REPORT OF THE ILLINOIS JUDICIAL CONFERENCE

1972

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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

(Printed by the Authority of the State of Illinois)
(55447 2M 11-73)

ILLINOIS JUDICIAL CONFERENCE

AREA CODE 312
793-3250

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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 1972.

This report includes the proceedings of the Associate Judge Seminar held at the Lake Shore Club of Chicago on February 2, 3 and 4, 1972 and the Judicial Conference held at the Lake Shore Club on June 14, 15 and 16, 1972.

Respectfully submitted,

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

TABLE OF CONTENTS

REPORT

OF THE

1972 ASSOCIATE JUDGE SEMINAR

OF THE

ILLINOIS JUDICIAL CONFERENCE

Lake Shore Club of Chicago
850 Lake Shore Drive
Chicago, Illinois 60611
February 2, 3 and 4, 1972

AGENDA

OF THE

1972 ASSOCIATE JUDGE SEMINAR

WEDNESDAY, FEBRUARY 2, 1972

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 - Hon. Archibald J. Carey
Opening Remarks -
Hon. Rodney A. Scott
Hon. Roy O. Gulley
Oath of Office - Hon. John S. Boyle

2:15 P.M. - 4:45 P.M.
FIRST SEMINAR SESSION
Grand Ballroom - First Floor
(Evidence Lecture)

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

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

THURSDAY, FEBRUARY 3, 1972

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

9:30 A.M. - 12:30 P.M.
SECOND SEMINAR SESSION

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

1:30 P.M.
THIRD SEMINAR SESSION

4:30 P.M.
SOCIAL HOUR
Main Lounge - First Floor

5:30 P.M.
DINNER
Grand Ballroom - First Floor

FRIDAY, FEBRUARY 4, 1972

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

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

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

11:45 - 1:00 P.M.
(Discussion of Lecture)

ILLINOIS SUPREME COURT

Robert C. Underwood
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Prof. Roy M. Adams
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Prof. Vincent F. Vitullo
Reporter

V
LECTURE ON
SELECTED TOPICS OF EVIDENCE

Prof. Prentice H. Marshall
Lecturer

Prof. Robert G. Spector
Lecturer

Hon. Matthew A. Jurczak
Liaison Officer

VI
LECTURE ON
SEARCH AND SEIZURE

Prof. Charles H. Bowman
Lecturer

Prof. Wayne R. LaFave
Lecturer

Hon. Burton H. Palmer
Liaison Officer

REPORT OF PROCEEDINGS

The Illinois Judicial Conference held its annual Associate Judge Seminar on February 2, 3 and 4, 1972 at the Lake Shore Club of Chicago.

Judge Glenn K. Seidenfeld, Chairman of the Associate Judge Seminar Coordinating Committee called the seminar to order, and the Honorable Archibald J. Carey, Jr., of Quinn Chapel in Chicago delivered the invocation.

INVOCATION

Hon. Archibald J. Carey, Jr.

Let us everyone pray.

Eternal God, our Father, giver of every good and perfect gift, grant us the favor of the sense of the presence of thy spirit throughout these deliberations.

Bless these assembled and the purposes for which they are met. Bless the homes here represented and bless in a special way those who have need in a special way.

Almighty God, to whom all hearts are open, all desires known, and from whom no secrets are hid, cleanse the thoughts of our hearts by the inspiration of thy holy spirit.

As thou has granted us a measure of authority over all fellow men, grant us, we ask, thy grace to match our responsibilities. Help us, Our Father, to be what thou wouldst have us to be. Make us wise, but save us from arrogance. As we are firm, help us to be fair. As we are constructive, make us also compassionate. Remind us that in thy sight all men are equal, and as they stand before the seats of our judgment, renew within us a sense of stewardship.

As thy servant Peter Marshall once prayed, help us to stand for something lest we fall for anything. Make us the instruments of thy will that not only judgment but justice shall roll down as waters of righteousness as a mighty stream and hasten through us the coming of the day when thou shalt see from heaven the dreams of thine own heart fulfilled: the end of war and all thy people free. Amen

WELCOMING REMARKS OF THE CHAIRMAN OF THE CONFERENCE

Hon. Rodney A. Scott

Mr. Chairman, Judge Gulley, most welcome guests and my fellow judges. As Chairman of the Executive Committee, it is my privilege to welcome you to the Associate Judge Seminar of the Nineteenth Annual Judicial Conference.

On this occasion we mark a series of firsts. This is the first major activity of the Illinois Judicial Conference in 1972 and the first under the Constitution of 1970, and it is also the first Associate Judge Seminar ever to be held.

Viewed in the prospective of the judicial history of our State, the Judicial Article of 1964 may well be regarded by future historians as a grand experiment.

The concept of a unified court system is not new but its reality was not achieved until the first truly unified court system in the nation was established in 1964 in our State. That unification resulted in the abolition of all justice of the peace, police magistrates and other courts of limited and special jurisdiction. The theorists said it couldn't work. We in Illinois have, and particularly you the former magistrates, proved that it does work.

Had the basic structure of our court system not been effective, the historical coincidence of the Constitutional Convention so closely following a complete court reorganization would have provided the opportunity of re-establishing the former organization and terminated the grand experiment. But this was not the case.

The Constitutional Convention of 1970 not only retained our basic unified court structure but further strengthened it by elevating the former magistrate to the new position of associate judge.

The Constitutional Convention was forced to recognize the contribution to justice of those judges who handled the lion's share of the cases in our trial courts. We recognize the importance of the associate judges to our system of justice in Illinois. We also recognize that you in the main establish the public view or image of all of the judges in Illinois.

The Associate Judge Seminar is part of your program of continuing judicial education. It is designed to help you understand the problems of the administration of justice in Illinois and to help you to increase your skill as judges. We think it is particularly appropriate that newly selected judges should start their judicial careers on this occasion at this conference.

The Executive Committee again is most interested in our successes, in your comments and in criticism. We are constantly trying to improve the format of our seminars; keeping it fresh, keeping it so that the most benefits may be derived by each of us. Your comments, which you will be called on again to make at the conclusion of the seminar, will be carefully digested by our Committee. We will give close attention to them.

At our meeting last Friday we had a letter from a judge who wrote to the Executive Committee saying that the month of February was not a good time to put on a seminar. He pointed out that the month was short two days already, and in addition to that were the two holidays and the weather to be expected in February. It was a most undesirable time to hold a seminar. We immediately went to your comments that you made last year as to your preferences as to when the seminar should be held and found the majority of you indicated that you would prefer the months of January, February or March. We have, last Friday, taken action to make plans for next year to have the seminar in March, which would be better as far as time, holidays, weather and so forth.

On behalf of the Executive Committee, I congratulate the new judges and welcome you to the Illinois Judiciary. To both the new judges and the old timers, I wish a most successful conference. Thank you very much.

OPENING STATEMENT

Roy O. Gulley, Director
Administrative Office of the Illinois Courts

Last April the Federal Government convened the National Conference on the Judiciary. President Nixon and Chief Justice Burger, as well as many other prominent people, addressed the Conference. It was my privilege to attend this meeting along with Chief Justice Underwood.

The National Conference on the Judiciary developed a consensus statement on state court systems. The statement proposes that states adopt unified court systems, very similar to the Illinois judicial system. Among other things, it proposed adoption of a unified trial court, an intermediate appellate court and state-wide budgeting for the expenses of the judiciary and judicial personnel.

It also said there should be unquestioned administrative authority in the chief justice of the supreme court with a state-wide court administrative staff to assist him in his administrative duties. Thirdly, it suggests a professional judiciary composed of people who are adequately paid, who can devote full time to judicial duties, and who make a career out of being judges.

Illinois is the only state that presently conforms to this consensus statement. Since the National Conference, I have been asked to appear all over the United States to explain the Illinois system. The single most important element of the system that judges from all over the country want to know about is the operation of our associate judiciary - you gentlemen who are selected by our circuit judges and who serve in our unified trial court. It is almost beyond their comprehension to understand that we do not have courts of limited jurisdiction in Illinois.

I want to welcome you to the seminar. I know you will enjoy it.

Thank ycu.

OATH OF OFFICE

Hon. John S. Boyle, Chief Judge, Cook County

I have a pleasant duty this morning. It is my job to swear in eleven new associate judges of the Circuit Court of Cook County. You must understand that the last time the Supreme Court of our State filled vacancies for the full circuit court, of the ten persons appointed by our Supreme Court, eight of them in Cook County were associate judges who were promoted to be full circuit court judges.

Now, Judge Gulley, I would like to hand you at this time a copy of General Administrative Order No. 72-1 which states:

> "It is hereby ordered that upon receipt of a letter dated February 1, 1973, in which the Director of the Administrative Office of the Illinois Courts has certified the eleven persons receiving the highest number of votes in the election for eleven associate judges of the Circuit Court of Cook County conducted pursuant to notice on October 22, 1971, and in which the ballots were mailed January 21, 1972 and returned to the Director on or before January 30, 1972, I hereby declare the following eleven persons to be appointed as associate judges of the Circuit Court of Cook County, their terms to expire on June 30, 1975:
>
> "Anthony J. Bosco; John M. Breen, Jr.; Martin F. Brodkin; Irwin Cohen; James A. Condon; Myron T. Gomberg; John J. Hogan; John M. Murphy; William E. Peterson; Joseph R. Schwaba and Thomas M. Walsh."

I would like to take this opportunity to introduce to you the nominating committee of the circuit court. The chairman is Judge Daniel Covelli. Will you stand, please?

Would you like to say something, your Honor?

JUDGE COVELLI: Yes, I would like to say a few words.

In a few minutes you will be vested with one of the greatest honors and the greatest trusts that any man can have; that is, the right and the power in passing judgment.

After you have been sworn in, you will find that each day you will be called on to pass upon property rights, liberty, and maybe later on, even on the life of the person who appears before you. As you ascend those three steps each day and get on the bench, ask the Divine Lord to give you guidance. In passing judgment, don't be hasty. Give each man his due in court. Listen to him no matter who he may be and then give your verdict. In giving your verdict, be fearless, otherwise you will never be a good judge.

JUDGE BOYLE: The next member of our nominating committee is Judge Robert Hunter, the presiding judge of the Divorce Division.

JUDGE HUNTER: Thank you.

JUDGE BOYLE: Another member is Judge Francis Delaney.

And the fourth and final member of the nominating committee is the one to whom most of you will report and work, Judge Eugene Wachowski, presiding judge of the Municipal Department, First District.

JUDGE WACHOWSKI: Chief Judge Boyle, Judges on the podium and my fellow judges out in the audience, and their dear friends and relatives and families who have gathered here to celebrate this auspicious occasion, my congratulations to all of you.

You are about to be inducted into an office where you will find that you will be buffers in public affairs. So you must, as Judge Covelli said, stand strong, give your own convictions, and make your decisions as you see them.

As Chief Judge Boyle said, I am hoping that you will be assigned to me. I need you. I need you as I needed all of the fine judges who came from outside of Cook County all summer long and all through the year to help us carry out the duties of this court system where we have much work to do. You are the men who are on the firing line, and you are the fellows that have to stand the blaze of public opinion day after day and handle the

thousands of cases that come into the court system. I welcome these new men.

JUDGE BOYLE: Now, will the eleven candidates step forward, please? Will you please raise your right hand and repeat after me:

"I do solemnly swear I will support the Constitution of the United States, the Constitution of the State of Illinois and I will faithfully perform my duties as an associate judge of the Circuit Court of Cook County, Illinois according to the best of my ability."

You must also take another oath. Now repeat after me:

"I do swear that I am not a member of nor affiliated with the communist party and I am not knowingly a member of or knowingly affiliated with any organization which advocates the overthrow or destruction of the constitutional form of the government of the United States or of the State of Illinois, by force, violence or other unlawful means."

JUDGE SEIDENFELD: Thank you, Judge Boyle. Congratulations to the families of the new judges.

I should also like to introduce some new judges. There are some other judges who were just appointed and who also should be recognized. Judge Warren Fox of the Nineteenth Circuit; Judge Arthur Greenwood of the Third Circuit; Judge William Young of the Tenth Circuit; and Judge Owen Lierman of the Eighth Circuit.

REMARKS

Hon. Glenn K. Seidenfeld, Chairman
Associate Judge Seminar Coordinating Committee

Those of you who were here last year will recall that we had looked forward together to the new constitutional title which you now bear and to the expanded role that you were assigned in our judicial system. Now, these happenings were a recognition of the fact that you were of great worth to the system. At the time, it was assumed that, in addition to the satisfaction of the job, there would be some earthly recognition which would also go along with your increased and enhanced responsibilities. Unfortunately, that didn't happen; but in equity and good conscience, we hope that whoever stands here next year will be able to announce that it has happened.

We hope that this will be a stimulating conference. The committee has worked very hard to select the materials, to go over and edit them, and bring them down to a size that is practical. A great deal of credit is due to the judges on the committee, the professors of law who worked with the committee, and to the Administrative Office of the Illinois Courts in that regard.

You are not just here to be stimulated. You are here also to stimulate. It also is an essential element of this kind of conference that you participate and teach each other, that you share the common experiences you have had, whether downstate or in Cook County. It is also a feature of this kind of an educational conference, and it is a constitutional mandate, that you, during the course of it, make recommendations and suggestions for the improvement of justice. We will talk about that a little later.

At this time I have a very sad and personal announcement to make. One of the judges who was an old frined of mine and a friend of many of you, Judge Ezra D'Isa, who was on a committee, died yesterday. For those of us who knew him, we are going to miss him tremendously; and I wonder if maybe we couldn't stand for thirty seconds and pay silent tribute to him.

(Moment of silent tribute.)

A few moments ago we talked about the constitutional obligation to make recommendations, and we do underscore that. We ask each of you to suggest recommendations to improve the administration of justice in the seminar sessions which you attend. The professor reporters will incorporate these recommendations into their reports which will be transmitted to the Coordinating Committee. Thank you.

REPORT OF DISCUSSIONS

TOPIC I—PROCEDURES IN CRIMINAL AND ORDINANCE VIOLATION CASES

Hon. Marvin E. Aspen
Chairman and Discussion Leader

Hon. John E. Richards
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Case Summaries

a) *City of Danville* v. *Hartshorn,* 131 Ill.App.2d 999, 268 N.E.2d 878 (1971) affd. in part and reversed in part 53 Ill.2d 399, 292 N.E.2d 382 (1973)

b) *City of Chicago* v. *Mulkey*, 44 Ill.2d 558, 257 N.E.2d 1 (1970)

c) *Village of Park Forest* v. *Nicklas*, 103 Ill.App.2d 99, 243 N.E.2d 421 (1968)

d) *People ex rel. Hanrahan* v. *Felt*, 48 Ill.2d 171, 269 N.E.2d 1 (1971)

e) *People ex rel. Filkin* v. *Flessner*, 48 Ill.2d 54, 268 N.E.2d 376 (1971)

f) *City of Chicago* v. *Campbell*, 27 Ill.App.2d 456, 170 N.E.2d 19 (1960)

g) *People v. Stout*, 41 Ill.2d 292, 242 N.E.2d 264 (transf. to 108 Ill.App.2d 103, 246 N.E.2d 319 (1969))

h) *People* v. *Sirinsky*, 47 Ill.2d 183, 265 N.E.2d 505 (1970)

i) *Village of Park Forest* v. *Bragg*, 38 Ill.2d 225, 230 N.E.2d 868 (1967)

j) *Village of Algonquin* v. *Berg*, 120 Ill.App.2d 184, 256 N.E.2d 373 (1970)

k) *Williams* v. *Oklahoma City*, 395 U.S. 458 (1969)

l) *City of Chicago* v. *Lawrence*, 42 Ill.2d 461, 248 N.E.2d 71 (1969)

m) *City of Chicago* v. *Joyce*, 38 Ill.2d 368, 232 N.E.2d 289 (1967)

n) *City of Chicago* v. *Greene*, 47 Ill.2d 30, 264 N.E.2d 163 (1970)

o) *City of Chicago* v. *Thomas*, 102 Ill.App.2d 143, 243 N.E.2d 572 (1968)

p) *People* v. *Allison*, 46 Ill.2d 147, 263 N.E.2d 80 (1970)

q) *Tate* v. *Short*, 401 U.S. 395 (1971)

2. *Memo On Civil Money Judgments In Ordinance Violation Cases.* Unpublished memorandum prepared by John P. Heinz (June 1970). Pages 15-18 of the Advance Reading Material

3. *Defending An Illinois Proceeding for Violation of a Municipal Ordinance: The Worst of All Possible Worlds,* Loyola University Law Journal, Vol. 1, No. 1 (Winter 1970). Pages 26-32 of the Advance Reading Material

B. Reference Material

1. Ill.Rev.Stat. 1969, ch. 24, sec. 1-2-1.1; ch. 38, sec. 180-6; ch. 110, sec. 73; ch. 110A, sec. 277

2. Constitution of The State of Illinois (1970), art. I, sec. 14; art. VII, sec. 6(c)(e)(g)(h) and (i)

3. H.B. 802 and 1111 (77th G.A.)

C. Summary of Discussions

Report of Professors Richard A. Michael and John P. Heinz

In the course of the discussions on procedures in criminal and ordinance violation cases, it soon became apparent that little difficulty was being encountered in the misdemeanor area, since the Illinois Code of Criminal Procedure gives sufficient guidance on the procedures to be followed in those cases. The same rules also apply to municipal ordinance violations which carry the possibility of imprisonment (Ill. Rev. Stat. 1971, ch. 24, sec. 1-2-1.1), and the problems in that area are also therefore minor. In the case, however, of a municipal ordinance violation punishable by *fine only*, significant problems and differences of opinion were encountered.

The repeated statement that ordinance cases are "criminal in nature but civil in form" does not give sufficient guidance to judges trying to resolve concrete problems in this area. (See comparative outline following this report.) Thus, the great majority of the judges' discussion was devoted to problems in cases of ordinances punishable by fine only. This report will not attempt to reproduce all of the problems discussed, but rather, through analysis of certain selected problems that were raised, will attempt to highlight the general nature of

the problems being encountered and to report those suggestions for improvement that received the most general support.

The problem of arrest is illustrative of the difficulties and confusion. It was noted that since an "offense" under the Criminal Code is defined as a violation of a state statute (Ill. Rev. Stat. 1971, ch. 38, secs. 2-2 and 102-15; see *City of Chicago* v. *Joyce*, 38 Ill.2d 368, 232 N.E.2d 289 (1967)). Officers can arrest for and warrants be issued for "offenses" only. This law does not provide authority for a person's arrest for violation of a municipal ordinance. The State's Municipal Code, however, seems to be to the contrary, as it clearly authorizes municipal police to arrest for violation of "any municipal ordinance" (Ill. Rev. Stat. 1971, ch. 24, sec. 3-9-4; see also sec. 1-2-9). In this connection it was noted that the Supreme Court rules specifically cover the problem of bail in an ordinance violation situation.

The arraignment and plea also created difficulties. Although the "fine only" ordinance violation case is "civil in form," and for this reason it was held that a failure of the defendant to plead does not vitiate the validity of the proceeding (*City of Chicago* v. *Campbell*, 27 Ill.App.2d 456, 170 N.E.2d 19 (1960)), the vast majority of judges continue to hold arraignments rather than utilize civil forms of asserting defenses. By contrast, many judges believed that civil rather than criminal rules for discovery were applicable in this area (*cf.*, *City of Danville* v. *Hartshorn*, 131 Ill.App.2d 999, 268 N.E.2d 878 (4th Dist. 1971); *People ex rel. Hanrahan* v. *Felt*, 48 Ill.2d 171, 269 N.E.2d 1 (1971)). Still other judges, however, allowed little, if any, discovery in ordinance violation cases.

