that the attorney had intentionally made a false statement affecting a case, then a rule to show cause should be issued; and thereafter, a hearing should be had to determine whether or not the action by the attorney conformed to the judge's suspicions.

An analogous problem was raised: This is the personal injury case where the attorney states to the court that his client is in the hospital. Many felt this would be a direct contempt on the court and subject to a rule for contempt. Some felt this was not a sufficient cause for imposition of any disciplinary action.

Problem #4:

Defendant has been charged with a felony and all pretrial procedures have been completed. Because of a series of continuances requested by defense counsel, trial is set and the trial date is more than six months after indictment. On the date set for trial, defense counsel, for the first time, requests a sanity determination. No evidence has been introduced to show a sudden change in defendant's mental health.

Commentary:

All judges felt that even if the defense counsel were using a case for a sanity determination as a trial tactic, the rights of the defendant in a criminal case should not be abridged and hence the court should allow the request. The general feeling was that if this was a trial tactic

which delayed the court in proceeding to trial, the sanction should be against the attorney, and not to the jeopardy of the defendant in a criminal case. It was suggested that it would be proper to hold a hearing to determine whether a behavioral examination should be ordered rather than a mere reliance on counsel's statement, especially in the case where there had been a series of continuances previously sought and granted.

A similar situation occurs in the chancery division of the Cook County Circuit Court, where counsel often at time of trial, petitions for the appointment of a guardian *ad litem*. While the court should not automatically appoint a guardian, it should refer the matter to the probate division for a hearing on the question of whether a guardian should be appointed.

Problem # 5:

You are hearing a case involving a number of motions and have daily called upon counsel to file briefs at given times. Each day that argument is heard on these motions and briefs, plaintiff's counsel informs the court that defendant's counsel has failed to present these papers to opposing counsel until the time of the hearing. You have advised defendant's counsel that he should serve these papers on opposing counsel at the same time he has been requested to present them to the court which has generally been three days before each hearing on argument. The defendant's counsel has consistently failed to comply with your order. What can you do to remedy plaintiff's counsel complaint? Should you do anything, or is this merely a matter of attorney tactics?

Commentary:

Where a court has ordered counsel to serve papers in a timely manner on opposing counsel, failure to do so would constitute contempt of court. However, a series of penalties may be considered whether contempt would otherwise lie. One of these may be assessment of cost which is represented by the presence of counsel at a trial which must be continued at counsel's motion. Some judges suggested that counsel be told to file two copies with the court, the second copy being made available to opposing counsel. The lawyer filing the papers could be assessed the cost of copying and of delivering a copy to opposing counsel. In extreme cases, a fine might be imposed or the case could be dismissed but this again raises the question of a client suffering for his counsel's practices. The basic aim here is to get to the merits of the case and this objective should be the guide for the judge.

Some judges said that doing nothing would not seriously interfere with the course of justice. They downgraded the significance of written trial memoranda. In any case, they considered this to be a matter of lawyer tactics.

Problem # 6:

A personal injury action was filed in 1965. The liability is apparently "thin" and the injuries are severe. At each progress call, both attorneys state they are not prepared to go forward and wish a continuance. It is simply a bad case and neither wants to try it. What should the court do? If both attorneys agree to a continuance or postponement, must the court agree? If not, what remedy is available?

Commentary:

The reaction of the judges as to their obligation to move a court docket has obviously been affected over the years by the existence of a considerable backlog. Many judges expressed the view that they had believed for years that the type of problem presented was one for the practicing bar to be concerned with and that there ought to be no judicial intervention. The more traditional view being that if neither party desires to proceed to the trial of the case, that was their prerogative. The existence of the backlog and the adverse public reaction to the judiciary by virtue of its existence seems to have caused all judges to take a different view. The judges were fairly uniform in believing the court has the responsibility to move the docket forward and that if the parties are unwilling in the absence of legitimate excuse to proceed, then the case should be dismissed.

The age of the case and the number of continuances granted should be considered. If both parties are present when trial is set and the age of the case and continuances granted are numerous, some judges said they would impound the jury. Even where the settlement process is proceeding, the presence of a jury panel seems to have a beneficial effect in encouraging settlement. Nevertheless, there was a general feeling that it is not the function of the trial court to compel settlement.

It was felt that a general rule striking cases after two years, for example, with notice to counsel would be desirable; in such a case, attorneys could apply for reinstatement and depending upon the age of the case, a burden would be placed on counsel to justify his application.

Problem # 7:

You have heard a case involving an alleged wiretap of a political party's headquarters. Following the conclusion of the trial you learn that one of the prosecutors permitted a witness to testify to certain facts when he had been informed by another state's witness that the former witness had stated prior to the trial an intention to perjure himself. Should you as a judge take any direct action? Are there any alternatives open to you other than a referral of this matter to the prosecutor's office, the chief of which is the attorney in question?

Commentary:

In such a case, the crucial burden on the judge is the establishment of a record. A court reporter should be called in to record an informant's accusations. Both prosecutor and opposing counsel should be notified. Then, one possibility is to set the matter for a hearing and to inform defense counsel of the possibility of a filing of motion for a new trial. A second possibility is to appoint a special prosecutor to investigate the matter and to determine ultimate sanctions to be sought if the information is verified. A third possibility is to turn the matter over to the Attorney Registration Commission since the prosecutor has a professional obligation to report to the court all matters which may affect the appropriateness of the prosecution's offer of evidence and proof. Finally, and least acceptable to most judges, was to hold a hearing on the informant's allegation and if proved to the court, the prosecutor would be subject to the contempt authority of the court.

Problem # 8:

The date and time to have a motion, or proceed to trial, has been set. At the set time, the secretary or law clerk for one of the attorneys appears and announces that counsel is appearing in federal court and cannot be present. Does the trial judge have any recourse at this point? Assume the judge calls the federal court and discovers that counsel, in fact, is not there. What recourse is open at this point?