The appropriate method of dealing with incompetents was also discussed. It was noted that in a criminal case a competency hearing would be required, while in a civil case a guardian would be appointed. Neither procedure appears to be followed in ordinance cases, although most judges indicated that no trial would be allowed if the defendant was "obviously" incompetent; rather, he would be referred to an appropriate agency for psychiatric care. Minors created similar problems. While it was noted that ordinance violation cases constitute an exception in the Juvenile Court Act, guardians *ad litem* were generally not appointed even though one would be required if the minor were a defendant in a civil case.

Two areas where the federal Constitution is directly relevant are the right to counsel and the right to a jury trial. The existence of a right to a jury trial and its nature was an issue of considerable controversy. Many judges did not allow a jury at all in these cases. Although a small majority of the judges would permit jury trials in some such cases, the judges were divided with respect to when the jury could be utilized. Some believed that a jury, if requested, should be allowed in the same manner as in criminal cases. Others reasoned that the right

to a jury trial existed only as it did in ordinary civil cases. (See *City of Danville* v. *Hartshorn*, *supra*.) When the Civil Practice Act was applied, a timely jury demand was required in order to preserve the right. Many judges carried this approach to the extent of requiring the payment of the civil jury fee before a jury would be empaneled. It was noted that the United States Supreme Court has never extended the constitutional right to a jury trial to these cases.

The vast majority of judges do not appoint counsel in "fine only" cases (even in the case of minors where the guardian *ad litem* analogy seems particularly applicable). It was noted that no such right exists under Illinois law and that the United States Supreme Court has not required appointed counsel in these cases. A case is presently pending on the docket of that Court, however, in which the issue is whether the right extends to an offense where a six month sentence was possible and a three month sentence was actually imposed. Moreover, *Mayer* v. *Chicago* recently held a free transcript (or an acceptable substitute) is required in a fine only municipal ordinance case on the theory that, if a defendant with means could purchase one, a violation of equal protection occurred if the transcript was not provided to an indigent. This reasoning might be extended to the right to counsel.

The idea that one could automatically assume that civil rules apply in these cases is further weakened by the existing law on the burden of proof. The Illinois Supreme Court has held the test to be that guilt must be established by a "clear" preponderance of the evidence. (*Chicago* v. *Joyce*, 38 Ill.2d 368, 232 N.E.2d 289 (1967)). This, of course, is not the test applicable in either criminal or purely civil cases.

Finally, the imposition of the sanction after conviction also creates difficulties. The decision of the Appellate Court in *Village of Algonquin* v. *Berg*, 120 Ill.App. 2d 184, 256 N.E.2d 373 (1970), held that the amount of the penalty must be fixed by the jury. Some judges took this to mean that a hearing in aggravation and mitigation could not be held. Others held such a hearing, a jury trial often not having been afforded in any event. Delayed or suspended penalties were also troublesome. The decision in *Village of Park Forest* v. *Bragg*, 38 Ill. 2d 225, 230 N.E.2d 868 (1967), clearly holds that a suspended sentence is not permitted. Probation of some sort would seem equally inappropriate. The practice of some judges of granting supervision was noted, and, while most believed it to be a useful tool, the majority believed that it could not be sustained if the municipaltiy chose to question it on appeal.

Many judges felt that the decision of the United States Supreme Court in *Tate* v. *Short*, 401 U.S. 395, holding that an indigent could not be imprisoned for non-payment of a fine, created difficulties in enforcement. Of course, absent indigency, payment may be enforced by

contempt powers. If the indigent has a source of income, contempt can also be used to require installment payments. In the case of an indigent without a source of income, however, all that can be done is to treat the fine as an unsatisfied civil judgment, collectable only if and when the defendant obtains some assets.

Two principal suggestions for the improvement of the procedures in fine only municipal ordinance cases were proposed by the judges:

First. It was almost unanimously suggested that legislation be proposed which would *preempt* the area of activity made criminal by State law, and thereby preclude local ordinances from imposing sanctions on behavior covered by the Criminal Code. Many areas of such overlap presently exist, *e.g.*, disorderly conduct, and while dual enforcement is precluded by the law of double jeopardy (*People* v. *Allison*, 46 Ill. 2d 147, 263 N.E.2d 80 (1970)), a great deal of discretion exists in determining which violation will be enforced. The drastic procedural differences which accompany this choice were deemed extremely undesirable.

While article VII, section 6 (e), of the new Illinois Constitution confers upon a "home rule unit" the power to punish by imprisonment for up to six months without the necessity of any enabling act by the General Assembly, paragraphs (h) and (i) of that same section would seem to make it clear that the General Assembly has the power to preempt if it wishes to:

> "(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."

The judges were in almost unanimous agreement that the General Assembly should use this authority to declare that the State's power over those areas in which the State has imposed the criminal sanction is exclusive. The judges recognized that many cities might wish to hold on to this power and the revenue it brings in, but felt that the State's interest in prosecuting behavior deemed serious enough to be covered by the criminal code should be paramount. Given the existing double jeopardy doctrine referred to above, municipalities may not preempt the State by prosecuting first. This was thought undesirable.

Second. More broadly, a need was recognized for a greater degree of certainty in dealing with the problems that exist in fine only municipal ordinance violations. One suggestion in this area was to provide that such cases be treated as truly civil matters, following civil rules of procedure in all respects. The sanctions for such violations would then be treated solely as civil penalties, analogous to those that

presently exist under the anti-trust and tax laws, enforced solely by civil remedies. In addition to providing certainty, such an approach might preclude the necessity of providing all of the traditional criminal procedural protections that the United States Supreme Court appears to be extending into this area.

Some judges foresaw difficulties in determining the amount of the penalty under the "purely civil" approach. In most existing civil penalty situations, the sanction is in some way tied to actual damages or to a percentage of taxes due. Absent such a standard for determining the amount of the penalty, these judges believed that the penal nature of the judgment entered would be held to require the application of some criminal procedual protections and to preclude the use of purely civil procedural rules. While many judges felt that a pure civil form was the most desirable approach, others, perhaps a majority, favored the adoption by Supreme Court rules of a code to govern the procedure in cases of this nature. If the choice were whether fine only ordinance cases should be handled in a "purely civil" *vs.* a "purely criminal" manner, however, a clear majority of the judges felt that civil procedures were preferable to providing the full panoply of criminal due process, in view of the volume of these cases.

OUTLINE OF PROCEDURES IN MISDEMEANOR AND ORDINANCE CASES

	Ch. 38 Cite	Misdemeanors	Ordinance Violations (Fine Only)
ARREST	Art. 107	1) Reasonable belief or Notice to appear 2) Warrant or summons	?
SEARCHES	Art. 108	1) Search warrant 2) Incident to arrest 3) Miscellaneous exceptions	Same ?
PRELIMINARY HEARINGS	Art. 109	"Without unnecessary delay"	?
BAIL	Art. 110	Recognizance, surety, cash bond	Same
CHARGE	Art. 111	Indictment, information, complaint	Complaint
LEAVE TO FILE		?	?
COMPETENCY HEARING	Art. 104	Reasonable ground to believe lack of competency	Guardian *ad litem?*
ARRAIGNMENT & PLEA	Art. 113	Informed of nature of charge	Same
MOTIONS	Art. 114	Motion to suppress Motion to dismiss Change of venue or judge Etc.	?

DISCOVERY		Motion to produce confession Motion for list of witnesses Alibi Motion for bill of particulars New Supreme Court rules	Civil discovery?
COUNSEL		Informed of right, appointed if indigent	?
SPEEDY TRIAL	Art. 103-5	120 and 160 day rules	?
JURY TRIAL	Art. 115 Art. 103-6	Right exists Waiver	Civil right only?
BURDEN OF PROOF	§ 3-1	Reasonable doubt	"Clear" preponderance of the evidence ?
HEARING IN AGGRAVATION OR MITIGATION	§ 1-7 (g)	Yes	?
SENTENCE	§ 1-7 (b)	Judge	Jury ?
PROBATION OR SUSPENDED SENTENCE	Art. 119	Authorized	Not authorized ?
APPEALS			
COUNSEL		?	?
TRANSCRIPT STATE APPEALS	Rule 601	No	Yes ?

TOPIC II—MISCELLANEOUS ACTIONS

Hon. William H. Chamberlain
Chairman and Discussion Leader

Hon. Arthur L. Dunne
Vice-Chairman, Liaison Officer and Discussion Leader

A. Summary of Advance Reading Material

1. Mass Arrest
   a) Excerpts from *Criminal Justice in Extremis*, 36 U.Chi. Law Rev. 455. Pages 35 and 37 of the Advance Reading Material
   b) Excerpts from Friedman, *Civil Disorder and Mass Arrest*, Case & Comment, Vol. 75, No. 6 (1970). Pages 36 and 37 of the Advance Reading Material

2. Environment
   a) Constitution of The State of Illinois (1970), art. XI, secs. 1 and 2
   b) Excerpt from DeLaurent, *Environmental Quality and the Illinois Lawyer*, 58 Ill.Bar J. 609. Pages 38 and 39 of the Advance Reading Material
   c) Excerpts from Burns, *Pollution Suit: Lawyer's Guide to Private Law Theory*, Trial Lawyer's Guide (1971). Pages 39 - 46 of the Advance Reading Material
   d) Excerpt from Fitzpatrick, *Private Tort Remedies for Air Pollution in Illinois*, 59 Ill.Bar J. 747. Page 43 of the Advance Reading Material

3. Narcotics
   a) *People* v. *McCabe*, 49 Ill.2d 338, 275 N.E.2d 407 (1971)
   b) Ill.Rev.Stat. 1971, ch. 56-1/2, sec. 701-719 and sec. 1100-1603
   c) *People* v. *Bailey*, 1 Ill.App.3d 161, 273 N.E.2d 74 (1971)

4. Obscenity
   a) *State* v. *Adult Book Store*, 26 Ohio App.2d 183, 271 N.E.2d 13 (1971)
   b) *City of Moline* v. *Walker*, 49 Ill.2d 392, 274 N.E.2d 9 (1971)
   c) *People* v. *Butler*, 49 Ill.2d 435, 275 N.E.2d 400 (1971)
   d) *People* v. *Movies, Inc.*, 49 Ill.2d 85, 273 N.E.2d 366 (1971)
   e) *City of Chicago* v. *Geraci*, 46 Ill.2d 576, 264 N.E.2d 153 (1970)

B. Reference Material
   1. *Narcotics Guide*, distributed by Amsterdam Company. Pages 49 and 50 of the Advance Reading Material
   2. General Order No. 18, *Proceedings in Mass Arrests,* Circuit Court of Cook County

C. Summary of Discussions

Report of Professors Robert E. Burns and Richard C. Groll

MASS ARRESTS

Each session began with a discussion of the materials which set forth the Chicago procedures for the handling of mass arrests. It was agreed that advance planning, foresight, and immediate trials form the essence of a well-designed program. The judges in attendance related their experiences in the handling of mass arrests and found that such problems as nonresident arrestees and those who used bogus names presented the most difficulty. The downstate judges indicated that the procedures in their areas were not well designed and were apprehensive about their ability to effectively handle a mass arrest if procedures were not established. All agreed that curfew violations and other problems involving juvenile offenders presented a unique problem. Some judges advised that when dealing with curfew violators where the arrest was prompted by some community disturbances, it was best merely to hold the juvenile until his parent or a responsible adult arrived. In dealing with a community disturbance in general, many judges with experience advocated the setting of a relatively high bond for a short period in order to deter the arrestee from returning to the streets too promptly.

ENVIRONMENTAL LAW

Though many judges had not had much experience in dealing with environmental litigation, all agreed that the preparatory material was useful. The discussions in general centered around the traditional distinction between a private versus a public nuisance. Since the Environmental Protection Act does not preclude individuals from pursuing a remedy based upon a theory of private nuisance, the judges were most concerned about developing a better understanding of the basic theory of private nuisance. Each was concerned that the circuit court dockets might be cluttered in the future with private law suits which more properly should be handled by the Pollution Control Board. Many judges questioned whether the Pollution Control Board and the remedies afforded under the Environmental Protection Act ought not to be exclusive and thereby preclude the filing of private suits in the

circuit court. In several of the discussion sessions the question was raised as to whether the wording of the new Illinois Constitution afforded an individual remedy which could be asserted in a private action which did not exist under common law principles. It was generally the consensus that the wording of the constitution should not afford a remedy, since such would be inconsistent with the establishment of the Pollution Control Board. In some sessions, the Chicago noise ordinance occupied a considerable time. The judges in general found that the noise ordinance which describes violation in terms of decibels of sound which extend over various specified space ranges impossible to enforce. Many questioned its constitutionality. The Chicago judges felt that such prohibitions against noise ought better to be handled by an administrative agency which would be equipped to balance the hardships and provide for better supervision of specific defendants.

OBSCENITY

Each session commenced with the discussion of the constitutional standards and the appropriate United States Supreme Court cases dealing with the problem of obscenity. Attorney Donald Reno of Champaign, Illinois, led an extremely lengthy discussion with regard to the constitutional standards as applied to current films and more popularly distributed magazines. The discussion session and the standards set forth were illustrated by the distribution of various materials which the United States Supreme Court has held to be constitutionally protected, i.e., not obscene. Many judges cited that they were subjected to open criticism because constitutional standards forced them to declare certain materials nonobscene. The general advice given to the judges was that when dealing with obscenity cases it is highly advantageous to write opinions citing the constitutional standards and the language of either the United States Supreme Court or the Illinois Supreme Court. Several of the judges in attendance cited particular instances of local politicians holding their opinions relative to obscenity cases up to ridicule. A considerable portion of the time dealt with the handling of obscenity cases from a procedural perspective. The judges recounted that when dealing with X-rated films, most theatres merely seek a one-week showing and the judges find it somewhat difficult to have a complete adjudication of the film within the one-week time span. They recounted that many theatres showing X-rated films have 52 different showings per year which would necessarily call for 52 different adjudications and a likelihood that a considerable amount of obscenity could be publicly displayed because of the awkwardness of procedures. It was generally advocated that upon the testimony of a police officer or state's attorney an affidavit relating to the nature of the film should be completed and the judge should give a three-day notice of an adjudication accompanied by the requisite subpoena for

the possession of the film in question. Most judges felt that three day's advance notice should be sufficient, although the authority for this conclusion is not clear. In each session, there was a considerable discussion of the *Geraci* case handed down by the Illinois Supreme Court.

NARCOTICS

In general, the discussion of narcotics occupied the smallest percentage of time. In each session there was a survey of the new Cannabis Control Act and the implications of the *McCabe* case. Judge Kargman of the Circuit Court of Cook County supplied each judge in attendance with copies of a report of the Illinois Legislative Investigation Committee on the drug crises.

The committee as a whole worked most effectively together. The sessions were most fruitful.

TOPIC III—COURTROOM DECORUM

Hon. Nathan M. Cohen
Chairman and Discussion Leader

Hon. William R. Nash
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Fed.R.Crim.P. 42. Page 94 of the Advance Reading Material
2. *The Lawyer and Courtroom Decorum*. Unpublished memorandum prepared by the Hon. Rodney A. Scott. Pages 94 and 95 of the Advance Reading Material

B. Reference Material
1. *People* v. *Baxter*, 50 Ill.2d 286, 278 N.E.2d 777 (1972)
2. *Board of Education* v. *Local 571*, 50 Ill. 2d 258, 278 N.E.2d 769 (1972)

C. Contempt of Court (Direct and Indirect)
Procedure - Guidelines
Prepared By Hon. John P. Shonkwiler

"That the heart of the judicial process in criminal justice, even in these changing times, is *still* the trial in the courtroom.

That a public trial is *not* to be equated with a forum for political debate, a market place for the sale of ideas, or an arena for a meeting of gladiators and their volaries.

That a fair and impartial jury is *still* a bulwark of individual freedom.

That the jury *must* have fair opportunity to do justice on the law and evidence presented.

That the trial judge must possess and should exercise the power necessary to prevent frustration of the purposes of the trial, and to direct it to a fair and impartial result."

Judge Frank J. Murray, Chairman

A.B.A. Section of Judicial Administration

"It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."

Mr. Justice Black, United States Supreme Court in *Illinois v. Allen*, 397 U.S. 337 (1970), at page 343.

Direct Contempt

A. *DEFINITION:* Direct contempt consists of any conduct, usually committed within the ocular view of the court, which tends to embarrass and obstruct the court in the administration of justice of tends to bring the administration of the law into disrepute. *People v. Sherwin*, 334 Ill. 609, 166 N.E. 513 (1929).

1. Upon the commission of a direct contempt in open court, the trial judge may act upon his personal knowledge of the facts and punish the offender *summarily* without the filing of an information, the entry of a rule to show cause or hearing. *Ex parte Terry*, 128 U.S. 289 (1888).

B. *EXAMPLES*

1. False testimony of a witness.
   a. In this situation, criminal [direct] contempt is warranted only in exceptional cases. It is necessary that there be elements in the case other than the mere fact that the witness, on cross-examination, gives testimony which directly differs from that given on direct. The admission that the testimony was false must also be accompanied by an admission that it was willfully false or the circumstances must be such that the court can, as a matter of law, so hold. The witness must be deliberately trifling with the court or must be willfully contemptuous in his conduct and inconsistant statements. *People* v. *Bialek*, 31 Ill. App. 2d 281, 175 N.E.2d 278 (1961).
2. Lawyer knowingly submitting a spurious will to probate. *In Re Kelly's Estate*, 365 Ill. 174, 6 N.E.2d 113 (1936).
3. An assault committed by any person against another within the presence of the court.
4. Refusal of a spectator whose conduct is disruptive to the proceedings to leave the courtroom when directed to do so by the court.
5. Interference with jurors during or after trial if in presence of the court.
6. Interference or undue influence brought to bear upon the court, whether it be by act, oral statement, or letter.

7. Refusal of a witness to answer a question when so directed by the court.
8. The filing of papers by a lawyer which are gross and indelicate in language, the use of scandalous language in a brief, or the making of statements charging the court with improper motives in rendering a decision. *People* v. *Miller*, 130 Ill.App.2d 137, 265 N.E.2d 175 (1970).
9. Collective acts may constitute direct contempt. *People ex rel. Jeske* v. *Burke*, 247 Ill. App. 220 (1928).
10. Misconduct by Clerk or Bailiff. *People ex rel. Rusch* v. *Levin*, 305 Ill.App. 142, 26 N.E.2d 895 (1940); *Shafer* v. *Northside*, 36 Ill.App.2d 441, 184 N.E.2d 756 (1962); *City of Chicago* v. *Hart*, 116 Ill.App.2d 39, 253 N.E.2d 496 (1969).

C. *RESPONSIBILITY OF THE JUDGE*

1. *The Judge's Responsibility to Maintain Order*. The purpose of a criminal trial is to determine whether or not the defendant is guilty of the offense charged. No one has the right to disrupt or prevent the orderly course and completion of the trial. The trial judge has the obligation to use his judicial power to prevent distractions from, and disruptions of, the trial. [Rule A.2, *Standards Relating to the Judges Role in Dealing With Trial Disruptions, A.B.A. Project on Standards for Criminal Justice*, May, 1971].

2. *Special Rules for Order in the Courtroom*. The trial judge, either before the trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, prosecutor, defense counsel, witnesses and others will be expected to follow in the courtroom, and which are not set out in the Code of Criminal Procedure or in the published rules of court. [Rule A.4, *Standards*, supra].

   a. An attorney charged with violating a "Policy Statement" relating to extra-judicial comment by attorneys regarding pending litigation may challenge the validity of the rule he violated. *In the Matter of Oliver*, 452 F.2d 111 (7th Cir. 1971).

   b. Before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is "a serious and imminent threat to the administration of Justice". *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970), *Craig v. Harney*, 331 U.S. 367 (1947), *Oliver*, supra.