Commentary:

This problem presents a situation very much similar to that covered in problems 1 and 2. Most of the judges expressed considerable concern about granting a continuance upon the request of a secretary or law clerk to an attorney. While the circumstances might legitimately warrant continuance, given the factual basis presented, there was considerable fear that the practice could easily get out of hand. In each case, if the attorney did not appear, the judges felt that the assessment of costs should follow and in the appropriate case a rule to show cause why an attorney should not be held in contempt. Many judges had very strong feelings that if the judiciary as a group did not attempt to enforce the obligation of a trial lawyer to be present, then even greater delays would occur. The general view was that if an attorney had a reasonable excuse, then this could be communicated over the telephone to the trial judge. If this did not occur, a more severe sanction than has existed to date should follow.

Problem # 9:

You are sitting in a criminal trial involving a murder indictment. During the questioning of the state's witnesses by the prosecutor, defendant's attorney can be heard at an audible level mumbling the

words "bullshit", "liar", and "that doesn't prove anything". Should you and can you do anything to remedy this situation? What can you do?

Commentary:

The judge should instruct the jury to disregard the attorney's remarks and should caution the attorney to cease his course of conduct. Contempt should be the last resort. While a mistrial may be appropriate, this may be a defense strategy so that a finding of prejudice could be made. The possibility of assessing costs should be considered by the court. Where age or personal habits of the counsel make it difficult to contain himself throughout an entire day's trial, the court may consider scheduling half-day sessions to avoid a problem where such conduct is a spontaneous response; however, such judicial concession should be restricted to extreme cases.

Problem # 10:

A series of problems have become apparent in your court; lawyers repeatedly fail to answer interrogatories, fail to produce parties for depositions and fail to appear in motion calls. While you have decided that something must be done about these problems, you are not certain that any number of other judges will follow your lead. Should you proceed with a case-by-case adjudication of these questions? Are there any alternatives to a case-by-case determination? Will there be any bar hostility against you; will there be any sense of lack of uniformity in these matters? Would a set of uniform standards and penalties be preferable? How could such uniform standards and penalties be developed?

Commentary:

Many of the judges felt that uniform standards should be drawn to deal with the attorney who fails to appear, appears late or otherwise uses dilatory tactics. Many felt that the aggravation level was too great for them to make a case-by-case determination of appropriateness of sanctions.

Many judges felt that a simple rule of thumb was that failure to file required papers or failure to answer interrogatories should always be dealt with by a striking of the pleadings. However, it was observed that this may unfairly penalize a client for his attorney's habits. However, it may result in the client moving his business to a diligent counsel which would benefit him and the court.

Some judge said their preference and conception of justice required a case-by-case determination with counsel afforded the opportunity to offer explanation.

While some judges said they would put a limit on the time for discovery, others said the demands of practice and unavailability of witnesses suggest a need to provide for the taking of depositions up to the time of the trial. Some trial judges said that the responsibility for overseeing discovery and motion pleadings should rest with the motion and assignment judges who should develop their own rules and practices for dealing with failure to comply with their orders.

Additional Discussion

In many of the sessions, a considerable period of time was devoted to those portions of the advanced reading materials which dealt with the reasonableness of parties and attorneys to settle. A considerable discussion was had with respect to the California approach and the Michigan plan. Most of the judges felt that some rule of court should be enacted that would force the parties to act reasonably with respect to out-of-court settlements. Most, however, held the belief that the imposition of any sanction to act reasonably should be within the discretion of the trial judge in order to deal with situations where truly changed circumstances occurred.

Topic VI—THE TRIAL JUDGE AND THE RECORD ON APPEAL

Hon. Leland Simkins
Chairman and Discussion Leader

Hon. John J. Stamos
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

I. Discussion Outline

a. Making the Trial Record

Reading Material: Address by Judge Crebs

1. Judgments
   (a) Form of judgment to be entered—civil and criminal
   (b) Be sure each count or claim has a judgment specifically entered

2. Pre and post trial motions—to dismiss, to suppress, for new trial, etc.
   (a) Require to be specific as to grounds; no "kitchen sink" motions; preferably in writing
   (b) Rule specifically on each ground and state reasons; see, e.g., 8 Ill.App.3d 613, 290 N.E.2d 912

3. Motions during trial, objections to evidence and instructions
   (a) Make sure made on the record, and while not in writing, make counsel be as specific as to grounds and authority as possible
   (b) Rule on each issue individually, and be as specific as practical as to reasons for ruling

b. Problems under Rules 401 and 402

Reading Material: Rules 401 and 402 plus excerpts from draft bench book

1. Have all admonitions on the record

2. State for the record all material information acquired off the record

3. Hearing in aggravation and mitigation
   (a) Necessity for on order to show sentence reasonable

(b) What kind of evidence is admitted?

c. Certifying Issues on Appeal

Reading Material: Rules 304 and 308

1. When should you do it?
2. What standards apply?
3. What is a final order?

d. Miscellaneous

Reading material: Rule 305

1. Offers of proof
2. Preserving demonstrative evidence
3. Setting supersedeas bond and bond on appeal
4. What to do if counsel has missed something crucial

II. Appellate Overview

Crebs, *Appellate Overview*, 1971 Ill.Jud.Conf.Rept. 17

III. Pleas of Guilty

a. Ill.Rev.Stat. 1971, ch. 110A, §§ 401, 402

b. Excerpts from *Bench Book (Criminal Cases)*, Chap. V, *Guilty Plea Generally*. To be published by the Illinois Judicial Conference Committee on Criminal Law for Illinois Judges.

IV. Rules Governing Appeals

Ill.Rev.Stat. 1971, ch. 110A, §§ 304, 305 and 308

B. Summary of Discussions

Report of Professors Richard A. Michael and Thomas D. Morgan

The committee on the Trial Judge and the Record on Appeal held three seminar sessions during this year's Judicial Conference. Each session was divided into two sections. One was presided over by the committee's chairman, Honorable Leland Simkins, and the other by the committee's vice-chairman, the Honorable John J. Stamos. Professor Thomas D. Morgan was reporter in Justice Simkins' sessions and Professor Richard A. Michael was reporter for Justice Stamos' sessions.

Each session began with the general admonition that the program could not promise to eliminate errors on appeal. Some judges are reversed when the Appellate Court decides a novel question or works a change in the law. Others are reversed because of the sheer impossibility of knowing every rule of law. However, the purpose of the committee and the effort in the seminar sessions was to identify common situations leading to relatively unnecessary errors in the hope that the number of errors on appeal could be substantially reduced.

Discussion of Illinois Supreme Court Rule 402

Rule 402, which deals with the procedure for accepting a guilty plea, has been the basis for a disturbing number of reversals on appeal—disturbing because the guilty plea should be the most clear-cut single trial procedure. Discussion centered on four major issues and the views of some of the judges were at times surprising.

1. The first step under Rule 402 consists of a series of admonishments. The trial judge is required personally to inform the defendant of certain things and assure himself that the defendant understands them.

The admonishment on which the most time was spent was that of the nature of the charge. Two-thirds of the judges in one session in which a straw vote was taken believed that the admonishment as to the nature of the charge requires only that the defendant understand the factual allegations of the indictment. These judges believed that it is not necessary that the defendant understand the elements of the crime with which he is charged. This seemed to the committee clearly in conflict with *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed. 2d 418 (1969). It was the understanding of the remaining judges and the opinion of the committee that the admonition must be as to both the factual allegations and the statutory provision. Indeed, one judge gave an excellent suggestion; i.e., he explains the elements of the statute by reading or paraphrasing the patterned jury instruction with respect to that charge. In this manner he attempts to let the defendant know in layman's language what it is that the State would have to prove if the case went to trial. The committee believes that this is an imaginative and constructive practice.

2. The next portion of Rule 402 requires that the judge determine that the defendant's plea is voluntary. An interesting discussion was held as to how voluntariness is ascertained. Many judges revealed that they simply ask the defendant a series of questions designed to elicit only yes or no answers. If the defendant satisfactorily answers "yes" to a series of questions as to the voluntary nature of his plea, that is sufficient. Other judges said that they ask the defendant on the record to explain the rationale for deciding to plead guilty. This is designed to have record show in the defendant's own words that the plea was his idea and not simply something that his lawyer and others had devised for him. The judges who ask only yes or no questions appeared quite troubled by this latter procedure. The view was expressed on a number of occasions that the defendant might inadvertently say

something which would indicate that he was not guilty or which would otherwise impeach the acceptability of the guilty plea. To the remaining judges, that was not a problem. It was an opportunity to ascertain the truth which these judges believed was the important element even if it meant "losing" a plea.

3. The third area, and the one which engendered the most discussion, was the nature of the requirement that there be a "factual basis" for the guilty plea.

The first problem was whether or not an individual may plead guilty to a charge which the admitted facts do not constitute. That is, if the admitted facts show the defendant was guilty of burglary, but not theft, may the defendant plead guilty to theft? A majority of the judges present seemed to believe that he could and that this was simply a part of the process of plea bargaining. An important case in support of that argument is *People v. Cope*, Illinois Supreme Court No. 44729, order entered June 1, 1973. In that case the defendant had pleaded guilty to burglary but admitted only that he had purchased stolen goods. In an unpublished order, the Court accepted the idea that what he had done was close enough to burglary that the plea could not be impeached. Mr. Justice Schaefer and Mr. Justice Ward dissented from the case on the ground that a defendant may not plead guilty to something which he says in open court he did not do. The *Cope* case seems an extremely important one and it is unfortunate that because it was merely an order accepting an *Anders* brief, the case was never reported. It does, however, seem to stand for the idea that the defendant may plead to a slightly different charge than that which he admitted.

The second issue is whether a defendant may plead guilty to something which he denies having done altogether. The key case here is *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1971). That case held that it was not improper to accept a plea of guilty from an individual who said that he did not commit premediated murder but wanted to plead guilty in order to avoid a possible death penalty. It was generally agreed that that case held the trial judge *may* accept a plea of guilty from someone who denies the charges, but the judge need not do so. Some judges, however, expressed the view that if a man said he was not guilty but had negotiated an acceptable jail term and then was forced to trial by the judge, upon conviction the judge might find it hard to impose a higher sentence than that negotiated originally.

In any event, it was agreed that the Illinois requirement of a "factual basis" does not necessarily reverse the *Alford* rule in Illinois. The factual basis need not be made by the defendant's admission; it may be dictated in the record by the State's Attorney who makes representation as to what his evidence would show. Defense counsel then

normally would be asked to agree that that is what the State's Attorney's evidence would show. Such a stipulation as to the state's case constitutes sufficient factual basis for acceptance of a plea even in the absence of the defendant's acknowledgment of his personal guilt.

4. Finally, some discussion was held of plea negotiations. Misunderstanding of the conditions under which a judge must recuse himself came out. Some judges believed that the judge must recuse himself if he has participated in any manner in a plea negotiation, the result of which has not been accepted by the defendant. The point was made in response that the rule only requires that the judge recuse himself when (a) he has concurred or has conditionally concurred in a sentence, (b) the defendant has pleaded guilty in reliance on that concurrence, and then (c) the judge backs out.

Miscellaneous Topics Concerning Preservation of the Record

The general heading for discussion of topics of preservation of the record was Justice Crebs' speech which was reproduced in the reading materials. He had made the point that a trial judge could get himself in trouble by saying too much as well as by saying too little. This formed the basis for discussion of five general problem situations.

1. The first involved getting matters on the record that occurred off the record. For example, it has been the practice of some judges to hold pre-sentence hearings in chambers in which both sides candidly lay the facts on the table and a sentence is determined by the court. Then the parties return to open court and waive a hearing on the record. This deprives the reviewing court of any basis for knowing the rationale of the trial judge in arriving at the sentence. The practice thus was generally seen to be improper.

A second side of this same point concerns telephone conversations or other informal communications with counsel about extensions, proposed stipulations, etc. A few judges said that they had been embarrassed by lawyers who took advantage of their good nature and failure to pin them down to their representations on the record. These judges suggested that the trial judge dictate a memorandum whenever he grants a telephone or other informal request or that he otherwise let the record show what has transpired.

2. The second question concerned what the trial judge should do if the course of the proceedings indicates that one or both counsel are inadequate or have otherwise left important material out of the record. While the differences between civil and criminal litigation were recognized, it was generally agreed that the court is not a mere passive umpire but may step in in obvious cases where necessary to avoid a grave miscarriage of justice. The trial judge was generally seen as having a responsibility for providing a complete and accurate record. If,

for example, counsel left out an obvious and virtually admitted point such as venue, the trial judge might ask a question necessary to establish it. Likewise, if a State's Attorney were proceeding down a clearly improper road, it would be the duty of the trial judge to avoid "plain error" by stopping him.