3. *Judges Responsibility For Self-Restraint.* The trial judge should be the exemplar of dignity and impartiality. He should exercise restraint over his conduct and utterances, suppress his personal predilections, and control his temper and emotions. He should not permit any person in the courtroom to embroil him in conflict, and he should otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during the trial for him to comment upon the testimony, he should do so in a firm, dignified and restrained manner, avoiding repartee, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues. [Rule B.1, *Standards*, supra].

4. *Consideration For Counsel and Others.* "...(The judge) should also require, and so far as his power extends, enforce on the part of the court personnel and counsel, civility and courtesy to the court, to other counsel, and to jurors, witnesses, litigants and others having business in court". [Supreme Court Rule 61].

5. *Improper Publicizing of Court Proceedings.* Proceedings in court should be conducted with fitting "dignity and decorum..." [Supreme Court Rule 61 (24)].

6. *Conduct of Court Proceedings.* Proceedings in court should be so conducted as to reflect their importance and seriousness. "Judicial robes should be worn whenever practicable". [Supreme Court Rule 61 (25)].

7. *Disqualification of Judge to Act in Direct Contempt:* Where there is an insulting attack upon the integrity of the judge carrying such *potential* for bias as to require disqualification, the judge must either:

   a. *Act immediately,* hold the person in contempt of court and sentence, or,

   b. If immediate action is *not* taken by the judge before which the alleged contempt was committed, the judge should have the record of the contemptuous acts or statements prepared at the conclusion of the trial, and ask another judge to hear the summary proceedings. The judge hearing the summary proceedings shall, if he finds the defendant in contempt upon a review of the record, forthwith sentence or fine the contemnor. *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971)

D. *CONDUCT AND RESPONSIBILITY OF THE LAWYER*

1. *A Lawyer Has These Professional Obligations:*
   a. To represent every client courageously, vigorously, diligently and with all the skill and knowledge he possesses;

   b. To do so according to law and the standards of professional conduct as defined in the codes and canons of the legal profession;

   c. To conduct himself in such a way as to avoid disorder or disruption in the courtroom;

   d. To advise any client appearing in a courtroom of the kind of behavior expected and required of him there, and to prevent him, so far as lies within the lawyer's power, from creating disorder or disruption in the courtroom. A lawyer is not relieved of the obligations by any shortcomings on the part of the judge, nor is he relieved of them by the legal, moral, political, social or ideological merits of the case of any clients. (American College of Trial Lawyers, Committee on Disruption of the Judicial Process, July 1970).

2. *Unprofessional Conduct of Attorneys*: "A judge should criticize or discipline with prudence unprofessional conduct of attorneys in matters pending before him, and if such action is not a sufficient corrective, should refer the matter to the proper authorities." (Supreme Court Rule 61 [24])

3. *Deterring and Correcting Misconduct of Attorneys*: The trial judge should require attorneys to respect their obligations as officers of the court. When an attorney causes a significant disruption in a criminal proceeding, the trial judge, having particular regard to the provisions of Rule A.3 [see page 43 paragraph 7a of this Guideline] should correct the abuse and, if necessary, discipline the attorney, using such powers as are available, including one or more of the following:

   a. Censure or reprimand;

   b. Citation or punishment for contempt;

   c. Removal from the courtroom;

   d. Suspension for a limited time (not to exceed six months) of the right to practice before the judge in whose courtroom the misconduct occured. (Rule D.1, *Standards*, supra).

4. An attorney may be held in contempt for willfully obstructing a trial [*Sacher v. United States*, 343 U.S. 1 (1952)], and if he engages in such unruly conduct as would require removal of a defendant, the attorney may be removed from the case. [*In re Isserman*, 345 U.S. 927 (1953)].

5. A lawyer shall not engage in conduct that is prejudicial to the administration of justice. [Disciplinary Rule 1-102 (A-5), Illinois Code of Professional Responsibility, Adopted May 1, 1970].

6. In appearing in his professional capacity before a tribunal, a lawyer shall not:

   a. Engage in undignified or discourteous conduct which is degrading to a tribunal.

   b. Intentionally or habitually violate any established rule of procedure or of evidence.

   A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards tribunals, judicial officers, jurors, witnesses, and litigents. [Disciplinary Rule 7-106, supra]

E. *CONDUCT OF THE PARTIES*

1. *The Disruptive Defendant:* A defendant may be removed from the courtroom during his trial when his conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. If removed, the defendant should be present in the court building while the trial is in progress, be given the opportunity of hearing the trial proceedings through his counsel at reasonable intervals, and be given a continuing opportunity to return to the courtroom during the trial upon his assurance of good behavior. The removed defendant should be summoned to the courtroom at appropriate intervals, with the offer to permit him to remain repeated in open court each time. [Rule C.1, *Standards*, supra]

   a. "A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings". [*Illinois v. Allen*, 397 U.S. 337 (1970)]

2. *The Defendant's Election to Represent Himself at Trial:* A defendant should be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the court makes thorough inquiry and is satisfied that he:

   a. Possesses the intelligence and capacity to appreciate the consequences of his act; and,

   b. Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case. [Rule C.2, *Standards*, supra]

   NOTE: The court should inform the jury that a *pro se* defendant has been offered the opportunity to defend with a lawyer, appointed or retained, and has declined the offer.

3. *Standby Counsel for Defendant Representing Himself:* When a defendant has been permitted to proceed *pro se*, the court should consider the appointment of standby counsel to assist the defendant when called upon, and to call the courts attention to matters favorable to the accused upon which the court should rule on its own motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants. [Rule C.3, *Standards*, supra]

   a. The role of the standby counsel is a limited one—to assist the accused when called upon by him and to call the court's attention to matters favorable to the accused upon which the court should rule on its own motion, but *not* to examine witnesses or make arguments over defendant's objection.

   b. If the *pro se* defendant consents to be represented by the standby counsel, before effecting the change, the court should explain to the defendant that once he accepts the standby as his counsel, the lawyer, and not the accused, will thereafter conduct the defense. *United States v. Conder*, 423 F.2d 904 (1970)

4. *Misconduct of the Defendant Representing Himself*: If a defendant appearing *pro se* engages in conduct which is so disruptive that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke permis-

sion for the defendant to proceed *pro se* and require representation by counsel. If standby counsel has previously been appointed, he should be asked to represent the defendant, in any event, the trial should be recessed only long enough for counsel to prepare himself to go forward. [Rule C.4, *Standards*, supra]

a. While a layman representing himself cannot be held to the same standards of decorum or competence expected of a member of the bar, he should not be permitted to immunize his activities from the court's control. [Rule C.4 comments]

b. The sanctions of removal or contempt will usually be inappropriate, since the misconduct of a *pro se* defendant will frequently be a blend of ignorance, emotional involvement, and mounting recognition of the inadequacy of his defense. [Rule C.4 comments]

c. The preferred course is to revoke permission for *pro se* appearance and require him to appear through counsel. If misconduct continues, the sanctions of removal or contempt should be applied. [Rule C.4 comments]

d. "A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself." *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)

F. *CONDUCT OF SPECTATORS AND OTHERS*

1. *Misconduct by Spectators and Others:* The right of the defendant to a public trial does not give particular members of the general public or news media a right to enter the courtroom or to remain there. Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded and, if his conduct is intentional, may be punished for contempt. Any person whose conduct tends to menace a defendant, attorney, witness, juror, court officer or the judge in a criminal proceeding may be removed from the courtroom. [Rule E.1, *Standards*]

   a. The right to a public trial does not entitle any particular spectator, including a relative of the accused, to attend the trial. [*In re Oliver*, 333 U.S. 257 (1948)]

2. *Arrangements for the News Media*: Although the news media may observe the trial of a criminal case in order that information be obtained for circulation to the general public, the trial judge should require that the conduct of their representatives not jeopardize the order and decorum of the courtroom. He should make reasonable arrangements to accommodate them consistent with the opportunity of other members of the public to attend the trial. [Rule E.2, *Standards*, supra]

G. *"CONTINUING" AS OPPOSED TO "SEPARATE" CONTEMPT ACTIONS*

1. The test as to whether a contemptuous action is a continuing contempt, or separate to the prior action, is whether the subsequent contemptuous act is so interwoven with the previous conduct that it is inseparable therefrom. [*Goutreaux v. Goutreaux*, 220 La. 564, 57 So.2d 188 (1952)]

2. The nature of the repeated contemptuous acts must be weighed against the available method for ending such acts other than repeated additional fines or consecutive periods of imprisonment for contempt. [Judge Nathan M. Cohen, Vol. 2:69 Loyola University Law Journal 88 (1971)].

H. *RIGHT TO TRIAL BY JURY*

1. A contemnor has no right to trial by jury in a contempt action. *United States v. Barnett*, 376 U.S. 381 (1964); *Cheff v. Schnackenberg* 384 U.S. 373 (1966)].

   a. *Exception:* If the court, prior to the summary hearing, proposes to sentence the contemnor to a term of *more than six months*, then the contemnor is entitled to a jury trial. [*Bloom v. Illinois*, 391 U.S. 194 (1968)].

   b. The Supreme Court has not ruled as to whether *consecutive* terms of six months or less each on multiple contempts, totaling many months, would require a jury trial, although in *Frank v. United States*, 395 U.S. 147 (1969), the Court upheld probation for a term of three years without requiring a jury trial.

   c. There is not right to trial by jury in civil contempt where the contemnor may obtain his release at any time by purging himself of contempt, even though the actual time may be more than 6 months. This would apply only when the contemnor is confined as a coercive measure.

I. *THE SUMMARY PROCEEDING AND SANCTIONS*

1. A summary proceeding for punishment of direct contempt does not constitute a violation of constitutional guarantees of due process. [*People v. Siegal*, 400 Ill. 208, 79 N.E.2d 616 trans. to 335 Ill.App. 475, 82 N.E.2d 378 (1948)].

2. *Right to Counsel*: Before one can be found guilty of direct contempt and sentenced, he is entitled to an opportunity to consult with a lawyer before going on with the summary proceeding. Failure to provide him with this opportunity is a denial of due process. *Johnson v. United States*, (5th Cir.), 344 F.2d 401 (1965).

3. *Inherent Power of the Court*: The court has inherent power to punish any contempt in order to protect the rights of the defendant and the interests of the public by assuring that the administration of criminal justice not be thwarted. The trial judge has the power to cite and, if necessary, punish summarily anyone who, in his presence in open court, willfully obstructs the course of criminal proceedings. [Rule F.1, *Standards*, supra], *Ex parte Terry*, 128 U.S. 289 (1888); *Cooke v. United States*, 267 U.S. 517 (1925).

4. *Admonition and Warning*: No sanction other than censure should be imposed by the trial judge unless:

   a. It is clear from the identity of the offender and the character of his acts that disruptive conduct was willfully contemptuous, *or*

   b. The conduct warranting the sanction was preceded by a clear warning that the conduct is impermissible and that specific sanctions may be imposed for its repetition. [Rule F.2, *Standards,* supra]

5. *Notice of Intent to Use Contempt Power —Postponement of Adjudications:*

   a. The trial judge should, as soon as practicable after he is satisfied that courtroom conduct requires contempt proceedings, *hold an summary hearing and punish the contemnor if prompt punishment is imperative*, or immediately inform the alleged offender of his intention to institute such proceedings.

   b. The trial judge should consider the advisability of deferring adjudication of contempt for courtroom misconduct of a defendant, attorney or witness until after the trial, and may defer such a proceeding *unless prompt punishment is imperative*. [Rule F.3, *Standards,* supra]. See *In re Oliver*, 333 U.S. 257 (1948) and *Sacher v. United States*, 343 U.S. 1 (1952).

6. At the summary proceeding after the contemnor has been cited for direct contempt, and he has been allowed to consult with counsel, the court should give the contemnor an opportunity to say what he wishes in mitigation of his act. He has no right to produce witnesses or give evidence.

   a. In a direct criminal contempt proceeding, that is, for contempts committed in the presence of the judge, which he observes and has personal knowledge of, no formal charge is filed and no plea, issue of trial is required [*In re Terry,* supra]. The contempt, having been committed in the presence of the court, evidence is unnecessary and no record is made. *People ex rel. Owens v. Hogen*, 256 Ill. 496, 100 N.E. 177 (1912).

   b. Before a defendant can be found in contempt for disobedience of an order of a bailiff, he has the right to be given the opportunity to show that the version of the incident related to the judge was inaccurate or misleading where the order does not show the act took place in the ocular presence of the judge. *Johnson v. Mississippi*, 403 U.S. 212 (1971).

7. *Sanctions:*

   a. *Judge's Use of His Power to Maintain Order:* If the judge determines to impose sanctions for misconduct affecting the trial, he should ordinarily impose the least severe sanction appropriate to correct the abuse and to deter repetition. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay or prejudice that might result from the character of the sanction or the time of its imposition. [Rule A.3, *Standards*]

   b. In imposing a penalty for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumanious behavior, the necessity of effectively terminating the defendants defiances as required by the public interest, and the importance of deterring such acts in the future. *In re Van Meter,* (8th Cir.), 413 F.2d 536 (1969).

   c. Unless a course of contemptuous conduct during the trial is broken up, separate citations for contempt, the justness and validity of cumulative sentences for separate acts of contempt may be open to doubt. [Rule F.3, *Standards* (comments) supra]. Also see *Yates v. United States*, 355 U.S. 66 (1957).

d. No facts which did not occur in the presence of the court should be taken into consideration by the court in adjudging guilt or in fixing punishment. *People v. Rongetti*, 344 Ill. 107, 176 N.E. 292 (1931).

e. After the contemnor has been adjudged to be in contempt, the court may:
   (1) Forgive the contempt after an appropriate and subsequent apology.
   (2) Sentence the contemnor to jail for up to six months (if jury trial is denied). If contemnor is granted jury trial and found guilty, there is no fixed limit.
   (3) Remove the contemnor from the courtroom during the trial.
   (4) Impose an appropriate fine.
   (5) Place contemnor on probation for an appropriate time. Note that the six months rule does not apply for probation.
   (6) Place defendant in jail (as a coercive measure) until he agrees to conduct himself properly in the courtroom. (*Illinois v. Allen*, supra)

f. A court may *not* strike pleadings and enter defaults as punishment for contempt. *Hovey v. Elliott*, 167 U.S. 409 (1897).

g. *Breach of Peace in Presence of Court:* A person who, in the presence of a judge, commits or threatens to commit an offense against the person or property of another, may be ordered, without process, to enter into a recognizance to keep the peace for a term not to exceed 12 months, and in case of refusal be committed as in other cases. [Ill. Rev. Stat. 1969, ch. 38, sec. 200-16]

J. *REFERRAL OF CONTEMPT MATTERS TO ANOTHER JUDGE*

1. The judge before whom contemptuous courtroom conduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge if his conduct was so integrated with the contempt that he contributed to it or was otherwise involved, or his objectivity can reasonably be questioned. [Rule F.5, *Standards*], *Offutt v. United States*, 348 U.S. 11 (1954).

   a. If the judge is the target of personal attacks and does not take instant action against the contempt, due process requires that the contempt be tried before another judge. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

   b. Even though the judge's objectivity has not been affected by the attacks, "justice must satisfy the appearance of justice". *Offutt v. United States*, supra.

   c. *Hearing To Determine Whether Judge Should Recuse Himself:* In *Johnson v. Mississippi*, 403 U.S. 212 (1971), the judge denied defendant's request for an opportunity to show why the judge should recuse himself. Contempt was reversed (in part) because the judge was "so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit". While the court did not state that such a hearing was required, if the court does not hold defendant in contempt immediately after the commission of the contemptuous act, and the court is "enmeshed in matters involving petitioner", then he should recuse himself.

K. *THE ORDER* [Order Form-Page 54]

1. The court must enter a written order setting forth fully and clearly the facts out of which the contempt arose so that the reviewing court may determine if the committing court had jurisdiction to enter the order. *People v. Rongetti*, 344 Ill. 107.

2. All essential facts must be fully set forth and no part thereof can be supplied by presumption or inference. *People v. Tavernier*, 384 Ill. 388, 51 N.E.2d 528 (1943).

   a. If a person does a contemptuous *act*, then that specific act must be made a part of the record, together with the circumstances surrounding that act, and entered in the contempt order.

   b. "In contempt proceedings, no matter how fully and clearly the facts are set forth, the recital part of the order cannot convey the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, hearing and attitude of the respondent. [*People v. DeStefano*, 64 Ill.App.2d 368, 212 N.E.2d 368 (1965)]. Reliance must be placed upon the fairness and objectivity of the presiding judge. The occurrence must be viewed as a unit in order to appraise properly the misconduct, and the relationship of the petitioner as an officer of the court must not be lost sight of". *Fisher v. Pace*, 336 U.S. 155 (1949).

3. After setting forth the elements of misconduct, the order should state that such conduct "tended to embarrass, hinder

or obstruct the court in the administration of justice and tended to bring the administration of the law into disrepute". The order should always set forth the sanctions entered by the court against the contemnor.

4. If a party or his attorney violates a special court rule against extra-judicial comment in a case being litigated, the record and order must contain sufficient specific findings by the trial court establishing that the party or his attorney's conduct is "a serious and imminent threat to the administration of justice". *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970); *Craig v. Harney*, 331 U.S. 367 (1947); *In the Matter of Frank W. Oliver, Attorney*, 452 F.2d 111 (7th Cir. 1971)

5. The contemnor has a right to have a reasonable bond set by the court pending appeal of the contempt order.

Indirect Contempt

A. *DEFINITION:* Where the contemnor "fails to do something ordered to be done by a court in a civil action for the benefit of another party therein". *People v. Gholson*, 412 Ill. 294, 106 N.E.2d 333 (1952).

1. "When punishment is a remedial or coercive measure—commitment of a contumacious party until he complies with the mandate of the court, a fine until there is obedience to the court's order, the contempt is said to be civil". *Board of Junior College District No. 508 v. Cook County College Teachers Union, Local 1600*, 126 Ill. App.2d 418, 262 N.E.2d 125 (1970).

B. *CONTEMPT FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS*

1. Contempt of discovery orders rests with the sound discretion of the court.

a. "...Supreme Court Rule 219 vests the trial court with the broad discretionary powers including the power to compel obedience to its orders by contempt proceedings". *People ex rel. General Motors v. Bua*, 37 Ill.2d 180, 226 N.E.2d 6 (1967). Its orders, as with other discretionary matters, should not be disturbed unless a reviewing court can say that its discretion has been abused. *Bee Chemical Company v. Servile Coatings, Inc.*, 116 Ill. App.2d 217, 253 N.E.2d 512 (1969).

b. *Failure to Comply With Order or Rules:* If a party or any person at the instance of or by collusion with a party,

unreasonably refuses to comply with any provision of Rules 201 through 218, or fails to comply with any order entered under these rules, the court may, on motion, enter in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:...In lieu of or in addition to the foregoing, the court may...by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under said rules. Ill. Rev. Stat. 1969, ch. 110A, sec.219(c).

c. Where a state's attorney fails to comply with a pre-trial discovery order, the evidence may be suppressed and he may be fined for contempt of court. *People v. Endress*, 106 Ill. App.2d 217, 245 N.E.2d 26 (1969).

d. A defendant who refuses to comply with a signed order requiring him to participate in a line-up, may be found guilty of criminal contempt. *United States v. Hammond*, 419 F.2d 166 (4th Cir. 1969).

e. A defendant may be fined for failure to produce certain formulas which it had been ordered to produce under certain safeguards. *Bee Chemical Co. v. Service Coatings, Inc.*, supra.

f. A judgment of criminal contempt for refusal to comply with a discovery order is a final judgment and immediately reviewable. *Hanley v. James McHugh Const. Co.* 419 F.2d 955 (7th Cir. 1969).