3. The next point concerned how specific a trial judge should demand that a lawyer be in his motions, particularly a motion to dismiss or motion for a new trial. It was pointed out that in *Macie v. Clark Equipment Co.*, 8 Ill. App. 3d 613, 290 N.E.2d 912 (1st Dist. 1972), the court held that a general motion to dismiss preserves all issues which possibly could have been raised. Several judges expressed the belief that this put the trial judge in an untenable position since he could be later reversed for issues that were not pressed before him in the argument on that motion or at any other time until the appeal. It was suggested that trial judges require the proponent of a motion to be specific as to the grounds which he is asserting and attempt to require him to waive all grounds which he does not see fit to articulate and stand on before the trial court.

4. The fourth issue was one involving saying too much rather than saying too little. It consisted of giving the wrong reasons for a ruling on a question. This discussion recognized that very often an Appellate Court will uphold a ruling if the ruling was right although the reasons were wrong. Yet situations were recalled in which a trial judge had simply put his foot in his mouth by taking a position which was so clearly wrong that the Appellate Court could not ignore it. One judge, for example, referred to the case in which a trial judge in effect had said to a defendant, "I am giving you a much longer sentence than your co-defendant because you were uncooperative and demanded a trial." While the decision to plead guilty might in some circumstances be a basis for reduction in sentence, it was agreed that asserting that the trial judge was punishing the defendant for going to trial was improper and constituted saying too much.

5. .nother example of protecting the record by not saying too much was that of reading into the record only that material which the trial judge was relying on. For example, some judges said that although the FBI sheet is presented to them in a pre-sentence hearing, they read into the record only those convictions which the defendant has had so as not to give the impression that they had relied on mere arrests not reduced to conviction.

Other General Topics

Two other topics were discussed very briefly, primarily in a lecture format. First, Rule 304 was distinguished from Rule 308. Rule 304 allows an appeal as of right upon certification by the trial judge that the case has been disposed of with respect to some but not all of the

parties or some but not all of the issues. Rule 308 permits an interlocutory appeal upon granting by the Appellate Court of leave to appeal where the trial judge has certified that the matter presented is of unusual importance and early resolution would aid disposition of the case.

Second, it was explained to the judges that the granting of a motion to dismiss the plaintiff's complaint is not itself a final order which may be appealed. Until judgment is entered for the defendant, there is no final order.

Conclusion

Each of the seminar sessions seemed to generate interests and discussion on the part of the judges in attendance. The professor-reporters wish to thank the chairman, vice-chairman and members of the committee who provided such valuable leadership and insights into the best topics for discussion. The entire committee wishes to thank the Administrative Office for its able help and support.

REFERENCE MATERIAL IN GENERAL

Each judge, who attended the 1973 Judicial Conference, received a copy of the following legislative synopsis as part of the Conference's continuing program of keeping Illinois judges informed of recent developments in substantive and procedural law. References are to Ill. Rev. Stat., ch.____, §____.

Selected Bills Passed By the Seventy-Eighth General Assembly (1973) Affecting the Judiciary or Practice and Procedure in Illinois Courts*

Administrative Review

HB-1844 Amends the Administrative Review Act. Makes act applicable to administrative decisions of all agencies of the State and of local governments, except the Industrial Commission and the Public Utilities Commission.

Adoption

SB-346 (Ch. 4, §§ 1, 5, 7, 8, 9, 10, 11 and 13; new §§ 12a and 20a)

Amends an act in relation to the adoption of persons and to repeal an act therein named by adding to the definitions of unfit person, revising petition procedures and other procedural rules, revising and adding forms of consent and surrender and the procedures therefor, and providing for notice to the putative father.

Attorneys' Fees

HB-1388 (Ch. 121-1/2, §§ 512 and 571)

With respect to the collection or enforcement of any retail installment contract entered into after Dec. 31, 1973 the court in its discretion may award attorneys' fees to either party as the interests of justice may require notwithstanding any clause or provision to the contrary in any such contract. Amends Motor Vehicle Retail Installment Sales Act. Amends Retail Installment Sales Act. Effective Jan. 1, 1974.

Civil Practice

HB-417 (Ch. 110, §§ 21, 64, 67, 68.1, 68.3, 72 and 73, rep. §§ 81 and 83)

Amends the Civil Practice Act. Deletes various provisions to coordinate with the Supreme Court rules.

*Indicates bills approved by the Governor through August 28, 1973.

HB-1389 Amends Civil Practice Act to require further information in certificate of officer making service of process on individuals or in record filed and maintained in the sheriff's office. Any process server or his employer who knowingly makes a false affidavit or certificate of service shall be liable in civil contempt, and just damages and, if prosecuted by a private attorney, reasonable attorney's fees may be awarded.

SB-524 (Ch. 147, new § 2)

Amends an act to revise the law in relation to attachments of boats, vessels and rafts by adding section 47 to require courts to permit amendment of the pleadings where relief has been sought under the wrong remedy, and to permit the courts to grant relief upon the amended pleadings or upon the evidence. Establishes considerations and procedures.

SB-530 (Ch. 119, new § 28)

Amends an Act to revise the law in relation to replevin by adding section 28 to require courts to permit amendment of the pleadings where relief has been sought under the wrong remedy, and to permit the courts to grant relief upon the amended pleadings or upon the evidence. Establishes considerations and procedures.

*HB-1648 (Ch. 25, § 8) PA 78-288

Amends act to revise law in relation to clerks of courts. Permits clerks of circuit courts to use facsimile signatures and seals in the execution of any process or notice..

SB-507 (Ch. 25, § 1.1)

Adds section to act relating to clerks of courts. Provides that clerk of the circuit court enters upon duties of his office on the first day in December on which the office is required to be open.

Criminal and Juvenile Law

HB-18 (Ch. 38, § 9.1; ch. 38, § 1005-5-3)

Amends the Criminal Code and the Unified Code of Corrections. Provides that in any case in which a defendant is convicted of murder, the State may seek im-

position of the death penalty. Provides after there has been a finding of guilty the trial judge shall before entering sentence notify the Chief Judge of the Circuit Court to assign three judges to hear evidence and determine imposition of sentence, mandatory death penalty or otherwise. After such determination by a majority of the three-judge court and notice to the trial judge the trial judge shall enter sentence accordingly. Details crimes for which mandatory death penalty should be imposed. State shall have the burden of proof for this imposition.

HB-20 (Ch. 38, § 9-1; ch. 38, § 1005-5-3)

Amends the Criminal Code and the Unified Code of Corrections. Imposes the death penalty for six specified crimes of murder and details such crimes. Provides that upon conviction of murder, the trier of fact shall make written findings of fact. If there is a finding of one of the crimes for which the death penalty is imposed, this shall be the sentence. Provides that in the event that the death penalty in this act is held to be unconstitutional by the Supreme Court of the United States or the State of Illinois, any person convicted of murder shall be sentenced to imprisonment in the penitentiary for a indeterminate term with a minimum of not less than 14 years.

*HB-269 PA 78-359

An act in relation to the compensation of victims of crimes of violence or of the dependents of such victims and to expand the jurisdiction of the Court of Claims to handle such matters. Sets out procedure for making such claims and the proof required to substantiate claim.

HB-1086 (Ch. 38, §§ 1003-2-2, 1003-3-1, 1003-3-3, 1003-3-4, 1003-3-5, 1003-3-7, 1003-8-5, 1003-8-7, 1003-9-1, 1003-10-11, 1005-1-4, 1005-1-16, 1005-1-18, 1005-4-1, 1005-5-3, 1005-6-3, 1005-6-4, 1005-7-1, 1005-8-1, 1005-8-4 and 1008-1-1; adds §§ 1003-11.4, 1003-8-10 and 1003-9-6)

Amends and adds to the Unified Code of Corrections to clarify language and meaning of certain provisions. Correct section reference and updates some personnel appointments and duties.

*HB-1087 (Ch. 37, §§ 702-7, 705-2 and 705-10) PA 78-341

Amends Juvenile Court Act. Substitutes "rules of evidence" for "burden and standard of proof" as to determination on whether to permit prosecution under the criminal laws; sets July 1, 1973, as final date for limitation as to prosecution of minor under 13 years of age; and provide for automatic termination of custodianship after 30 days following petition for such termination. Companion to HB-1086.

SB-33 (Ch. 37, §§ 704-8, 705-2 and 705-8)

Amends Juvenile Court Act. Custody of the minor shall not be restored to any parent, guardian or legal custodian found by the court to have neglected the minor or to have been the source of the minor's dependency until such time as a hearing is held on the issue of the fitness of such parent, guardian or legal custodian to care for the minor and an order of the court has been entered that such parent, guardian or legal custodian is fit to care for the minor. Effective upon becoming a law.

SB-345 (Ch. 37, § 1-14 and new § 5-9.1)

Amends the Juvenile Court Act with regard to the definition of "parents", and provides for notice to the putative father in adoption cases and for his declaration or disclaimer of paternity.

Divorce

SB-1133 (Ch. 40, § 9)

Amends "An Act to revise the law in relation to divorce". Eliminates the requirement for examination of witnesses at hearings where the complaint is taken as confessed and the requirement to prove by witnesses the cause of divorce before divorce is granted in a case of default.

Eminent Domain

SB-266 (Ch. 47, §§ 10 and 14)

Amends Eminent Domain Act. Provides that court shall have exclusive jurisdiction to hear and determine all rights in and to condemnation awards, and that the county treasurer shall receive and disburse the compensation awards subject to the order of the court.

Ethics

HB-1797 (Ch. 127, §§ 602-104 and 604A-107)

Amends Governmental Ethics Act. Sets out penal-

ties for failure to file interests statement. Provides act applies to public employees as well as officers. Includes prosecution for official misconduct in penalty section. Extends statute of limitation from 18 months to 3 years on prosecutions of violations of act. Makes other non-substantive changes. Effective upon becoming law.

SB-1186 (Ch. 127, § 604A-105)

Amends the Illinois Governmental Ethics Act. Provides for a 30 day extension of the filing period for persons who, within 10 days before or after the final filing date, file a declaration of intention to defer the filing of such statement. Provides for 30 day grace period after the effective date of this amendatory act for the filing of statements of economic interests which were due before that date. Effective immediately.

Evidence

SB-132 (Ch. 51, § 2)

Amends the Evidence Act. Repeals present provisions of section 2 of the act (commonly called the Dead Man's Act) and substitutes new provisions which (1) limit the bar of the statute to conversations with the deceased or incompetent person and to any event which took place in his presence; (2) changes the exceptions to conform to the limitations of the exclusions and expressly permits testimony competent under section 3 of the act and facts relating to the heirship of a decedent; (3) defines an incompetent person as one who is adjudged by the court in the action to be unable to testify by reason of mental illness, mental retardation or deterioration; (4) excludes from the definition of an interested person one who is interested solely as a fiduciary; and (5) permits survivor to testify to rebut any witness called by the protected party. Applicable to proceedings filed on or after effective date of act.

Judges

HB-767 (Ch. 37, § 25)

Amends Act relating to appellate courts. Increases from 3 to 4 the number of Appellate Court judges to be elected in each downstate judicial district.

HB-1138 (Ch. 108-1/2, §§ 18-121, 18-123 and 18-125.1)

Amends the Judges Retirement System Article of the Illinois Pension Code. Reopens options for participation by judges who have elected not to participate in the system or in the provisions relating to widow's annuities or automatic increases in annuity.

HB-1184 (Ch. 108-1/2, new §§ 2-119.2, 14-153.3, 15-136.2, 16-133.2 and 18-125.2)

Amends the General Assembly, State Employees, State Universities, Downstate Teachers, and Judges Retirement System Articles of the Pension Code. Provides for the replacement of present automatic annual increases in benefits with a system of increases tied to the consumer price index which apply to all monthly benefits. Retains present employee contribution rate for increases. Offers present annuitants an opportunity to elect to retain the fixed rate increases.

HB-1304 (Ch. 37, § 23.72)

Amends an act relating to the compulsory retirement of judges to permit any judge who reaches age 70 to complete his unexpired term in order to fulfill the minimum requirement under the Judges Retirement System.