(1) If no penality in the way of fine or imprisonment is imposed, then such order of contempt is not a final order for purposes of appeal. *In re Estate of Atwood*, 97 Ill.App.2d 311, 240 N.E.2d 451 (1968).

C. *FAILURE TO OBEY ORDER OF PAYMENT [CIVIL JUDGMENT OR SUPPORT]*

1. "The power to enforce payment for support money by contempt is limited to cases of willful and continued refusal to obey the order of the court". *Wick v. Wick*, 19 Ill.2d 457, 167 N.E.2d 207 (1960).

2. "Extraordinary power is vested in the court to commit a person for contempt, to compel obedience to decrees for payment of support money, where it appears the defendant had pecuniary ability to comply and his disobedience is willful." *Cole v. Cole*, 85 Ill.App.2d 105, 229 N.E.2d 293 (1967).

3. "The failure of a husband to comply with the decree directing the payment of support money for children is prima facie evidence of contempt." *Cole v. Cole,* supra.

4. Mere absence of compliance with the provisions of the decree is not sufficient basis for a judgment of contempt of court unless the evidence shows the failure to comply was willful and contumacious refusal to obey the court. *Cole v. Cole,* supra.

5. "It is incumbent upon the defendant to establish to the satisfaction of the court that his failure to pay was due entirely upon his inability to pay." *Shapiro v. Shapiro,* 113 Ill.App. 2d 374, 252 N.E.2d 93 (1969).

D. *CONTEMPT BY RECALCITRANT WITNESSES*

1. "When witnesses refuse to testify, the citation of contempt can usually be termed civil, since in effect an order of the court is being disobeyed. However, it is possible that refusal to testify would constitute criminal contempt....Whether a witness is acting in a contemptuous manner requires a much finer analysis than when a typical discovery order is disobeyed. Even when a witness is openly uncooperative it may become difficult to ascertain when this behavior becomes contempt". Cohen, Vol. 2:69 Loyola University Law Journal 85.

   a. When a witness has a detailed recollection of many events and responds with a "I don't remember" to questions closely relating to the events he previously testified to, he may be held in jail until he agrees to testify as to the later events. *Second Additional Grand Jury v. Cirillo,* 12 N.Y.2d 206, 188 N.E.2d 138 (1963).

   b. A contemnor may be held in civil contempt for refusal to answer questions before the Grand Jury after being granted immunity, and be held in confinement until he agrees to answer. *Shillitani v. United States,* 384 U.S. 364 (1966).
      (1) Such contemnor is entitled to notice and hearing—he cannot be summarily punished. *Harris v. United States,* 382 U.S. 162(1965).

E. *RIGHT TO TRIAL BY JURY*

1. In indirect contempt, the contemnor has no right to trial by jury if the purpose is to coerce rather than punish, and the contemnor may escape further confinement by agreeing to follow the court's order. *Shillitani v. United States,* supra.
   a. If the purpose is *not* to coerce, and the court plans to sentence the contemnor to more than six months, then he is entitled to jury.

F. *CONSTRUCTIVE CONTEMPT (THE NEWS MEDIA CASES)*

1. Definition: Acts which affect the administration of justice through criticism, pressure and interference with participants in the judicial process.

   a. A publication is contemptuous only if it is calculated to impede, embarrass or obstruct the due administration of justice. *People v. Gilbert,* 281 Ill. 619, 118 N.E. 196 (1917).

   b. The publication of scandalous or libelous matter concerning a court or judge is not, without more, contemptuous. The publication must tend to affect the outcome of a pending case. *Storey v. People,* 79 Ill. 45 (1875).

   c. It is not necessary to show that an interference with the administration of justice has actually occurred, nor is it a defense for the contemnor to disclaim any subjective intention of producing that result. *People v. Wilson,* 64 Ill. 195; *People v. Doss,* 382 Ill. 307, 46 N.E.2d 984 (1943).

   d. Remarks made over the air by a television broadcaster calling a witness a "professional sneak and liar" and promising a party to the suit that he would do everything within his power "to prevent the legal kidnapping of her child" constituted an interference with the administration of justice and such contemnor may be fined or jailed. *People v. Goss,* 10 Ill.2d 533, 141 N.E.2d 385 (1957), cert. denied 365 U.S. 811 (1961).

G. *CONTEMPT BY MEMBERS OF THE BAR*

1. An attorney cannot be held in contempt for failure to produce a privileged communication with a client. *People v. Ryan,* 30 Ill.2d 456, 197 N.E.2d 15 (1964).

2. An order directing counsel to turn over a certain written document to opposing counsel for inspection during the trial of the case does *not* constitute contempt upon his refusal if such use of the document would not require counsel to submit it to opposing counsel for examination. *People ex rel. Morgan v. Milliken,* 41 Ill. App.2d 282, 190 N.E.2d 502 (1963).

3. An "out of town" attorney was held in contempt who had devoted substantial efforts on behalf of his client, did not file a written entry of appearance, received notice of trial identifying him as attorney of record at which he made no objection, but failed to appear for trial because his client had not advanced the trial fee. *People v. Buster,* 77 Ill.App.2d 224, 222 N.E.2d 31 (1966).

a. "One of the primary duties of an attorney is that owed to the court. He is an officer of the court and owes to the court a duty to be obedient to its rules and orders. When engaged in litigation, he owes a duty to the court to appear before it upon notice and to assist the court in expeditious consideration and disposal of pending cases." *People v. Buster,* supra.

b. "Canon 21 of Professional Ethics of the Illinois State Bar Association and the American Bar Association impose upon the lawyer the duty 'to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.' While such canons do not have the force and effect of judicial decisions or statutory law, they nevertheless are of interest to this court, provide guidelines to members of the profession and are helpful in reaching determinations in particular cases." *Illinois State Bar Association v. United Mine Workers of America, Dist. 12,* 35 Ill.2d 112, 219 N.E.2d 503 (1966), vac. 389 U.S. 217; *People v. Buster,* supra.

(1) Contrast the *Buster* case with *People v. Bracy,* heard as *People v. Rile,* 96 Ill.App.2d 253, 238 N.E.2d 266 (1968), where the "out of town" lawyer did not have sufficient notice of local rule.

H. *INJUNCTIONS*

1. Normally the violation of an injunction is considered civil contempt. *Woolen Mills v. Laidke*, 238 Ill. App. 92 (1925).

2. The only way an injunction can be attacked is by action in the court that issued it and then by an appeal from the unfavorable decision, but not by proceedings in a collateral action. An injunction must be obeyed however erroneous, and disobedience constitutes contempt of court. *City of Chicago, et al. v. King,* 86 Ill. App.2d 340, 230 N.E.2d 41 (1967).

3. Whether the trial court rightfully or erroneously granted the temporary injunction and whether the injunction order was constitutionally permissible are questions that cannot be litigated in a contempt proceeding. *Board of Junior College District 508 v. Cook County College Teacher's Union, Local 1600,* 126 Ill.App.2d 418, 262 N.E.2d 125 (1970); *The Board of Education v. Kankakee Federation of Teachers Local No. 886,* 46 Ill.2d 439, 264 N.E.2d 18 (1970).

I. *PETITION FOR RULE TO SHOW CAUSE, NOTICE, HEARING AND THE ORDER*

1. If it is necessary to bring the court's attention to an alleged indirect contempt, a Petition for Rule to Show Cause should be filed with the court.

   a. If the court finds from the verified Petition that there is probable cause to believe that indirected contempt has been committed, it shall enter a Rule to Show Cause, fix a date for hearing on the rule and order at least 5 days notice to be given. *People v. Pomeroy,* 405 Ill. 175, 90 N.E.2d 102 (1950).

      (1) Notice need not be personal, but proof of notice must be given.

      (2) If proper notice is given, and defendant does not appear at the hearing, a writ of attachment may be ordered and bond fixed.

2. At the hearing if the court finds that such acts of the defendant were not willful or intentionally contemptuous, then the rule will be discharged and the petition dismissed.

   a. Contempt of court is a crime against the court, considered a misdemeanor, and therefore must be proved beyond a reasonable doubt. *People v. Vitucci,* 49 Ill.App.2d 171, 199 N.E.2d 78 (1964).

3. If, after hearing, the court finds that such act (or failure to act) was willful and contemptuous, it shall so find, and:

   a. Immediately impose sanctions, or,

   b. Set conditions and time to allow contemnor to purge himself by complying to the specific conditions.

4. Where resort is had to contempt proceedings to secure obedience to a court decree, the merits of the original controversy cannot be relitigated.

   a. The court should hear evidence concerning defendant's conduct, and the circumstances surrounding it, to determine whether he complied with the decree or willfully violated it.

   b. The enforcement of a court's decree by civil contempt is not the enforcement of a private right but rather the process of the court to secure obedience to its decrees, the benefit to the party invoking the aid of the court being merely incidental.

c. The court may imprison or fine for contempt but is without authority to recompense plaintiff for his damages. *Eberle v. Green,* 71 Ill. App.2d 85, 217 N.E.2d 6 (1966).

5. The Order [Order Form-Page 55]

a. The court must enter a written order setting forth fully, clearly, and specifically the facts out of which the contempt arose so that the reviewing court may determine if the committing court properly entered the order. *Kenwick v. Kenwick,* 41 Ill.App.2d 108, 190 N.E.2d 486 (1963); *People ex rel. Andrews v. Hassakis,* 6 Ill.2d 463, 129 N.E.2d 9 (1955).

b. The record must establish and the order state that the defendant deliberately trifled with the court or that he was willfully and intentionally contemptuous in his conduct or that his conduct was calculated to embarrass, hinder, or obstruct the court in the administration of justice or calculated to lessen its authority or dignity. *People v. Bialek,* 31 Ill. App.2d 281, 175 N.E.2d 278 (1961).

c. It must be proved that the alleged contemnor had knowledge of the order which he is said to have violated. *Wilson v. North Carolina,* 169 U.S. 586 (1898).

(1) The order which is said to have been violated must be specific and certain. *In re Rubin,* 378 F.2d 104 (1967).

(2) Persons who hear or are apprised of a courts oral decision and violate the provisions of the order, are liable to contempt proceedings. *People v. Kennedy,* 43 Ill.App.2d 299, 193 N.E.2d 464 (1963).

d. An order is not final for purposes of appeal until sanctions are imposed by the court. *In re Estate of Atwood,* 97 Ill.App.2d 311, 240 N.E.2d 451 (1968).

J. *SANCTIONS*

1. "In imposing a penality for contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future". *In re Van Meter,* 413 F.2d 536 (1969).

2. A court cannot strike pleadings and enter defaults as punishment for contempt. *People ex rel. General Motors v. Bua,* 37 Ill.2d 180, 226 N.E.2d 6 (1967).

a. A court may not, on the theory of punishing for contempt, summarily deprive a party of all right to defend an action. *Hovey v. Elliott,* 167 U.S. 409 (1897).

b. It is a principle of fundamental justice that, however plenary may be the power to punish for contempt, no court having obtained jurisdiction of a defendant may refuse to allow him to answer, refuse to consider his evidence and condemn him without a hearing in the original cases at issue because he is in contempt of court. *Walter Cabinet Co. v. Russell,* 250 Ill. 416, 95 N.E. 462 (1911).

3. If the court finds the defendant in indirect contempt of court, it may:

a. Confine contemnor to jail for a period not to exceed six months if jury trial is denied. *Bloom v. Illinois,* 391 U.S. 194 (1968).

b. Confine contemnor to jail for a period exceeding six months if jury is waived or a jury finds the contemnor guilty of contempt.

c. Confine contemnor to jail for an indefinite period of time if the purpose is to coerce and he may obtain his discharge by purging himself of contempt. Contemnor has no right to trial by jury.

d. Forgive the contempt after a subsequent apology.

e. Continue the contempt proceedings to give the disobedient party one more chance to comply with the order.

f. Fine the contemnor, then remit all or a part of the fine if there is prompt subsequent compliance.

4. Where a party who has been adjudicated a contemnor would have mooted his appeal by compliance, his appeal has the effect of staying enforcement by the trial court. He need not obtain a stay order. *United States v. Roundtree,* 420 F.2d 845 (1969).

5. If contemnor desires to appeal the contempt order, the court must fix a reasonable bond pending appeal.

Special acknowledgment is given to the Honorable Nathan M. Cohen, Judge of the Circuit Court of Cook County, whose many articles on contempt and continuing consultation greatly contributed to the preparation of this Guideline.

IN THE CIRCUIT COURT OF THE
30TH JUDICIAL CIRCUIT
JUSTICE COUNTY

People of the State of Illinois	)	
vs.	)	71-CR-545734
Malacum C. Badacus	)	

O R D E R
[DIRECT CONTEMPT]

Now, in the name and by the authority of the People of the State of Illinois, the defendant, Malacum C. Badacus, being present in his own proper person and with his counsel, Mr. Carl R. Solewick, the matter against said defendant of alleged direct contempt is considered by this court.

And, thereupon, the Court DOES FIND:

[1] That on May 21, 1971, being one of the days of the May term A.D., 1971, of the Circuit Court, 30th Judicial Circuit, Justice County, the case of the People of the State of Illinois vs. Malacum C. Badacus, Case No. 71-CR-545734, Treason, came on to be heard in the regular course before this court.

[2] That a petit jury had been duly impaneled and sworn to try the issues before them in said case.

[3] That throughout said trial, which commenced on May 19, 1971, the court repeatedly asked the said defendant to obey the court's rulings and instructions and admonished him concerning his improper courtroom behaviour.

[4] That on May 21, 1971, during the direct examination of Mary Madden, the following took place:

Mr. Doyle, Assistant State's Attorney:...Q. Mrs. Madden what, if anything, did you see the defendant, Mr. Badacus, do after he signed his name to the paper?

Mr. Badacus: Objection, Objection. The witness is about to tell a lie.

The Court: Overruled. It's your lawyer's responsibility to make any objection, and keep your voice down. You don't need to shout.

Mr. Badacus: I'm not hollering at you. You don't even know how to rule on objections, you dirty sonofabitch. I'm not going to be railroaded into any prison by any dirty, tyrannical old dog like yourself.

Take that.....

The Bailiff: Look out!

The Court: Let the record show that during the last comments from the defendant he was shaking his fist at the court, and that he did throw a book at the court. I am citing Mr. Badacus for direct contempt of court. Mr. Badacus, your remarks have been contemptuous as have many of your acts. You have totally disregarded the Court's orders and instructions. You have been warned many times. Mr. Solewick, do you or your client have anything to say prior to sanctions being entered?

Mr. Badacus: Go to hell, I don't want to talk to you any more.

The Court: Then please sit down and keep quiet.

Mr. Solewick: No, he's pretty well said it all.

[5] That the conduct of the defendant, which took place in front of this court while in open session, tended to impede and interrupt the proceedings and lessen the dignity of this court. That the Court further finds that the defendant, who is now and here present in open Court, is by reason of said conduct, guilty of direct contempt of this court.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the said Malacum C. Badacus, because of said contempt, be sentenced to a period of six months in the County Jail of Justice County, or until otherwise discharged by due process of law. Warrant of Commitment to issue, instanter, directed to Sheriff to execute.

JUDGE

IN THE CIRCUIT COURT OF THE
30TH JUDICIAL CIRCUIT
JUSTICE COUNTY

Clyde C. Cunningham	)	
vs.	)	No. 71-L-798369
Dennis R. DeFaultie	)	

O R D E R
[INDIRECT CONTEMPT]

This cause being heard on the 28th day of May 1971, on the rule to show cause heretofore entered against Dennis R. DeFaultie, respon-

dent herein, to show cause, if any he has, why he should not be held in contempt of this court for refusing to comply with the order of this court heretofore entered on the 3rd day of February 1971.

And said Dennis R. DeFaultie, having on said 28th day of May 1971, appeared in person and by his attorney Joseph Z. Laraia, and the court having jurisdiction of this cause and the parties hereto and having heard the testimony herein and having heard the arguments of counsel and said respondent DOES FIND:

[1] That said Dennis R. DeFaultie has failed and willfully refused to comply with the order of this court entered on the 3rd day of February 1971.

[2] That the said respondent has repeatedly expressed and shown his defiance of this court and the aforesaid order, and that no sufficient cause is shown by him why he should not comply with the aforesaid order, but that although able to do so, willfully failed and refused to obey the aforesaid order of his court.

[3] That the court further finds and adjudges the said respondent to be guilty of contempt and that said contempt has tended to defeat and impair the rights and interest of the plaintiff herein and to impede, embarrass and obstruct the court in its administration of justice and to bring the administration of justice into contempt.

IT IS THEREFORE ORDERED that said respondent Dennis R. DeFaultie be and is hereby ordered committed to the County Jail of Justice County, Illinois, for a period of thirty days, there to remain charged with said contempt until the sentence has been served or until he has purged himself of contempt by paying to the Circuit Clerk of Justice County the sum of $1500.00, which said sum is to be applied on the judgment heretofore entered in the above entitled cause, the Clerk to transmit said funds to plaintiff if and when received, or until said respondent is released by due process of law. Warrant for such commitment to issue instanter, directed to the Sheriff to execute.

_____

JUDGE

D. Summary of Discussions

Report of Professors Thomas A. Lockyear and Thomas D. Morgan

The seminar sessions on Courtroom Decorum were chaired by Hon. Nathan M. Cohen, committee chairman, and Hon. William R. Nash, vice-chairman, assisted by the undersigned professor reporters. Sessions were begun with a lecture by Judge Cohen or Judge Nash on the law of direct contempt, followed by a lecture by Professor Lockyear or Professor Morgan on indirect contempt. A discussion was then held of (1) current issues in the law of contempt and (2) practical problems in keeping decorum in the courtroom. The outline below summarizes that discussion.

I. Current Issues in the Law of Contempt

A. Distinction Between Direct and Indirect Contempt

1. *People v. Tomashevsky,* 48 Ill.2d 559, 273 N.E.2d 398 (1971), holds that the distinction is whether any facts material to the issue of contempt are outside the personal knowledge of the trial judge.

a. There the contempt was laughing in the courtroom—something which happened in the judge's presence. But because the judge did not know *who* had laughed, the contempt was indirect.

b. An issue was raised whether it is a direct contempt if a man fails to respond to a citation to discover assets. It was agreed that that was indirect because the judge could not personally know whether the man had been served or why he failed to appear.

2. The significance of the distinction is that direct contempt may be punished summarily while indirect requires giving the accused contemnor notice (usually through a rule to show cause), a hearing and an opportunity to defend.

B. Current Problems in Direct Contempt

1. The case of *Illinois v. Allen,* 397 U.S. 337 (1970), upholds the court's right to keep order, even to shackling or excluding the defendant. The practice should be extremely rare, but the power is there in reserve.

2. *Bloom v. Illinois,* 391 U.S. 194 (1968), holds that the contemnor may not be sentenced to more than six months for contempt unless he has the right to a jury trial. This puts a practical ceiling on sentences, particularly for summary direct contempt, because of the delay and formality in having a jury trial.