HB-1653 (Ch. 46, new § 2-7.2; repeals §§ 2-7.1 and 2-9)

Amends Election Code. Makes it clear that judges are to be elected at November general election.

HB-1866 (Ch. 108-1/2, § 18-112)

Amends the Judges Retirement System Article of the Illinois Pension Code. Extends to judges in service on July 1, 1972, rather than judges in service on July 1, 1969, the privilege of establishing service credit in the system for periods of service before January 1, 1964 as a justice of the peace, police magistrate or civil referee in the Municipal Court of Chicago.

SB-451 (Ch. 108-1/2, § 18-121)

Amends Judges Retirement System Article of the Pension Code. Extends to November 1, 1973 the period during which a judge may rescind his election not to participate in the system.

Jurors

*HB-77 (Ch. 78, § 2) PA 78-199

Amends act concerning jurors by lowering juror age qualification from 21 to 18.

SB-105 (Ch. 78, §§ 9, 10 and 11; § 32; adds §§ 9.1, 10.1 and 11.1)

Amends the act concerning jurors and the Jury Commissioners Act in other than single county circuits to permit service of summons for grand or petit jury duty by certified mail, return receipt requested, delivery to addressee only sent by the issuing clerk or court. If service by certified mail not possible then service by sheriff of the county where trial to be had. Details selections and service of summons for grand or petit jury duty in single county circuits. Sheriff shall serve such summons.

Landlord and Tenant

HB-729

New act. Provides that security deposit given a landlord, holding over 10 units of residential real property, must be returned in full upon the tenant's vacating the premises unless, within 30 days of that date, the landlord furnishes the tenant, delivered in person or by mail to last known address an itemized accounting of property damage for which the deposit is being retained, attaching paid receipts or copies for repair or replacement. Effective January 1, 1974. Applicable to leases executed on or after that date.

Limitations

*HB-129 (Ch. 85, §§ 8-101 and 8-102) PA 78-201

Amends Local Governmental and Governmental Employees Tort Immunity Act. Changes the limitation on actions brought under the act from 1 year to 2 years. Changes notice requirement to within one year of accrual of cause of action (now within 6 months of accrual of cause of action) and permits service by registered or certified mail in lieu of personal service.

HB-318 (Ch. 83, § 19)

Amends Limitations Act. Clarifies prospectively the effect of statutory procedures for effecting "long arm" service of process on non-residents, upon the provision of the Limitations Act which states that the period of the statute of limitations does not run during a defendants absence from the State. Applicable only to causes of action which arise after effective date.

No-Fault Automobile Insurance

SB-187 (Ch. 73, new §§ after § 1065.163, rep. § 755a and §§ 1065.150 through 1065.163)

Amends Insurance Code. Requires, as a condition of registration of vehicles after December 31, 1973, that insurance be provided for public liability and for certain first party benefits including medical and hospital benefits, income continuation benefits, loss of services benefits, and survivor's benefits. Provides for optional higher benefit schedule. Requires uninsured motorist coverage except with optional benefit schedule. Includes provisions for prompt payment of benefits, subrogation and inter-company arbitration. Repeals the no-fault insurance provisions held unconstitutional in *Grace v. Howlett*, 51 Ill. 2d 478.

Paternity

HB-404 (Ch. 106-3/4, §§ 54, 55, 56, 57, 59 and 64)

Amends the Paternity Act to require that complaint of pregnant women be accompanied by affidavit that defendant has threatened to leave the State, that defendant be fully informed of his rights and potential liability, that an indigent defendant have the right to appointed counsel, and that blood test evidence be received in accordance with Illinois law. Removes double bond provision on continuance and clarifies standard of proof.

Probate

*HB-527 (Ch. 3, § 57) PA 78-264

Amends Probate Act section on evidence necessary for court to declare heirship. Permits affidavit by any person made before notary public. (Presently affidavit must be made in court and by a party.)

HB-897 (Ch. 3, §§ 76, 96 and 105)

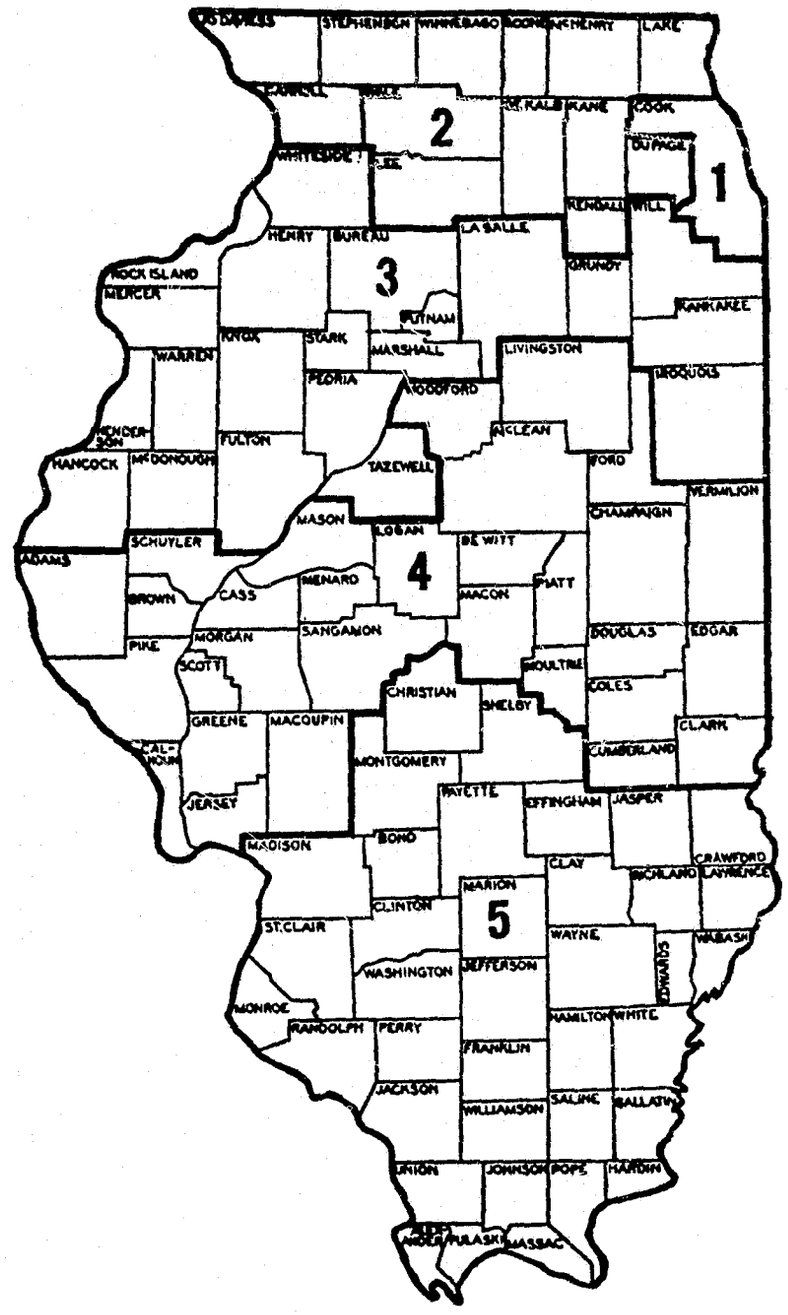
Amends Probate Act. Brings together all provisions for death, or resignation of an executor, or the failure or refusal of executor to act. Changes order of preference of letters of administration issued after September 30, 1973, and provides manner of selection of administrator to collect.