3. *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971), puts an important limit on the power of the judge to sentence for contemptous acts directed at him personally. He may so sentence if he sends the jury out and acts immediately to punish the contempt. See *People v. Baxter,* 50 Ill.2d 286, 278 N.E. 2d 777 (1972), reading *Mayberry* this way. If he fails to act immediately however, he must send the case to another judge to hear the issue of contempt and impose a sanction.

   a. The other judge apparently may decide the contempt issue on the written record. He need not hold a hearing or call the first judge as a witness.

   b. If the defendant is entitled to a jury trial because of the sentence that might be imposed, presumably there would have to be a hearing and the trial judge as well as any other witnesses called.

   c. Regardless of whether the judge punishes immediately himself or sends the case to another judge to hear the issue of contempt, an order by the court fully and completely setting forth the factual basis for its finding as well as a means of insuring the appellate courts with an adequate basis for review is required.

C. What Specifically Constitutes Contempt

1. Conduct of Attorneys. It was suggested that attorneys must be permitted somewhat greater latitude than parties or spectators in raising their voices, being flamboyant, etc. because "they are the gladiators." Others suggested, however, that they would more likely excuse an outburst from a layman than from an attorney since the latter should know better. Several judges were concerned with the problem of the "foreign" lawyer who enters the courtroom for the single case at hand and has not thought of further practice before the court. It was suggested that uniform guidelines governing attorney appearances in such cases would greatly aid many judges in clearly establishing firm control in potentially disruptive situations.

2. Contempt by Newspapers. It was generally agreed that the courts may be the subject of comment by newspapers, even to the extent of trying to discredit the judicial system or particular judges. What they can be held in contempt for is trying to influence the result in a particular case by consciously prejudicing potential jurors.

3. Public Employee Strikes. It was agreed that if public employees violate a back-to-work injunction, they may and should pay the price even if their employing agency wants to "wipe the slate clean" later.

4. Failure to Comply With Discovery Orders. It was pointed out that refusal to comply is a standard and honorable way to test a discovery order. In cases of good faith desire by trial counsel to test the law (as perhaps in the new criminal discovery rules), it was argued that the judge should enter a finding of criminal contempt and impose a token fine so the party can appeal. Only in cases of an attempt to obstruct orderly processes, should a serious sanction be given.

D. Federal Rule 42—Criminal Contempt

It was agreed by a substantial majority of the participants that it would be desirable to have a Supreme Court rule patterned after Federal Rule 42 to specify the procedure for the court to follow in contempt situations. Case law is available to use in patterning behavior, but it was believed that a clear rule would help trial judges and help achieve uniform practice.

II. Practical Problems in Keeping Courtroom Decorum

A. It was agreed that the contempt power is the ultimate weapon but something that should be used only in very rare instances. Some judges have never used it and some suggested that a judge has not properly been on top of the situation if it gets sufficiently out of hand that a contempt sanction is needed.

B. It was generally agreed that a stay and bond pending appeal of a finding of contempt and imposition of sanction was proper procedure. Several questions were raised, however, concerning the application of the 10% deposit provisions of Ill. Rev. Stat., chap. 38, sec. 110-7 (1971). The statute appears not to have considered bond in this type of situation, and several judges suggested Court or legislative clarification so that state wide use of these provisions would be uniform.

C. While it was agreed that a judge's personal tone and level of expression must fit the parties and the situation, it was generally agreed that wearing the judicial robe lends an important air of dignity to even the busiest court or most informal proceeding.

D. Most judges agreed that it is desirable to open court formally to set a tone of dignity. One judge reported that everyone in his courtroom is asked to pledge allegiance to the flag (at the opening of court), a practice some other judges seemed to think was a good idea.

E. It was agreed that all court personnel help set the tone of the courtroom. The bailiff, reporter, clerk, etc., should all dress neatly and obey court rules to set an example for spectators and parties. Their behavior should be equally good when the court is in recess, i.e. no smoking in the courtroom, putting feet up on the tables, etc., since people arriving for a case should get a sense that their case will be responsibly and fairly heard.

F. Finally, there was a concensus that a judge should hear both sides out even if he soon realizes one side is making a specious argument. A party deserves to go away thinking his side was given a hearing even if, speaking objectively, he did not have much of a case. Nothing breeds disrespect as much (it was felt) as a belief that the judge only considered one side of a question.

Topic IV—RECENT DEVELOPMENTS IN THE LAW

Hon. Richard Mills
Chairman and Discussion Leader

Hon. Abraham W. Brussell
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Miscellaneous Recent Developments

   a) *Jack Spring, Inc.* v. *Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972)

   b) *Rules of Procedure of Judicial Inquiry Board of Illinois,* (November 4, 1971)

2. Traffic Law Developments

   a) Ill. Rev.Stat., 1972 Supp., ch. 95-1/2, sec. 11-501.1

   b) *People* v. *Ardella,* 49 Ill.2d 517, 276 N.E.2d 302 (1971)

3. "No Fault" Legislation

   a) Ill.Rev.Stat. 1971, ch. 73, secs. 1065.150-1065.163

   b) *No-Fault: An Analysis*, prepared by the Continuing Legal Education Committee of the Chicago Bar Association for presentation at a seminar held in Chicago on October 5, 1971. Pages 102-168 of the Advance Reading Material

   c) *Pinnick* v. *Cleary*, 271 N.E.2d 592 (Mass.Jud.Sup.Ct. 1971)

   d) *Grace v. Howlett* et al., 71 CH 4737, Chancery Division, Circuit Court of Cook County (1971)

B. Summary of Discussions

Report by Professors Vincent F. Vitullo and Roy M. Adams

The committee on recent developments chose four general topics for discussion at the 1972 Associate Judge Seminar: (1) new miscellaneous changes, (2) rules of the Judicial Inquiry Board, (3) the Implied Consent statute, and (4) the "No-Fault" insurance statute.

At each session a publication of the Chicago Title and Trust Company was distributed. This publication listed in detail many of the important statutory changes enacted by the General Assembly during 1971. No attempt was made to discuss the entire content of the publication. However, certain topics were selected for discussion. These topics were: (1) the abolition of dower, (2) the legal majority of males, (3)

the voiding of exculpatory clauses in leases, and (4) the reinstatement by statute of sovereign immunity.

In addition, the recent Illinois Supreme Court decision in *Spring* v. *Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972), was discussed in detail. The participants in each of the sessions expressed a great deal of interest and concern with the possible interpretations of "multiple dwellings," as that term was used in the opinion. Various other problems involving affirmative defenses raised in forcible entry and detainer proceedings were also discussed. However, none of the discussion groups was of the opinion that the new decision would create a great amount of additional litigation.

The second major area to be discussed was the new rules of procedure of the Judicial Inquiry Board. All of the participants were greatly concerned about the lack of protection of individual rights which they found in certain aspects of the rules. The fact that the Inquiry Board could lodge a formal charge against a judge without a hearing and without an opportunity to confront the complainant was the primary concern. It was pointed out that the filing of a formal charge (even though it were later dismissed) could ruin a judicial career. Under the Constitution of 1970, a judge must obtain 60% affirmative vote when seeking retention in office. The filing of an unfounded or unsubstantiated complaint could make it difficult to obtain such an electoral plurality.

The third general area of discussion involved the newly enacted Implied Consent statute, P.A. 77-1800, effective July 1, 1972. It was noted that the statute contained a basic ambiguity concerning the interpretation of the word "tests" and the number of "tests" required by the statute. Mention was also made of the fact that the standards and limitations in the statute were so formidable and burdensome that many law enforcement agencies would find the statute difficult to enforce. For example, it was reported that no breath testing device used in the State in February 1972 complies with the new statutory requirements and, in view of the high cost of this equipment, it was feared that many small communities might not have funds available to buy it.

The fourth and final area of discussion was the newly enacted "No-Fault" insurance statute, Ill. Rev. Stat. 1971, ch. 73, art. 35*. The provisions of this statute were discussed section by section. Of primary interest were sections 609, 608, and 600.

*On April 17, 1972 the Illinois Supreme Court held that Article 35 of the Insurance Code was violative of several provisions of the 1970 Illinois Constitution and therefore void. *Grace* v. *Howlett*, et al., 51 Ill.2d 478, 283 N.E.2d 474 (1972).

In discussing section 609, each of the groups expressed great concern over the question of the availability of arbitrators. The problem as perceived by the associate judge is that section 609 makes no provision for the compensation of arbitrators. None of the participants was of the opinion that a sufficient number of volunteers would come forward to make the arbitration machinery work satisfactorily. Further, it was thought the constitutional prohibition against fee officers in the judiciary would make it impossible to assess the cost of the arbitrator against the parties involved.

Section 608, the General Damage Section, provoked division among the participants on the construction of the "No-Fault" Act. This section is applicable to *any* action in tort which arises out of the operation, ownership, maintenance, or use of a motor vehicle. Only formula damages are recoverable, which severely limits the amount of money which can be obtained by an injured party unless the injury results in death, dismemberment, permanent total or permanent partial disability, or permanent serious disfigurement. Notwithstanding the ability of a "clever lawyer" to bring almost any case within that savings clause, it is likely that many cases will be subject to the limitations of section 608, particularly if the number of clever lawyers is insufficient to go around to all clients.

It was the position of one group of judges in the discussion group that the general damage limitations which are imposed by section 608 will not be construed to be applicable to "any action in tort" as the section specifically states. Their position is that the "No-Fault" law must be construed in a manner which is consistent with itself and in a manner which reflects the intent of the legislature to provide forced protection under section 600, as well as forced limitation upon liability which is contained in section 608. This group contends that section 608 limitations will apply only to accidents which arise when parties who are covered by section 600 benefits are involved.

The opposing view is that section 608 means exactly what is says. All motor vehicle accident cases whether they involve commercial or private vehicles will be limited by the formula damages which are available under section 608. This point of view excludes the possibility of construing the "No-Fault" law to limit 608 damages only to section 600 participants. This side of the fence, so to speak, argues that section 600 and section 608 have been intentionally separated by the legislature. There is not necessarily a relationship between the requirement of protective coverage in 600 and limitation of liability in 608. Consequently, a person may be uncovered by the personal injury protection or the excess personal injury protection which is available under section 600 and nonetheless be limited in a recovery by the amount of formula damages in 608.

If section 608 is construed to be limited only to the persons who are covered by section 600, the significance of this position is readily apparent. Section 600 applies only to the named insured and members of his family, to other persons injured while occupying the insured automobile as guest passengers, or while using it with permission of the named insured, and to pedestrians who are struck by the automobile of the named insured when it is operating on the highways of this State.

Section 600 excludes commercial vehicles or occupants of commercial vehicles. It may exclude under certain circumstances people who own no car or own no insurance on the car. The former covered group, when any member of that group is involved in an accident, can expect to receive the benefits under section 600, fundamentally a medical payment coverage, and the limited general damages available under section 608. But the people who are excluded from section 600, although they receive no medical payment benefits under that section, are not limited either by the general damage formula benefits under 608. They may sue in tort for whatever damages they choose. This certainly puts the participant in the "No-Fault" plan at a disadvantage in too large a number of accident cases, particularly where the likelihood of bypassing the damage limitations of section 608 through the permanent disfigurement language is nil.

In reference to section 600, it was additionally noted that the sole effect of this section was to provide additional compulsory insurance coverage in policies of automobile insurance issued in this State. Of major concern to the participants was the distinction between private passenger vehicles and commercial vehicles. There was no apparent reason why the additional coverage should be compulsory for private passenger vehicles and not for commercial vehicles. It was thought by some that this could create an equal protection problem.

The constitutional issues which have been raised in pending litigation (Supreme Court No. 44902) over this statute were also discussed. The pros and cons of each are articulated, but no positions were taken on the issues in litigation.

It was concluded that the "No-Fault" statute was essentially not a no-fault plan because the basic concepts of fault are still retained in section 608 and section 609. In addition, even where compulsory insurance provisions are applicable, the complainant is not barred from suing the party at fault. Furthermore, any insurance company which pays out benefits is subrogated *pro tanto* to the rights of the insured against any other party at fault.

Topic V—LECTURE ON SELECTED TOPICS OF EVIDENCE

THE DEADMAN'S ACT AND CONFIDENTIAL COMMUNICATION PRIVILEGES

Prof. Prentice H. Marshall
Lecturer

Prof. Robert G. Spector
Lecturer

Hon. Matthew A. Jurczak
Liaison Officer

NOTE: The text of this lecture was published in the 1971 Report of the Illinois Judicial Conference.

Topic VI—CRIMINAL LAW

Prof. Charles H. Bowman
Lecturer

Prof. Wayne R. LaFave
Lecturer

Hon. Burton H. Palmer
Liaison Officer

A. Lecture on Search and Seizure

Note: The text of the lecture was published in the 1971 Report of the Illinois Judicial Conference.

B. Problems for Discussion

Problem #1:

Detectives investigating the armed robbery of the First National Bank learned that the robber had been dressed in a black suit and that he had driven away in a vehicle of a certain model, make, and color. A Bond Clothing Company store tag was found at

the crime scene, and inquiries at that store indicated that the tag was probably from a suit which had recently been sold to one Arnold Arvin. The detectives then drove to Arvin's address and placed him under arrest when he pulled up in a car matching that described as used in the robbery. Arvin was dressed in a yellow shirt and brown slacks at that time, which was two days following the robbery. A search of his car turned up nothing of significance. On the basis of all of the above information, the detectives then applied for and obtained a search warrant authorizing a search of Arvin's house for the proceeds of the robbery. In executing the search warrant, the detectives discovered and seized two dark suits, one with a Bond clothing label. Arvin has now moved to suppress the two suits from evidence. What result? Why?

Commentary:

The basic issue here concerns when, if ever, items not named in a search warrant may be seized when discovered during the lawful execution of that warrant. One source of the difficulty here has been in the case of *Marron v. United States*, 275 U.S. 192 (1927), concerning the execution of a search warrant at the defendant's premises for intoxicating liquors and articles for their manufacture. Upon entering the premises, the officer observed liquor being sold and immediately placed the person in charge under arrest. They then proceeded to search the premises, and seized a large quantity of liquor and also ledgers and bills connected with the illegal business. The Court accepted the defendant's contention that the seizure of the ledgers and bills could not be justified under the search warrant: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." But the Court went on to rule that these items were lawfully seized as incident to the arrest of the person in charge of the premises, thereby pointing up the curious distinction that by virtue of making an arrest at the scene the police somehow acquired that discretion which they lacked when merely acting pursuant to a search warrant.

Marron received a mixed reaction from the courts. On the one hand, it has sometimes been taken to mean that even unnamed contraband may not be seized, United States v. Coots, 196 F.Supp. 775 (E.D.Tenn. 1961), while other courts have upheld the seizure of unnamed items which were quite obviously connected with the crime being investigated, e.g., *Johnson v. United States,* 293 F.2d 539 (D.C. Cir. 1961).

The matter became further confused with the abandonment of the "mere evidence" rule in *Warren v. Hayden,* 387 U.S. 294 (1967). One approach was that reflected in *United States v. Alloway,* 397 F.2d 105

(6th Cir. 1968), where the facts were essentially as stated in problem #1. The court concluded that the seizure of the suits was permissible by analogy to *Hayden,* where the Court upheld the seizure of clothing found during a search within premises upon hot pursuit for an armed felon, requiring only that the evidence seized be such that there is "cause to believe that the evidence sought will aid in a particular apprehension or conviction." But in *People v. Baker,* 23 N.Y.2d 307, 244 N.E.2d 232 (1968), on somewhat similar facts, the court concluded that the *Marron* rule was not limited by *Hayden*; indeed, the court asserted that now that mere evidence was subject to seizure there was even more reason to require that such evidence be described in advance in the search warrant.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court appears to have finally put the *Marron* rule to rest. In discussing the plain view doctrine, the Court stated as an example the situation in which items of an incriminating character are found during the lawful execution of a search warrant naming other items. However, the Court then imposed a new limitation: "the discovery of evidence must be inadvertent," for if "the police know in advance the location of the evidence and intend to seize it," there is no excuse for not having the magistrate pass upon this matter in advance. Four members of the Court expressly joined in this part of the opinion; four others expressly dissented; and Justice Harlan concurred in another part of the opinion of the Court which incorporated by reference this limitation on the plain view doctrine.

Problem #2:

An REA truck loaded with several hundred fur garments was hijacked at gun point. Some months later an informant told detectives that furs from that shipment could be found in the Rosalle Furs store. The informant had previously helped agents secure four convictions and was himself an experienced furrier. His tip was corroborated by an employee of the shipper whose furs were hijacked, who visited the Rosalle Furs store and saw a "natural ranch mink coat" which he positively identified as having been a part of the hijacked shipment. On the basis of an affidavit containing the above facts, a search warrant was issued for the Rosalle Furs store authorizing a search for "fur coats, stoles, jackets and other finished fur products, books, records and other fruits and instrumentalities." The officers executing the search warrant seized a large quantity of furs, a set of index cards, and a binder of consignment memoranda. Ralph Rosalle, owner of the store, was later arrested. Rosalle has now moved to suppress all of the items seized from the store. What result? Why?

Commentary:

This problem is based upon the case of *United States v. Scharfman*, 448 F.2d 1352 (2d Cir. 1971).

The first issue is whether the warrant issued on probable cause. In *Scharfman*, the court held that the information from the informant met the *Aguilar* test, as the informer had given information in the past and knew of the underlying crime and knew about the fure industry. This is a questionable conclusion, as, unlike *Aguilar*, there is no showing as to how the informant came to know that the furs were in the store named. It would be more correct to say that there is probable cause here under the *Spinelli* test, for there is information from an informer plus corroboration by the employee of the shipper. Indeed, the information from the latter person would seem to be independently adequate, given the fact that no showing of past reliability is required from crime victims and the like, as opposed to informers who associate with criminals. *Brown v. United States*, 365 F.2d 976 (D.C.Cir. 1966).

A related issue is whether there was probable cause with respect to books and records, inasmuch as the information received by the police only mentioned furs. The court in *Scharfman* answered in the affirmative: "It was entirely reasonable, under the circumstances of this case, for the magistrate to conclude that books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of fur garments through a facade of legitimacy."

Next comes the question of whether the items to be seized were described with sufficient particularity. The general rule is that the goods must be described with such particularity that the officer charged with the execution of the warrant will be left with no discretion respecting the property to be taken. *People v. Sovetsky*, 343 Ill. 583, 175 N.E. 844 (1931). Using that test, it might be argued that the description was not sufficient, as there was no way the executing officers could distinguish the stolen furs from others in the store. However, the court in *Scharfman* concluded this was a special situation: "The futility of further particularization is clear in this case. If the REA manifest had contained descriptions of the hijacked garments..., the warrant conceivably could have contained a descriptive itemization. In such an instance, however, if the searching agents entered a specified location with thousands of garments on the premises but the warrant itemized only a few hundred which had been allegedly stolen, the task of identifying and seizing the specified garments would have required a legion of fur experts to perform the task in a reasonable period. [T]he Fourth Amendment requirements do not impose a burden on the executing officer 'beyond his power to meet.'"

Finally, defendant contended in *Scharfman* that the memo book, containing entries written in his own hand, should have been suppressed because the Fifth Amendment would permit him to refuse to produce such evidence if he had possession. The court disagreed, noting that it had held in *United States v. Bennett*, 409 F.2d 888 (2d Cir. 1969), that "the Fourth Amendment does not protect broadly against the seizure whose compulsory production would be forbidden by the Fifth." Contra is *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971), taking the view that tax records which the defendant cannot be compelled to produce are likewise beyond reach of the government by resort to a search warrant.