Replevin

*HB-1395 (Ch. 119, amends §§ 1, 4, 7, 12 and 21; adds §§ 4a, 4b, and 4c) PA 78-287

Amends Replevin Act. Requires notice to defendant and hearing prior to issuance of a writ of replevin to conform with U.S. Supreme Court opinion in *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972). Summary seizure of disputed property without notice and hearing is proper in certain narrowly defined instances if justified by necessity. Effective upon becoming a law.

ILLINOIS JUDICIAL DISTRICTS



SUPREME AND APPELLATE COURTS

SUPREME COURT OF ILLINOIS

FIRST DISTRICT

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Chicago, Illinois

Thomas E. Kluczynski
Chicago, Illinois

Daniel P. Ward
Chicago, Illinois

SECOND DISTRICT

Charles H. Davis
Rockford, Illinois

THIRD DISTRICT

Howard C. Ryan
Tonica, Illinois

FOURTH DISTRICT

Robert C. Underwood
Bloomington, Illinois

FIFTH DISTRICT

Joseph H. Goldenhersh
E. St. Louis, Illinois

APPELLATE COURT OF ILLINOIS
(May 1, 1973)

FIRST DISTRICT

First Division

Joseph Burke, Presiding Justice
Edward J. Egan
Mayer Goldberg
Albert E. Hallett

Second Division

John J. Stamos, Presiding Justice
Robert J. Downing (assigned from the Circuit Court of Cook County)
John C. Hayes
George N. Leighton

Third Division

John T. Dempsey, Presiding Justice
Thomas A. McGloon
Daniel J. McNamara
Ulysses S. Schwartz (retired-serving by assignment)

Fourth Division

Henry L. Burman, Presiding Justice
Thaddeus V. Adesko
Henry W. Dieringer
Glenn T. Johnson

Fifth Division

Joseph J. Drucker, Presiding Justice
Robert E. English
Francis S. Lorenz
John J. Sullivan

SECOND DISTRICT

William L. Guild, Presiding Justice
Mel Abrahamson
Thomas J. Moran
Glenn K. Seidenfeld (assigned from the 19th Judicial Circuit)

THIRD DISTRICT

Jay J. Alloy, Presiding Justice
Walter Dixon
Albert Scott (assigned
from the 9th Judicial Circuit)
Allan L. Stouder

FOURTH DISTRICT

James C. Craven, Presiding Justice
Leland Simkins (assigned from
the 11th Judicial Circuit)
Samuel O. Smith
Harold Trapp

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Caswell J. Crebs
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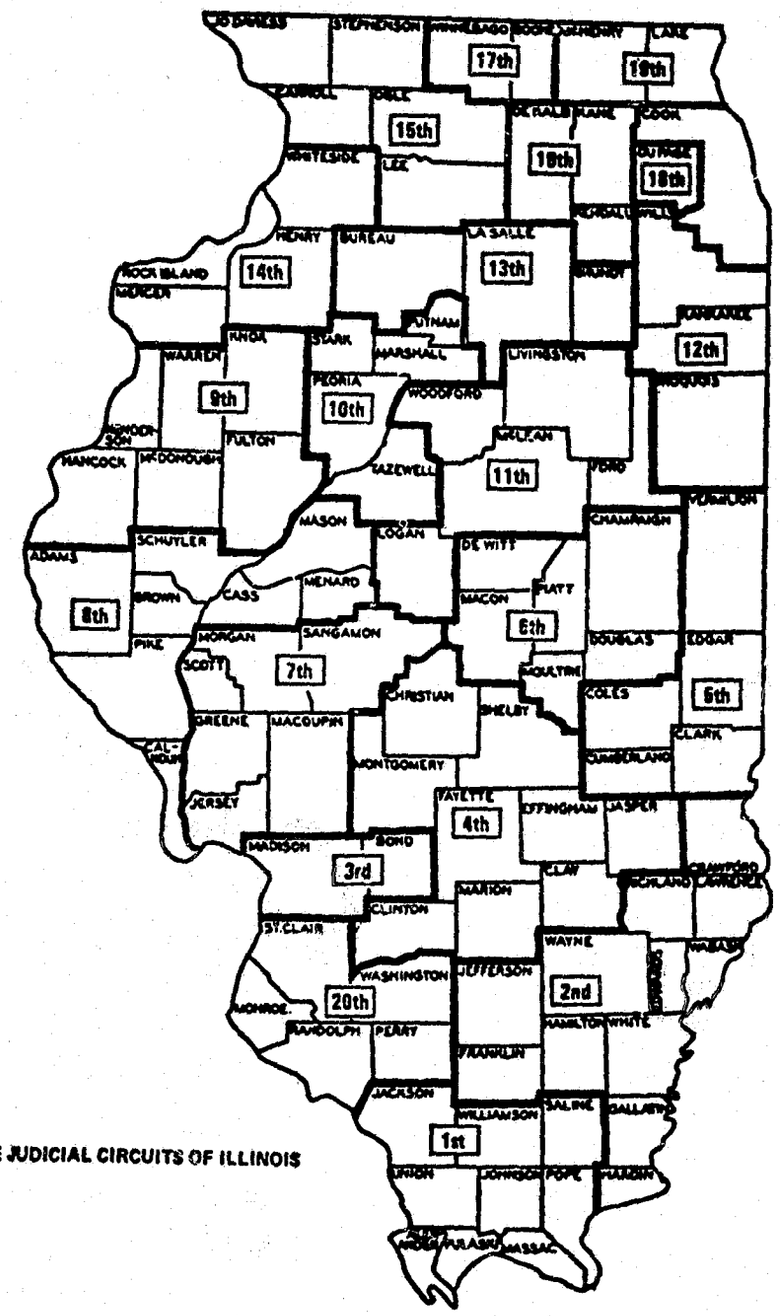
the 2nd Judicial Circuit)
George J. Moran