Problem #3:

On May 18 at about 5 a.m. the police were notified that a 1967 Chevrolet Corvette had been stolen. Some hours later the police found the car, stripped of its transmission, engine, radiator, hood and steering wheel; from the surrounding circumstances, it appeared that the car had not been stripped where it was found but rather at some other place in the general area. The police conducted a systematic survey of a 3-block area, and found tell-tale sweepings of nuts and bolts in front of a three-car garage facing a public alley. The sliding doors of the garage, because of their construction and age, were not completely closed, leaving an opening of a few inches. Because it was relatively dark inside, an officer employed his flashlight to look through the gap. Lying about 10 feet away he noticed a transmission shaft. On his knees for a better view, he identified it as a Chevrolet product, and observed that the speedometer cable had been clipped. Returning to the Corvette, a check of its speedometer cable showed it had been clipped. The officer contacted the Auto Squad and reported his discovery, and was advised to return to the garage and seize the stolen transmission. He returned with another officer, and at that time saw a car parked by the garage with the trunk open. In the trunk were a steering wheel, clutch plate, and pressure plate from a 1967 Corvette. The officers then moved toward the side door of the garage, and as they did Carl Cuspid and two other men emerged from the garage. The three men were arrested, after which one of the officers entered the garage door. No one was present therein. The officer continued to look around the garage and in a minute or two located the stolen transmission under a blanket. He seized the transmission. Cuspid, charged with possession of stolen property, has moved to suppress the transmission. What result? Why?

Commentary:

For the most part, this problem is based upon the case of *United States v. Wright*, 449 F.2d 1355 (D.C.Cir. 1971).

The first matter taken up by the court was the question of whether the officer's actions in shining a light into the garage in order to dis-

cover the transmission was an illegal search in violation of the Fourth Amendment. Some of the cases have taken the position that under the instrusion-into-a-justified-expectation-of-privacy test of *Katz*, use of a flashlight is not contrary to a justified expectation when "the circumstances of a particular case are such that a police officer's observation would not have constituted a search had it occurred in daylight, [and] the officer used a flashlight to pierce the nighttime darkness." See *Marshall v. United States*, 422 F.2d 185 (5th Cir. 1970) (nighttime use of light to look into parked car); *People v. Woods*, 6 Cal.App.3rd 832, 86 Cal.Rptr. 264 (1970) (nighttime use of light to look into pocket of suspect without spreading the pocket or pulling it open).

But, in the instant case the flashlight was used in the daytime to look inside a dark garage. Does this call for a different conclusion? No, the majority concluded in *Wright*. One basis for the officer's action was said to be that police are entitled to take "a closer look at a challenging situation." The notion here seems to be that on evidence somewhat short of probable cause it is reasonable for the officer to engage in this minimal invasion of privacy, and also that no warrant is called for because the officer was in the midst of an investigation. A somewhat different explanation was also offered: there was no search, because the transmission was in plain view. A dissenting judge responded: (a) that the challenging situation theory might work, as in cases cited by the majority in support, to justify looking into parked cars and the like, but could not be used to look into buildings, which are entitled to greater protection under the Fourth Amendment; (b) that under *Katz* it is correct that it is not a search for an officer to see what might be observed by a curious passerby, but a curious passerby would not be using a flashlight, particularly in the daytime.

Assuming that looking into the garage was proper, what about the later seizure of the transmission. Under *Chimel*, it can hardly be viewed as a search incident to the arrest of the three persons outside the garage; indeed, such a search is improper even under pre-*Chimel* standards - see *Vale v. Louisiana*. One might argue, however, that the entry into the garage was proper to see if any other persons were hiding therein, as it was not known whether the three persons who exited from the garage were the only persons involved. Cf. *People v. Block*, 16 Cal.App.3d 140, 93 Cal.Rptr. 779 (1971) (where arrests in living room for use of marijuana, officers allowed to look in other rooms for other persons). However, since the transmission was no longer in plain view, that argument will not suffice in itself. In *Wright* the majority concluded a warrantless search and seizure was permissible because of the risk an accomplice might dispose of the goods before a warrant could be obtained. That theory was not accepted by the Supreme Court in *Vale*, but it was indicated in *Williams v. United States*, 401 U.S. 646 (1971), that the issue may be open to re-examination.

Problem #4:

Dan Druid was arrested by the police because he became involved in a fight in a bar. At the station, he was searched and was found to have $200 on his person. When questioned as to how he came upon this money (Druid, at the time of booking, said he was unemployed), he said it had been given to him by one Edgar Echo because he (Druid) had loaned Echo a car which Echo had used while committing the armed robbery of the Last National Bank. The police checked and determined that the bank had in fact been robbed two weeks earlier by two masked men. In response to further questioning, Druid said that Echo was presently residing with his girl friend, one Fanny Farquar. The police immediately went to Farquar's apartment, arriving about 11:30 p.m., and knocked on the door. Miss Farquar answered the door, and the police told her that they had come to arrest Echo. She said he was not there, but the police entered the apartment anyway. One of the officers entered into the living room, where Echo was found dressed in pajamas and a robe. When Echo was advised that he was under arrest, he said, "O.K., let's go," and started for the door, but was stopped by one of the officers. Meanwhile, another officer walked through the various rooms in the apartment, and when he reached the kitchen he saw a valise filled with money open on the table. The officer seized the valise. Echo was then ordered to go into the bedroom and put on his street clothes. He walked into the 6-foot by 8-foot bedroom with one of the officers, who immediately opened the dresser drawers and found a pistol inside, which he seized. Echo has now moved to suppress the money and the pistol. What result? Why?

Commentary:

The first issue is whether there is probable cause for the arrest of Echo, based upon the information provided by Druid. The facts do not appear to meet the two-pronged test of *Aguilar*, as while the informant has explained why he knows what he claims to know, there is no background as to his reliability in the sense referred to in *Aguilar* - information that the informant had proved reliable in the past. However, Druid has admitted his own involvement in the crime, which may make a difference. In the recent case of *United States v. Harris*, 403 U.S. 573 (1971), the informant admitted purchasing illicit liquor from the defendant for more than two years. In a part of the opinion of the Court expressly joined in by only four members, it is stated: "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility — sufficient at least to support finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admit-

ted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on a certain premise, itself and without more, implicated that property and furnished probable cause to search." Query if that analysis will work here, given the fact that Druid did not admit to a course of criminal conduct over a long period. The four dissenters in *Harris* expressed the view that an informant does not become credible "upon the bare fact that by giving information he also confessed to having committed a crime."

The next question concerns the nighttime warrantless entry to arrest, which the Supreme Court characterized as a "grave constitutional question" in *Jones v. United States*, 357 U.S. 493 (1958). At least one court has held that a warrant is ordinarily required "not only in case of entry to search for property, but also in case of entry to arrest a suspect." *Dorman v. United States*, 435 F.2d 385 (D.C.Cir. 1970). The court in *Dorman* indicated a warrant might be excused under exceptional circumstances, and indicated that the factors to be taken into account are: (1) the gravity of the crime; (2) whether the suspect is believed to be armed; (3) a very high level of probable cause; (4) strong reason to believe the suspect is in the premises; (5) a likelihood the suspect will escape if not swiftly apprehended; (6) whether the entry is peaceable. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), five members of the Court stated in strong dictum "that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'"

As to the discovery of the money, it might be argued that this was necessary to prevent destruction by the girl friend [see discussion of this in comment on problem #3], or that it was a plain view discovery during a cursory search for accomplices [see comment on problem #3], but this brings into play the new limits on the plain view doctrine [discussed in comment on problem #1].

As to the discovery of the gun, there are cases saying that when the arrestee goes to change his clothes the officers may accompany him and search areas which thereby come into his control under *Chimel*. See *People v. Pearson*, 126 Ill.App.2d 166, 261 N.E.2d 519 (1970); *People v. Mann*, 305 N.Y.S.2d 226 (1969). But see the dissent in *Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971), arguing that on these facts there "appears no motivation for appellant to have announced his readiness to go in his robe as he stood in the front foyer other than his desire to limit the officers' intrusion into the privacy of his home which they had no warrant to search," and that the police should have honored that desire.

Problem #5:

A lone gunman robbed a telephone company employee of a coin box, after which the victim gave police an accurate description of the culprit and his car, including the license number. Six days later a telephone company investigator spotted the car parked on the street, and notified the police of this fact. Two detectives staked out the car. Some time later, two men and a woman entered the car. As the detectives approached, they noted that the man sitting in the driver's seat matched the description of the robber. One of the officers opened the rear door of the car, where the woman was seated, at which point she picked up a small coin purse off the seat. The officer immediately seized the purse, opened it, and found heroin inside. The woman, Gertie Glut, was then arrested. Glut has now moved to suppress the heroin. What result? Why?

Commentary:

The facts here are quite similar to those in *United States v. Collins*, 439 F.2d 610 (D.C.Cir. 1971). Under *Chimel*, it is clear that the search of the purse was not of an area within the control of the person being arrested for the robbery, who was seated in the front seat.

Another approach is to view that as a search of the car on probable cause under the *Carroll-Chambers* rule. Assuming (which is far from clear) that this is properly characterized as a search of the vehicle rather than the person, does that rule apply here? The court in *Collins* answered in the negative for two reasons: (1) in view of the passage of six days, there was no reason to believe that the coins taken in the robbery would still be in the car; (2) even if there was probable cause, there were no exigent circumstances excusing a warrant because the police could have obtained a warrant to search the car. The latter point may be debatable, if the reference is to the time between when the car was spotted and the three persons appeared, as the police had no way of knowing how soon they would appear. If the reference is to the passage of six days since the crime, query whether the police must obtain a warrant for a car when they have no idea where it is.

Yet another approach is to view this as a variation on the stop-and-frisk situation. The argument is that upon making an arrest of a person — at least for a crime involving a weapon — the police may frisk that person's companions for their own protection. An Illinois case supporting this view was decided some years ago, even before *Terry v. Ohio*: *People v. Bowen*, 29 Ill.2d 349, 194 N.E.2d 316 (1963). In *Collins*, the court rejected this argument, noting (a) that the police were not concerned for their own safety because they made no effort to immediately search the robber; and (b) the risk that there might be a weapon in the purse could be avoided by simply putting the purse out of reach until the investigation was completed.

REPORT

OF THE

1972 ANNUAL MEETING

OF THE

ILLINOIS JUDICIAL CONFERENCE

Lake Shore Club of Chicago
850 Lake Shore Drive
Chicago, Illinois 60611
June 14, 15, 16, 1972

AGENDA

OF THE

NINETEENTH ANNUAL ILLINOIS JUDICIAL CONFERENCE

WEDNESDAY

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 - Dr. K. Everett Munson,
Pres., Church Fed. of Gtr. Chgo.
Opening Remarks -
Hon. Robert C. Underwood

3:00 P.M.

FIRST SEMINAR SESSION
Grand Ballroom - First Floor
Video Technology And The Courts*-
Demonstration and Panel Discussion

5:30 P.M.

SOCIAL HOUR
Main Lounge - First Floor

6:30 P.M.

DINNER
Grand Ballroom - First Floor
Address - Mr. Leon Jaworski,
President, American Bar Assn.
Presiding -
Hon. Thomas E. Kluczynski

*Audio-video equipment will be on display in the Old Salem Room, Third Floor, after 5:30 P.M. on Wednesday

THURSDAY

7:00 - 9:00 A.M.

BREAKFAST
Mediterranean Room - Third Floor

9:30 A.M.

SECOND SEMINAR SESSION

12:30 P.M.

LUNCHEON
Grand Ballroom - First Floor
Program honoring retiring judges
Presiding -
Hon. Walter V. Schaefer

2:00 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

7:00 - 8:30 A.M.

BREAKFAST
Mediterranean Room - Third Floor

9:00 .AM.

GENERAL SESSION
Grand Ballroom - First 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
Nicholas J. Bua
Harold R. Clark
Henry W. Dieringer
George Fiedler
Frederick S. Green
Peyton H. Kunce
John J. Lyons
Daniel J. Roberts
Eugene L. Wachowski

Thomas E. Kluczynski
Liaison Officer

1972 JUDGE SEMINAR COMMITTEES

I

LECTURE ON
SELECTED TOPICS OF EVIDENCE

Prof. Prentice H. Marshall
Lecturer

Prof. Robert G. Spector
Lecturer

II

LECTURE ON CRIMINAL LAW

Prof. Charles H. Bowman
Lecturer

Prof. Wayne R. LaFave
Lecturer

III

LECTURE ON
INDIVIDUAL RIGHTS UNDER THE
1970 CONSTITUTION

Prof. Vincent F. Vitullo
Lecturer

IV

COMMITTEE ON TORTS

Hon. Paul C. Verticchio
Chairman

Hon. Joseph J. Butler
Vice-Chairman

Hon. William L. Beatty
Hon. William C. Calvin
Hon. John C. Fitzgerald
Hon. Sigmund J. Stefanowicz
Hon. Nicholas J. Bua
Liaison Officer

Prof. Robert E. Burns
Reporter

Prof. Richard C. Groll
Reporter

V

COMMITTEE ON
CHANCERY PROBLEMS

Hon. Donald J. O'Brien
Chairman

Hon. Charles E. Jones
Vice-Chairman

Hon. Walter P. Dahl
Hon. Francis T. Delaney
Hon. Robert E. Hunt
Hon. Alfred E. Woodward
Hon. Rodney A. Scott
Liaison Officer

Prof. Richard A. Michael
Reporter

Prof. Thomas A. Morgan
Reporter

VI

COMMITTEE ON
VIDEO TECHNOLOGY AND THE COURTS

Hon. Wendell E. Oliver
Panelist

Robert M. Roe
Technical Consultant

Edmund Sinnott, Esq.
Technical Consultant

William M. Madden, Esq.
Consultant

Hon. Daniel J. Roberts
Liaison Officer

VII

COMMITTEE ON
RESOLUTIONS AND MEMORIALS

Hon. Albert G. Webber, III
Chairman

Hon. L. Sheldon Brown
Hon Norman A. Korfist

REPORT OF PROCEEDINGS

The Illinois Judicial Conference held its Nineteenth Annual Meeting on June 14, 15 and 16, 1972 at the Lake Shore Club of Chicago.

Judge Rodney A. Scott of the Sixth Judicial Circuit, Chairman of the Executive Committee of the Conference, called the meeting to order and asked Dr. K. Everett Munson, President of the Greater Chicago Church Federation to offer the invocation.

INVOCATION

Dr. K. Everett Munson

Shall we be in prayer.

Eternal God, we humbly come into Thy presence seeking Thy guidance in our lives and in our responsibilities.

In our quiet nature, we know how difficult it is to express Thy will in the commonplace experiences of life. And so we seek Thy blessing, the blessing of forgiveness for those things wherein we are amiss, the blessing of grace that we have the privilege of renewal and another tomorrow, and the blessing of holy purposes to give us always the motivation to seek that which is just in Thy sight. Amen.

INTRODUCTORY REMARKS

Hon. Rodney A. Scott

You recall that a number of years ago our conference consisted of committees of judges who were assigned subjects to study. The committees prepared very thoroughly for us certain subjects, which we thought were worthwhile to bring before the conference. Those reports were then read to the conference, a discussion followed, and then recommendations were made.

You will recall that among the subjects that we discussed and explored were: less than unanimous verdicts; comparative negligence; and juries of less than twelve members. Those three subjects resulted in recommendations that legislation be introduced. Such legislation was introduced as a result of the conference study. None has passed, but they were subjects that were of interest to all. From that format of

committee reports and recommendations, we moved into an entirely different type of conference—seminar discussion sessions. We pursued that for a number of years.

You will note that our program now is a combination of lectures and discussion groups. The Executive Committee is always interested in what you want. We want to maintain a fresh format. In the past, we have asked for subjects that you would like to have considered. Some of the suggestions have been followed. Some lend themselves to a discussion-type representation, and some, of course, the lecture-type presentation.

We have had the evidence lectures now for five years. We have had criminal law lectures for a number of years. We have had the subject of chancery matters for the third year, and perhaps it is about to run dry.

So we will appreciate it very much if you will pay attention to the questionnaire which you will receive; give it some thought; answer it, and return it so that we can evaluate the same and try to make your conference more effective.

OPENING REMARKS

Chief Justice Robert C. Underwood

It is always a pleasure for the members of our Court to join the other judges of Illinois at this Conference designed to improve the administration of justice in this State. While the Supreme Court seems always beset with urgent problems, particularly at Conference time, and we will necessarily be spending a substantial portion of tomorrow resolving some of those problems, I am hopeful that we will still be able to participate to an appreciable degree in the Conference activities and discussions.

It is appropriate, I think, at this time to consider the mandate of our Constitution that this Conference "consider the work of the courts and...suggest improvements in the administration of justice", together with the additional fact that a report to the General Assembly is required by January 31 of each year as to those matters upon which legislative action is thought desirable. Our action in that respect in the past has not, in my judgment, been as comprehensive as it should be, nor has it been entirely consistent with the constitutional mandate. Part of the problem is the difficulty involved in completing a comprehensive report within one month after the end of the year. The published report of the Conference is not, nor can it be, available within that time limit.

We can, however, do a more nearly adequate job than we have been doing. The several committees of this Conference study various functions of the judicial system throughout the year and present conclusions and recommendations thereon. If those recommendations can be presented by September 1st of each year for review by our Court, I see no reason why those which are approved cannot be transmitted to the General Assembly in compliance with the constitutional provision. The result would be a substantially more meaningful report to the legislature.

The judges of Illinois deal each day with interpretation of the laws which govern this State. Each of us has frequent occasion to reflect upon the need for statutory change in those areas where problems have arisen, and it seems clear to me that suggestions and recommendations from a group as knowledgeable in this area as are the members of this Conference would be quite helpful to the members of the General Assembly. This, of course, was the purpose of the constitutional provision. I suspect, however, that there are many individual judges who from time to time have useful ideas regarding legislative or other changes, but who do not communicate those ideas to the Conference. I suggest that you not hesitate to submit to the Executive Committee of the Conference, or to the Administrative Office, any recommendations, legislative or otherwise, which you believe may be beneficial in the operation of the system as a whole. Each of us is a member of this Conference, and each of us shares responsibility for the operation of the judicial system of this State. One of the functions of the Conference is to act as a sort of clearing house for the judiciary - to analyze problems and evaluate proposals for their solution. Your active participation in that process will assist in the performance of that function.

The thrust of the constitutional provision is not, however, limited to the foregoing. It requires that we "consider the work of the courts" - a very broad command which includes consideration not only of the workload of the courts and the structure of the court system, but also attention to the people in our court system. I have repeatedly said and firmly believe that, structurally, Illinois has the finest judicial system in the nation. If we assume, however, that an excellent court structure is the total solution to our problems, we are mistaken, for it is the qualities and abilities possessed by those who operate that system which determine the quality of justice which it provides. The court system involves many persons: lawyers, clerks, reporters, bailiffs, sheriffs, probation officers and judges. But of all these, the most important are the judges, for it is they who have the greatest responsibilities and upon whom the heaviest burden falls. It is the judges, and usually the judges alone, at whom criticism of the courts is directed even though that criticism may have been induced by the failure of others to do the job which should have been done. Having achieved a unified court structure, our concern should now shift to achieving a

unified judiciary, dedicated to improving the quality of justice available in our courts. Obviously, when I speak of a unified judiciary, I am not advocating that we become judicial robots. Rather, I am advocating that we make a conscious effort to overcome the philosophy which generally and understandably prevailed throughout the judiciary during the pre-Judicial Article days. I think I do not overstate the fact when I say that most of us who were then judges were chiefly, if not solely, concerned with the operation of our own courts. Judges then were sort of undisputed rulers of their own domains, and most gave little or no thought to the operation of courts other than their own or to the operation of the judicial system as a whole.