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CIRCUIT COURT JUDICIAL OFFICERS OF THE STATE
(April 1, 1973)

COOK COUNTY

Circuit Judges

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Raymond Trafelet
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Harold G. Ward
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William Sylvester White
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Kenneth E. Wilson
Minor K. Wilson
Joseph Wosik
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Thomas M. Walsh
James M. Walton
Jack A. Welfeld
Willie Mae Whiting
James A. Zafiratos
George J. Zimmerman

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Everett Prosser
Paul D. Reese
Richard E. Richman
Dorothy W. Spomer
R. Gerald Trampe

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Robert W. Schwartz

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Don Al Foster
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A. Hanby Jones
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Randell S. Quindry
Wilburn Bruce Saxe
Alvin Lacy Williams
Carrie LaRoe Winter
Harry L. Ziegler

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Charles Deneen Matthews
Charles L. Quindry

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A. Andreas Matoesian
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Roy W. Strawn
Doane Kent Trone

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Raymond O. Horn
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Gail E. McWard
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Bill J. Slater
E. Harold Wineland

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Robert M. Washburn

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Jerry S. Rhodes
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Dennis L. Schwartz
Gordon D. Seator

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Lyle E. Lipe
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J. Ross Pool
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Richard F. Scholz
Edward D. Turner
Ernest H. Utter
Guy R. Williams

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Virgil W. Timpe

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Francis P. Murphy
Albert Scott (assigned to Appellate Court)
Keith F. Scott

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G. Durbin Ranney
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Keith Sanderson

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Ivan Dean Johnson
Darrell H. Reno
Robert Leo Thornton

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Angelo F. Pistilli
Thomas W. Vinson

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Robert R. Buchar
Charles P. Connor
Emil DiLorenzo
Thomas P. Faulkner
Louis K. Fontenot
John F. Gnadinger
John C. Lang
John F. Michela
John Verklan

THIRTEENTH CIRCUIT

Circuit Judges

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Thomas R. Flood
Leonard Hoffman
Robert W. Malmquist
John S. Massieon
W. J. Wimbiscus

Associate Judges

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Herman Ritter
Wendell LeRoy Thompson
C. Howard Wampler
Robert G. Wren
John D. Zwanzig

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Robert J. Horberg
Wilbur S. Johnson
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John B. Cunningham
John R. Erhart
Jay M. Hanson
Ivan Lovaas
Edwin Clare Malone
Henry W. McNeal

FIFTEENTH CIRCUIT

Circuit Judges

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Wesley A. Eberle
Thomas E. Hornsby
Robert D. Law
John L. Moore
John W. Rapp, Jr.

Associate Judges

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James R. Hansgen
Martin D. Hill
Dexter A. Knowlton
James M. Thorp

SIXTEENTH CIRCUIT

Circuit Judges

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James E. Boyle
Neil E. Mahoney
Rex F. Meilinger
John S. Page
John S. Petersen
Paul W. Schnake
Robert J. Sears
Carl A. Swanson, Jr.

Associate Judges

Donald T. Anderson
Thomas J. Burke
James W. Cadwell
Thomas S. Cliffe
William H. Ellsworth
Joseph T. Suhler
Carlyle Whipple

SEVENTEENTH CIRCUIT

Circuit Judges

Albert S. O'Sullivan, Chief Judge

David R. Babb
Seely P. Forbes
John S. Ghent, Jr.
John C. Layng
William R. Nash
John E. Sype

Associate Judges

John T. Beynon
Robert A. Blodgett
Edwin John Kotche
Robert Elwood Leake
Michael R. Morrison
John W. Nielsen
Alford R. Penniman

EIGHTEENTH CIRCUIT

Circuit Judges

LeRoy L. Rechenmacher, Chief Judge

Edwin L. Douglas
Bruce R. Fawell
William V. Hopf
Philip F. Locke
George W. Unverzagt
Alfred E. Woodward

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William E. Black
George Borovic, Jr.
George Herbert Bunge
Richard L. Calkins
James E. Fitzgerald
Marvin E. Johnson
Helen C. Kinney
Gordon Moffett
Robert A. Nolan
Charles R. Norgle, Sr.
Jack T. Parish
Lester P. Reiff
George B. VanVleck
Blair Varnes

NINETEENTH CIRCUIT

Circuit Judges

Lloyd A. VanDeusen, Chief Judge

Henry H. Caldwell
James H. Cooney
LaVerne A. Dixon
Fred H. Geiger
William J. Gleason
John J. Kaufman
Charles S. Parker
Glenn K. Seidenfeld (assigned to Appellate Court)
Harry D. Strouse

Associate Judges

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Leonard Brody
Eugene T. Daly
Thomas R. Doran
Warren Fox
John L. Hughes
Bernard J. Juron
Paul J. Kilkelly
Robert K. McQueen
Alvin I. Singer
Robert J. Smart

TWENTIETH CIRCUIT

Circuit Judges

Richard T. Carter, Chief Judge

Robert Bastien
Carl H. Becker
Joseph F. Cunningham
Harold O. Farmer
William P. Fleming
Robert L. Gagen
James Wendell Gray
John J. Hoban
Alvin H. Maeys, Jr.
Francis E. Maxwell

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