It is that philosophy which must change. We are now, to a substantially greater degree than ever before, each an integral part of a unified court system in which ultimate supervisory and administrative authority is vested in our Court. But, that system will function best if each judge in the State recognizes his individual responsibility to contribute his best efforts towards improvement of the system as a whole. Certainly improvement in the operation of the court in which you serve is important - but it is no longer the extent of your obligation which now includes devoting your best efforts towards cooperating in the operation and improvement of courts other than your own.

I spoke at last year's Supreme Court dinner of the improvements in the operation of the Cook County Circuit Court. Perhaps it would not be inappropriate to again mention that subject here as an example of results which can be achieved by dedicated cooperative effort.

Some of you will recall that when the Judicial Article became effective on January 1, 1964, the Circuit Court of Cook County inherited from the former Superior and Circuit Courts a massive backlog of nearly 50,000 law jury cases with an average delay of 62.2 months in the disposition of cases going to verdict.

Some advocates of the 1964 Judicial Article had, unfortunately, misinterpreted the effect of reorganizing the courts into a unified trial court system. Some overly zealous backers had implied that the reorganization brought by the Judicial Article would automatically eliminate that backlog. This was, of course, just not the fact. As you know, the Judicial Article, in and of itself, did not eliminate a single case nor add a single judge. A major benefit of the unified court system was the flexibility with which judicial manpower could be utilized. Confronted with the continuing problem of unreasonable delay and the absence of substantial progress in reducing the elapsed time between the filing of a complaint and its disposition by verdict in Cook County, our Court, in cooperation with Chief Judge Boyle, determined to implement suggestions we received from the Illinois State and Chicago Bar Associations, from our Administrative Office, from individual judges and from other sources, as to the use of personnel

and procedures which seemed to offer the greatest prospect for success. In short, those changes involved the following:

1. The establishment of an independent pretrial section within the Law Jury Division to pre-try cases no more than 30 days before they were assigned out for trial.

2. Authority in the presiding judge of the pretrial division to advance a case for trial to a date certain.

3. The establishment of a one-year status call.

4. Maintenance of the Law Jury Trial Division at 38 trial judges.

5. While not a part of the original understanding between the Circuit Court and our Court, a program of preselecting juries was also instituted by Chief Judge Boyle.

As I have said, implementation of these innovative procedures began about a year and a half ago and have produced substantial improvement in the Cook County situation. During the 17-month period from January 1, 1971, through the end of May, 1972, the number of pending cases in the Law Jury Division has been reduced from 36,000 to 30,840. The use of the status call combined with more effective pretrial procedures has eliminated much deadwood from Judge Butler's assignment call and resulted in far more efficient use of valuable trial judge time. As a result, an average of 70 more cases per month were assigned for trial during 1971 than were assigned in 1970. The average time elapsed from the date of filing to the date of verdict has been reduced from 61.7 months on January 1, 1971, to 50.9 months as of the end of May, 1972. In my estimation, these figures are an indication of substantial progress.

In January, 1972, Judge Butler reported that there were no cases on his trial call which were filed any earlier than 1966. He now reports that in September he will be assigning for trial only cases filed in 1968 and 1969. Judge Stefanowicz reports that in August his division will be pretrying only cases filed in 1969. These goals appear to be entirely reasonable because the Circuit Court of Cook County will not only continue its successful summer pretrial program but will also continue the regular pretrial calls and the trial call. The latter will be operated by five circuit judges who have volunteered to forego summer vacations in order to keep the trial call moving and to try cases that are difficult to schedule for trial at other times. In short, it would appear that the goal of 24 months average time lapse from date of filing to date of verdict is a realistic possibility within a reasonable time in the Circuit Court of Cook County.

I comment on this, not to indicate that the Cook County court has solved all of its problems, for it most certainly has not. But there has been very substantial improvement in this one area of its operation, and it does, I think, indicate what can be accomplished by dedicated, cooperative effort. I am told by the Administrative Office that, beginning in January of 1971, one could detect within the Law Division a new spirit of cooperation and teamwork, a willingness to work together to overcome a common problem. That spirit encouraged the judges to begin to take a personal interest and involvement in the responsibility for the backlog of delayed cases. Judges within the division found themselves experiencing a sense of teamwork, pride and urgency which they transmitted to the court personnel and to the trial attorneys. Judges on their own, without any formal programs or meetings, began communicating their difficulties not only to each other but to the assignment judge. Results that have been achieved in this fashion have been substantial, and they have been made possible in part by the willingness of the downstate judges to accept assignment to Cook County. While I realize that to speak of "willingness to accept assignment" is somewhat euphemistic, I do want you to know that our Court appreciates your service in Cook and counties other than your own under circumstances, which, I am sure, are sometimes inconvenient if not actually distressing.

I should add that delay in the disposition of cases is not a problem indigenous to Cook County. For instance, in 1971 6 circuits had an average delay of more than 24 months from the date of filing of all law jury cases to the date of verdict. They are the 3rd, 9th, 12th, 13th, 19th and 20th Circuits. Three circuits—the 3rd, the 12th and the 13th—each have delay averages of more than 30 months. The 12th has an average of 35.2 months—almost 3 years from date of filing to verdict. In fact, the elapsed time from date of filing to date of verdict increased in 1971 as compared to 1970 in every circuit of the State except the 5th, the 8th, the 10th and the 16th Circuits. These facts prompt me to again speak of the importance of the office of Chief Judge in the proper functioning of our system. While I spoke of this at last year's Conference, it is, in my judgment, of such importance that repetition here is justified. I said then and repeat now that automatic rotation of the office of Chief Judge within the circuit, or election of Chief Judges for 6 months is ridiculous. Such arrangements not only do not contribute to - they actually prevent - anything approaching an efficient, consistent and orderly conduct of the business of the courts.

There are many able judges who have no particular talent for resolving administrative problems, or who dislike them, and this is certainly no reflection upon their judicial abilities. It is, however, unfair to those judges, and a disservice to our judicial system, to burden them with the responsibility of dealing with the many problems which a Chief Judge has, not the least of which are the very distressing per-

sonnel difficulties. Chief Judges should be judges who have the ability to recognize and understand the problems in the circuit and the system, the courage to do what has to be done to remedy them, and the tact to do it as diplomatically as possible.

Any judge whose choice for Chief Judge is someone who simply can be counted upon to neither issue unpopular orders, nor call upon his fellow judges to extend themselves in pursuit of efficient administration, does a disservice to the people of this State. Judges must be prepared to follow the administrative directions of the Chief Judge whom they select, even though it becomes necessary for him to impose upon them conditions and obligations which are unpopular or burdensome, and a judge who is unwilling to incur the occasional displeasure of his colleagues by restricting vacations, making unpopular assignments and similar actions ought not to permit himself to be elected Chief Judge. Every judge should recognize that he no longer is completely independent, that his desire to attend colleges, conferences and other judicial gatherings and still take full vacation time is quite possibly incompatible with the efficient operation of the courts of his circuit and is, in any event, subject to the approval or disapproval of the Chief Judge. Every Chief Judge, in turn, should be prepared to make the hard and sometimes unwelcome decisions necessary in such instances.

Some of my remarks may seem critical of some members of the judiciary. For those few judges who are not adequately discharging their responsibilities, they are so intended. But to the great majority who are conscientiously performing well their difficult duties, my comments are intended solely to indicate additional areas wherein your talents may be utilized to the improvement of our judicial system. And, as we now go about the business of this Conference, I suggest that when you become discouraged and frustrated at your inability to provide completely satisfactory solutions to many of the problems before you, there is a considerable degree of comfort to be derived from the knowledge that your fellow citizens could have paid you no greater honor than choosing you to decide questions involving their lives, their liberties and their property.

INTRODUCTION

Hon. Thomas E. Kluczynski

Many years before judicial education became popular and many years before millions of dollars in federal funds became available for judicial education, the judiciary of Illinois committed itself to not only judicial education, but also to an active role in the development of the law and judicial administration.

Eighteen years ago, at Northwestern University, seventy-three judges gathered for the first Illinois Judicial Conference. Today, we expect over three hundred fifty judges to be present at this nineteenth annual conference. The Illinois Judicial Conference has become recognized as one of the prime factors in keeping Illinois in the forefront of the continuing struggle to improve the quality of justice in a changing society. From its modest beginning, the conference has now matured into a constitutional organization with dedicated judges and law professors working together to improve the administration of justice.

Tonight, it is my honor and my privilige, as liaison officer of our Judicial Conference, to introduce a distinguished lawyer, civic leader, author, public servant and businessman.

Born in Waco, Texas, he received a Bachelor of Law from Baylor University and his Master of Law from Suffolk University. At an early age, he became a partner in the Houston law firm of Galbraith, Crocker and Jaworski. Today, he is the senior partner. During World War II, he served in the Judge Advocate General's Department, with the rank of Colonel. During this period, he not only served as a trial judge on military trials, but personally prosecuted the first major war criminals in the European theater. The past President of the Texas State Bar, the American College of Trial Lawyers, and the Texas Civic and Judicial Council, he presently serves as Director on the Board of Trustees of twelve different civic, educational or charitable organizations, and is Trustee of the Baylor College of Medicine. He was a member of the Hague Permanent Court of Arbitration from 1965 to 1969; the President's Commission on Causes and Prevention of Violence from 1968 to 1969; U. S. Attorney and Special Counsel to the Texas Attorney General from 1962 to 1965.

Ladies and gentlemen, it is my distinct honor and pleasure, and our distinct honor to have with us the President of the American Bar Association, the Honorable Leon Jaworski.

ADDRESS

Leon Jaworski, Esquire

Thank you very much, Justice Kluczynski.

Mr. Chief Justice, Justice Schaefer, and all of the other distinguished ladies and gentlemen in the audience and the head table, this very gracious and generous introduction brings to mind the story of an individual who had no one to introduce him, but thought he would attend to it himself. He was a politician, not a judge, to be sure. He was running for office, and had called the news media together. He proceeded to express his great self-esteem over quite a period of time. Finally, one of the members of the media, becoming not only bored, but extremely tired of it all, caustically said to him, "Now, I suppose that you were born in a log cabin." This politician looked at him and said, "No, you are confused." He said, "That was Abraham Lincoln. I was born in a manger."

I have imbibed most freely of your hospitality since arriving here. I must say that it almost puts me to wondering whether the claims that we Texans make so often about our great hospitality have not been somewhat exaggerated. I have never been accorded a more gracious reception than that which was mine here. Both Judge Gulley and Mr. Rolewick not only met us at the airport, but had us brought as nearby as possible by helicopter. We had an escort to make certain that we could get here early enough to share a pleasant experience with you before the dinner itself. So I have something to record in my memories and something to talk about at other places besides the serious subjects that we discussed.

I must say to you that the subject I have selected to discuss this evening I am undertaking to discuss for the first time. At the moment, it is not controversial, but it may well become controversial. I have had to speak on some subjects in the past that were somewhat controversial, and it always troubles me a little bit because even talking about noncontroversial subjects, I apparently don't do too well. I undertook to discuss a matter several months ago on television that I thought was somewhat innocuous and certainly not something that the emotions should become aroused over. By the time I got home, there was a telegram awaiting me. It was a very brief and cryptic one. It simply said, "Go to hell, offensive letter follows."

I count it really a special privilege to be here tonight. The Illinois Judicial Conference, we know by reputation, is a prestigious organization before which any lawyer should be honored to speak. Then you are meeting here in Chicago in a city which has been the home base of the American Bar Association for almost a century. But most of all, as

I have noted here this evening, you are meeting under the aegis of the Supreme Court in compliance with a mandate of the Illinois Constitution to assemble annually to consider the business of the several courts and to suggest improvements in the administration of justice. So you must understand that I feel at home here because we are on familiar ground to begin with, and because the purpose of your conference coincides with one of the basic purposes for which the American Bar Association was founded, that is to advance the science of jurisprudence and to improve the quality of justice throughout our system of law and courts.

It is the normal function of the American Bar Presidents to travel about the country expounding, for all who will listen, upon the challenges facing our free society and upon the activities of the American Bar Association as they touch the interests and concerns of our more than a hundred and fifty-five thousand member lawyers and judges. Doing this as frequently as I do gets to be something of a habit.

Tonight, as I have indicated, I am departing from that format to discuss with you a proposed undertaking in the discharge of our stewardship as professional men and women. It's a proposal of potential import to every judge and every lawyer, and which, in the years ahead, if found to be sound and feasible, could have truly a very important impact on the administration of justice throughout the United States. The proposal to which I refer, which originated in the American Bar Center, is that there be created in the United States a new type of organization, quasi-public in character, to marshall our private resources and energy for a coordinated and accelerated program of modernization and improvement of our legal and judicial systems to better serve the needs of two hundred million persons. The organization is to be called the National Institute of Justice. Let me emphasize that it would not supplant or duplicate the activities of existing agencies, federal or state, which are working now in the field of judicial improvement. Rather, it would compliment their activities and widen the basis of support for them. It would concern itself with a system of justice as a whole, providing for the first time a national focus, a continuity of experimentation and research that would be designed to synthesize the widely fragmented efforts in these directions.

The National Institute of Justice as it is proposed, would take the form of an independent non-profit corporation, chartered by the Congress to be governed by a qualified board insulated from partisan control and funded from both public and private sources. Its purpose would be somewhat analagous to the National Science Foundation or the National Health Institute. In terms of its public corporate structure, it would be similar to the Corporation for Public Broadcasting, which was created five years ago and received funding from federal and private sources to encourage public service types of TV program-

ming. It is neither an organization nor an establishment of the United States Government, but a corporate structure designed to provide the independence needed for effective operation.

Chief Justice Burger, in his address last month before the American Law Institute, urged that the Institute receive the careful consideration of the legal profession and of the country. The Chief Justice said this: "We spend more than two billion dollars annually through the National Institute of Health, and the country is better for it. But the social, economic and political health of the country must be fostered by a comparable facility to revitalize the faltering machinery of justice . . . . Happily, that can be done for a mere fraction of the National Institute of Health's budget." Chief Justice Burger then said, "I sincerely hope that the proposal will be challenged and debated vigorously by the bar and the public. It deserves a wide audience."

Following that, the Board of Governors of the American Bar Association, taking note of the proposal, promptly called for a thoughtful inquiry into the matter and created a task force to examine the proposal. The task force is to consider the feasibility of a national conference on the subject and to contact other national organizations concerned with the administration of justice and government to determine their interest in jointly exploring the proposal. It is charged to determine sources of funding to support the recommendations it determines appropriate to make to the Board of Governors. The task force is to make its final report to the Board of Governors at its August 1972 meeting. Charles Rhyne of Washington, known to many of you, and the former President of this Association, is the chairman, and the other four members come from both the federal and state judiciaries, as well as from private practice.

May I, at this point, so I will not be misunderstood, attempt to make it clear that I am not prepared to support this proposed project. It deserves far more study, far more thought than it has so far received. But I would like to make it equally as clear that I do support ernestly and without any reservation the idea of giving it objective and constructive consideration. I bring the subject to the attention of your conference in the hope that you will examine the proposal at an appropriate time and that other influential organizations of the judiciary and the bar all over the country will do the same. There will be ample time to do this. A proposal of that magnitude and import does not come over night. It calls for examination and discussion in many forums because the administration of justice involves more than judges and lawyers. It involves federal, state and local government agencies, the private foundations, the organized bar and many private institutions.

Let me set forth more specifically what the National Institute would be designed to do, and also underscore what it would not do.

The purposes and functions of the proposed Institute would be these:

First, the Institute would provide direction and leadership to improve the functioning of the legal system, serving as consultant and advisor to all components of the administration of justice at both the federal and state levels.

Secondly, the Institute would be a permanent body charged with the development of the overall view of the law and the courts in operation, identifying priorities for needed improvement, and having responsibility for the coordination of educational resources, research activities and projects of the organized bar.

Thirdly, the Institute would serve as a fiscal agent to receive and disburse public and private funds for research, evaluation and action. It is conceived that the Institute would be both a grantor as well as a grantee of funds. In its role as grantee, the Institute would be authorized to receive funds for its general administration under contract for specific projects and programs. As grantor, the Institute might serve as a funding agency to apply public or private funds for specific research or action programs.

The operating functions of the Institute would be providing a central national source for the collection and dissemination of information and operating our law society, a function not now being provided by any national source. An additional function would be to identify and evaluate the principal bottlenecks in the flow of civil and criminal justice and to recognize new problem areas as they arise. This, too, is a function that never has been assumed by any agency or organization on a continuing basis.

The coordinating function, including evaluation of the results of action and research programs would be, of course, one of the functions. There would also be a research catalyst function to see that legal research is applied where it is most needed, and that the results are made available on a national scale. There would also be an advisory function available to all branches of government and the legal profession. Finally, in what might be termed the neutrality function, the Institute would remain to the fullest possible extent free from political control of its decision-making. While the rule of law in theory knows no party, our representative government invariably brings political influence to the administration of justice. Thus, an Institute impartially governed and operated would be essential.

The Institute is not intended to supplant or put out of business existing agencies performing valuable work in the various areas of law and justice. Its aim will be to do more. It would not conflict with or duplicate the work of such organizations as the Federal Judicial Center, the National Center for State Courts or the state judicial conferences such as your own. It would provide an agency through which the

innovations undertaken by states could be made more readily accessible to other states. The Institute would most certainly not include any attempt to federalize the state courts. I don't think that this is even necessary for me to point out, except that we all realize that in some places this is a delicate issue, and one which must be given high priority in the deliberations which lie ahead. The Institute would be as much a servant of the state as it would the federal government. Its reputation would depend on its evenhanded administration, its thoroughness and its understanding of the broad spectrum of problems in the administration of justice at all levels. Its resources would be available for investigation and analysis of legal and law related problems. Thus, its staff would primarily perform a consulting service, as opposed to having direct responsibility for the impelmentation of reform movements. It would, of course, have no coercive power. Its effectiveness would necessarily result from its creativity and the value of the services it performs.

The proposal to establish the Institute is not to imply that we have made no progress, rather it is an attempt to mold together the best of the innovative steps that are being taken and to speed up the processes of court improvements. It is an attempt to deal with the problems of the courts, federal and state, which Chief Justice Burger said are suffering from accumulated neglect.

I have only one further comment to make before I turn to the even broader subject of the future relationships between the press, the bar and the judiciary in our country. Earlier, I referred to the unique opportunity given to the men who hold the office I occupy, the chance to travel far and wide and to speak to audiences of lawyers, judges and laymen in every section of the country. But, I try to do a lot of listening and observing, too. I am convinced that never before has there been more favorable public opinion in support of court reorganization, for enlargement of the machinery of justice, and for innovative steps to keep pace with the widening demands on the courts in our increasingly urbanized, automated and sophisticated society. Here in Illinois, you have experienced this public attitude in the approval by the people of Illinois of your new judicial article, which is the envy of many other states, and then in the adoption of your new constitution which added to the improvements achieved in the judicial article. There are stirrings and rumblings in other states for improvements, for changing the judicial structure. In my own state, we are making efforts in that direction. I cannot rest until those efforts are successful.

Not only are we in an era of significant advances in the structuring and management of the courts, but we have an opportunity to achieve still further gains of historic proportions. If we are to realize this potential, we must not shy away from the serious consideration of innovative ideas such as I have undertaken to discuss with you. Most

important, it seems to me we must dispel even the slightest tendency toward alienation between the judiciary and the bar, which upon occasion has manifested itself in some places. We need to keep our eyes on our common problems and on our common aims and goals and cultivate the cooperation that is so vitally necessary if the problems are to be resolved and the aims and goals achieved.

I want to report to you tonight on what the American Bar Association is now attempting to do to strengthen that alliance by enlarging the participation of judges in American Bar Association affairs and giving them an increased voice in the policy-making mechanisms of our Bar Association. Within the last year, the Association created a special committee on judicial representation, under the chairmanship of Justice William M. McAllister of the Oregon Supreme Court. The committee reviewed the concerns, which some judges have expressed about their role in the American Bar Association activities, and the McAllister committee, composed of lawyers and judges, has now made its report and recommendations. The house of delegates is scheduled to act upon them in August at our annual meeting in San Francisco.

The recommendations are quite significant. They include the creation of a division of judicial administration with enlarged staff support to replace the present section of judicial administration. Another recommendation proposes enlarged representation of judges in the house of delegates, and a judicial member-at-large on the Board of Governors. Instead of one delegate in the house, the proposed division would have four. One of the added delegates would represent each of the three judicial conferences, the National Conference of Trial Judges, the Appellate Judges Conference and the National Conference of Special Court Judges. Incidentally, there are now seventeen judges in the house, but most of them are there as representatives of nonjudicial bar groups.

The next recommendation would create a new class of associate membership for non-lawyers serving as judges, magistrates and other judicial personnel, including court administrators and the federal circuit executives. The final recommendation proposes the creation of a special dues structure for judges. I cannot, of course, foretell what the action of the house of delegates will take on these several recommendations. But I do know that the principal officers of the Association have joined me in supporting the amendments to our American Bar Constitution and the bylaws. I can also tell you that my support has not been just a passive one. It has been an active one. I intend to continue to be active. I do feel completely confident in saying that the Association intends to bring about maximum judicial participation in its affairs. We lawyers and judges need each other. We certainly could get more done by working together than by going at it alone. That has been demonstrated repeatedly in the important things, which lawyers

and judges, working together through the organized bar, have accomplished and are in the process of accomplishing. Let me cite briefly just a few examples, although there are many that could be cited. Judges and lawyers in tandem, through their work, have brought about the most important contribution that the American Bar Association has made to the improvement of the administration of justice in modern times in the promulgation of standards of criminal justice. A hundred or more of the leading jurists and practitioners in the country participated in establishing the guidelines for refashioning the entire judicial system. Illinois supplied some of those responsible for carrying out that formidable assignment. Among them were Justices Schaefer and Ward of the Supreme Court, and Judge Richard Austin of the federal bench. All across the country, the process of utilizing the new standards is going on through court rules, court decisions and legislative enactments. I was pleased to learn that some of these standards already have been incorporated into your own Supreme Court Rules.

The implementing of the standards must be carried out chiefly at the state and local levels of government. I hope that this great state, which has a reputation for initiative in such matters, will again be in the vanguard of the states in applying the new standards as a part of a nationwide effort to make the process of criminal justice more effective and fair. I have spoken not only to bar associations on the subject of these standards, but I have spoken to rather large groups of laymen. I cannot begin to tell you the deep interest that they have manifested in this particular undertaking. Civic leaders everywhere are behind it because they feel that the standards are needed. It doesn't mean that the standards must be applied precisely as they are presented. Some may be applicable and some may not. But they do represent the finest thinking that could be brought together. It would be a shame, it would be something to be deeply regretted if they were to be gathering dust on the shelf, as have other notable undertakings.

Many of you have attended the National College of the State Judiciary at Reno. It is an activity of the section of judicial administration of the A.B.A. So was the creation two years ago of the Institute for Court Management at Boulder, Colorado, to train professional court administrators. I am also sure you know of the establishment in Houston of the National College of Prosecutors, which I am pleased to report to you is moving ahead with considerable success. It has brought young prosecutors from all over the country for special instruction. I think that some of you know there is now in progress an effort to also establish a National College for Defense Counsel. These and other current activities of the Association in judicial improvements are coordinated under a special committee headed by Washington lawyer C. Frank Reifsnyder. The promulgation of standards of judicial conduct, brought up to date by a distinguished panel of judges and lawyers under the chairmanship of former Chief Justice

Roger Traynor of California is a task now completed and scheduled for the house of delegates next August. The reformulation of standards of judicial administration for the first time in thirty-five years has been completed by a special committee headed by an Illinoisian, Carl McGowan, now a United States Circuit Judge in the District of Columbia.

I should mention to you, too, that there are so many undertakings in which so many of you and your brethren, your colleagues, have participated. There are so many who have labored in the vineyards of the American Bar Association over a period of time, and have helped us so much with our endeavors and our undertakings. I have seen some of you here this evening.

One of the toughest of all tasks is that of working on the so-called "No-Fault" insurance problem. Judge Reardon, who has spent many hours of faithful work in this effort, deserves much credit. His committee will be reporting this coming August to the house of delegates.

It will be remiss to omit from this recital a significant project to bring about sorely needed improvements and resources for criminal corrections in our prisons. A special disciplinary commission funded from foundation sources and headed by former Governor Richard Hughes of New Jersey has embarked on a wide ranging program to vitalize penal corrections, bringing to bear the best in modern thinking in this complex and difficult field. Three Illinoisians, highly qualified in corrections, are members of that commission - Peter B. Bensinger, Norval Morris of the University of Chicago Law School and a representative of the Institute for the Study of Crime and Delinquency and Corrections at Southern Illinois University. I must confess that when I first was introduced to the subject of corrections, I had something less than a full appreciation of its far-reaching nature, the grave situation and its importance to our society. However, it is an indisputable fact that a large percentage, maybe ninety percent, maybe ninety-five percent, of those who are now in our penal institutions, will someday return to the stream of society. This fact always reawakens me to our great obligations in this respect. These men and women are going to come back either as better citizens or perhaps as more hardened criminals. Which way they go may, to a large extent, depends on what we do in our efforts during the next few years.

Well, I have not forgotten my promise to refrain from reviewing all the present activities of the American Bar Association and organized bar. Indeed, I have only scratched the surface in touching upon these few activities related to the judicial field. There are many more that could be cited and that I would undertake to cite if time allowed. Particularly, I would like to pay tribute to others of your bar, of the Illinois Bar, for the advances and contributions you have made.

I hope from what I have said, you have gained some sense of the responsibility which the American Bar Association is undertaking in its activities relating to the courts. In all of these activities, I believe it can be fairly said that the legal profession in America, the bar and the judiciary, are responding to the special needs and the unique role of law and the legal process in the life of the United States. Anthony Lewis, the distinguished journalist for the New York Times, one time reporter of the Supreme Court activities, author of Gideon's Trumpet, described this role so eloquently in an article written during the meeting of the American Bar Association last summer. DeTocqueville wrote over a century ago, "(E)very political question in the United States is eventually made a legal question." Lewis said that another way of putting it is to say that in the United States more than anywhere law is an instrument of social change. What politicians and union leaders and social reformers do to achieve change, without revolution, in other societies, lawyers, judges, and I can say, conversely, judges and lawyers, do in our society. Yet, our constitutional scheme also puts on the legal profession responsibilities for protecting individual freedom. Members of the American bar have been impressed, and rightly so, Lewis said, "by the swiftness of the British justice, by the articulateness of bench and bar, the pervasive dignity and professionalism....These are virtues, and to a regrettable degree, we lack them. But,...they are not more important than the social responsibility."

Certainly, a central purpose of our professional associations must always be to discharge the social responsibility which Mr. Lewis described so well. I believe we are doing so in a partnership with the judiciary. We cannot do so without that partnership. I truly believe that the record confirms that we are entering upon a new era of closer cooperation between the bar and the judiciary, which will lead to solid advances in the administration of justice in this decade and in the balance of this century. If there is anything that I have undertaken to do, anything that has resulted in a small contribution to bringing about a greater working force for the improvement of our judicial machinery, for helping the cause of the administration of justice, during my career as president of the American Bar Association, if there is anything to which I can point with pride, I hope it will be that I have helped to foster a better understanding between the judiciary and the members of the legal profession.

Again, I want to thank you for this opportunity and your hospitality in permitting me to wish you well in the work of your conference. It's been a great honor to address you. I appreciate it very much.

PROGRAM HONORING RETIRED JUDGES

Hon. Walter V. Schaefer, Presiding

Almost all of the judges who are sitting at the speaker's table have retired or are about to do so. Some tendered their resignations, and some have decided not to seek retention.

I think that these judges will be interested in a suggestion that I recently heard for the improvement of the judicial retirement system. The suggestion came from the wife of a retired judge. As she was commenting on her new status she said this: "Since he has retired, I find that I now have much less money and much more husband than I had before. I wish it could have been worked out in the other way."

I suppose the appropriate response is that God created woman second because he did not want any suggestions as to how to create man.

Let me present to you first a judge of the Circuit Court elected in 1951, who served as chairman of the Illinois Judicial Conference committee that investigated the subject of civil jury instructions way back in 1954, that submitted a report which ultimately resulted in the adoption of the I.P.I., the first civil jury instructions. Judge Robert F. Cotton, who resigned as a judge of the Fifth Judicial Circuit on December 30, 1971.

Judge Joseph E. Fleming served as a judge of the Probate Court of St. Clair County from 1930 to 1934; from 1934 to 1936 as a judge of the County Court of St. Clair County; from 1948 to 1956, he was a judge of the City Court of East St. Louis; and from 1956 he served as a judge of the Circuit Court of the Twentieth Circuit. He resigned April 1, 1972.

Judge Elmer N. Holmgren served as a master in chancery, a member of the General Assembly, and as a judge of the Superior Court of Cook County from 1953 to 1964; and thereafter, as a judge of the Circuit Court of Cook County. He resigned effective June 1, 1972.

Judge John F. Spivey was elected a judge of the Circuit Court in 1951. I may say that was a vintage year. He served as a member of the Executive Committee of the Judicial Conference and also served by designation of the Supreme Court as a judge of the Appellate Court both of the Second and of the Fourth Appellate Court Districts. He was chairman of this Conference in 1964 and 1965. He resigned as a judge of the Fifth Judicial Circuit effective October 1, 1971.

Judge Julian P. Wilamoski served as a judge of the City Court of Kewanee from 1943 to 1964, and thereafter as an associate judge and judge of the Fourteenth Judicial Circuit. He often sat up here as many of you know. He resigned effective July 1, 1972.

Judge Edwin Becker served as a judge of the County Court of McDonough County from 1958 to 1964. And, thereafter, as an associate judge and judge of the Ninth Judicial Circuit. He has decided not to seek retention.

Judge John Dixon served as a judge of the County Court of Lee County from 1958 to 1964, and thereafter, as an associate judge and judge of the Fifteenth Judicial Circuit. He is not seeking retention.

Judge Burl A. Edie served as a judge of the County Court of Piatt County from 1934 to 1942, and as a judge of the Sixth Judicial Circuit since 1964. He has decided not to run for retention.

Judge L. Melvin Gundry served as a judge of the County Court of Jo Daviess County from 1936 to 1964, and as an associate judge of the Fifteenth Judicial Circuit since 1964. He is not going to seek retention.

Judge Michael Kinney served as a judge of the County Court of Madison County from 1948 to 1964, and thereafter as an associate judge and judge of the Third Judicial Circuit. He has decided not to seek retention.

Judge Lowell A. Mehrhoff served as a judge of the County Court of Green County from 1934 to 1942, and as an associate judge and judge of the Circuit Court of the Seventh Judicial Circuit. He is not going to seek retention.

Judge Harold Sewell served as county judge of Boone County from 1962 to 1964, and thereafter as associate judge and judge of the Seventeenth Judicial Circuit. He has decided not to seek retention.

Judge Joseph A. Troy served as a judge of the City Court of East St. Louis from 1943 to 1946, and thereafter as a judge of the Twentieth Judicial Circuit. He is not going to seek retention.

Judge Lyle R. Wheeler served as a magistrate of the Eighth Judicial Circuit from 1965 to 1966, and as an associate judge and judge of that circuit from 1966 until the present time. He is not going to seek retention.

Some judges who are not here today are also retiring or will not seek retention.

Judge Albert R. Cagle, who served as a judge of the County Court of Williamson County from 1950 to 1958, as a judge of the City Court of Marion from 1959 to 1964; and then as an associate judge and circuit judge of the First Judicial Circuit. He resigned April 11, 1972.

Judge Creel Douglass served as a judge of the Probate Court of Sangamon County from 1950 to 1957, and then as judge of the Circuit Court of the Seventh Judicial Circuit. He resigned effective September 28, 1971.

Judge Maurice Schultz served as justice of the peace in Blue Island from 1941 to 1952; as a judge of the City Court of Blue Island from 1952 to 1963; and since 1964 as a judge of the Circuit Court of Cook County. He resigned effective September 30, 1971.

Judge John J. Lyons, was here yesterday, and I think I may breach confidence to tell you that he is not here today because this is his fortieth wedding anniversary. He served as an assistant probate judge of Cook County from 1946 to 1953; in 1953 he was elected a judge of the Superior Court of Cook County. He served as head of the Law Division of that court. In 1964, he was elected to the Appellate Court of Illinois. He has now decided not to seek retention.

Judge Foss D. Meyer served as a judge of the County Court of Bond County from 1954 to 1964, and since that time, as associate judge and judge of the Third Judicial Circuit. He too will not seek retention.

Judge Quinten Spivey served as a judge of the Probate Court of St. Clair County from 1946 to 1950, and from 1951 as a judge of the Circuit Court of the Twentieth Circuit. He is resigning effective June 30, 1972.

It is difficult to know what to say on an occasion of this kind. You know we are going to miss you, and we know we are going to miss you. All of us, your colleagues, are grateful indeed for the services that you have rendered both to us, to the judicial system and to the people of Illinois. You have our heartfelt good wishes for the years ahead. I must warn you, however, that there is certainly the possibility that you will be called upon from time to time to help us man the judicial system that you have served so well over these years.

Thank you, gentlemen, all of you, very much.

REPORT OF COMMITTEE ON RESOLUTIONS AND MEMORIALS

Hon. Albert G. Webber, III

The committee recommends that votes of thanks be given to Mr. Jaworski for his address on Wednesday night; to the Lake Shore Club for the use of its excellent and dignified facilities; to the Chicago Police Department for the effective protection that it has given to us at this Conference; and most especillay to the law professors who have prepared the advance reading material and who have done the lecturing and reporting.

It is our unhappy duty to report to you that since the last Conference, nine of our colleagues have died. Six of them were on retired service, three on active service. The six retirees are Justice John McCormick, retired judge of the Appellate Court; Donald S. McKinlay, Circuit Court of Cook County, retired; John Melaniphy, Circuit Court of Cook County, retired; Thomas J. Courtney, Circuit Court of Cook County, retired; John Gutknecht, Circuit Court of Cook County, retired; Edward J. Turnbaugh, Fifteenth Circuit, retired.

The active judges were Harry H. Porter, Circuit Court of Cook County; Trafton Dennis, Circuit Court of the First Circuit; Howard T. Ruff, Circuit Court of the Fifth Circuit.

Appropriate resolutions have been placed on file with the Administrative Office.

I move, Mr. Chairman, that these memorials become part of the permanent record of this Conference; that copies be sent to the clerks of the courts in which these judges served; and that copies also be sent to their nearest relatives.

JUDGE SCOTT: We have a motion. Do we have a second?

JUDGE WELLS: I second the motion.

JUDGE SCOTT: There will be no further discussion. All in favor indicate by saying aye.

(A chorus of ayes.)

So carried.

RESOLUTION

In Memory of

The Honorable Thomas J. Courtney

Thomas J. Courtney, who retired as a judge of the Circuit Court of Cook County December 7, 1970, died last December 3 in Ravenswood Hospital just short of his 77th birthday. At the time of his retirement, he had served the Circuit Court 22 years.

Judge Courtney had a truly remarkable career, most of it in the service of the public, which spanned several decades and brought him much merited recognition.

He was born December 23, 1894, at 29th and Wallace Streets on Chicago's south side, the son of a Chicago policeman. It was a large family and as a boy, while attending Visitation School, young Tom Courtney got up at 4:00 a.m. to deliver morning newspapers to add to the family income. After school he rushed to a news-stand at 55th and Halsted Streets to sell more newspapers.

After his graduation in 1912 from St. Rita High School, he worked at the stockyards and at a stationer's office in the Loop. In 1913, at the age of 18, he took a police department civil service examination for secretary and became a secretary to a police captain. When he was 21, he took and passed a promotional exam that gave him a senior clerk rating and won him assignment to the City Clerk's office. He became secretary of the Chicago City Council's Committee on Building and Zoning and also principal clerk and sergeant-at-arms of the City Council. During World War I he took a leave from his city job and entered the Navy. Illness kept him from receiving a commission and from serving at sea.

While working in the City Hall, Mr. Courtney attended night classes at Chicago-Kent College of Law. He was graduated in 1926 and admitted to the Bar that year. He also was elected State Senator in 1926 and was reelected in 1930, serving as the Democratic minority leader in the Senate.

He resigned from his city job in 1926 to practice law and served as attorney both for a council committee and the Sanitary District of Metropolitan Chicago. In 1932, he was elected State's Attorney of Cook County and began a record 12 years in that office. As State's Attorney, he was credited with smashing arson and auto theft rings, jailing ransom kidnapers, and warring against gambling, outlaw unions, and the extortionists and hoodlums who dominated these unions.

Although he was a Democrat and always ran for public office with the support of his party, Mr. Courtney was always his own man, unafraid of anyone. In 1939 he waged a losing battle for his party's nomination for mayor against the late Edward J. Kelly. Nevertheless, so great was public admiration for him that in 1940 he was reelected State's Attorney with the support of the Democratic organization.

Judge Courtney was married in 1917 to Kathryn Foley. She died November 1, 1968. They had one daughter, Mrs. Rita Marie Vaughn, and five grandchildren.

This Illinois Judicial Conference realizes the terrific loss sustained by the family of Judge Courtney and by the Bench and Bar, and extends to the family of Judge Courtney its sincerest expression of sympathy.

RESOLUTION

In Memory of

The Honorable Trafton Dennis

The Honorable Trafton Dennis, Circuit Judge of the Circuit Court of the First Circuit of Illinois, died at Harrisburg, Illinois, on April 9, 1972. He is survived by his widow, Mildred; two sons, George and Michael; and two daughters, Deborah and Rowena.

He was born February 16, 1911, in Saline County, Illinois, and was a lifelong resident of that area. He was educated at Harrisburg Township High School and the University of Illinois, class of 1938. He graduated from the University of Illinois Law School with the class of 1940 and was admitted to the Bar in October of that year.

Following his graduation and admission to the Bar, he opened his practice in Harrisburg and was soon called into service in World War II. After the war he resumed his law practice and was elected County Judge of Saline County in 1954. He was successively re-elected and became Associate Judge on January 1, 1964, under the 1962 judicial reorganization. On July 1, 1971, he became Circuit Judge under the 1970 reorganization, and served as such until his death.

He was a member of the Illinois State Bar Association and the Saline County Bar Association, together with various civic and fraternal organizations.

We salute the many years of service given by Judge Dennis to the judiciary of Illinois and the people of his community and we deeply and affectionately sympathize with the members of his family.

RESOLUTION

In Memory of

The Honorable John Gutknecht

The Honorable John Gutknecht, a retired Judge of the Circuit Court of Cook County, Illinois, departed this life on the 1st day of June, 1972, leaving surviving his widow, Effie, nee Ziegler.

Judge Gutknecht was born in Chicago on July 19, 1889. He attended Chicago elementary public schools and graduated from John Marshall High School.

He received his A.B. degree from the University of Michigan in 1911, spent two years at the Law School at the University of Michigan and completed his law studies at the University of Colorado where he received his LL.B. degree in 1913.

Judge Gutknecht engaged in the general practive of law in Chicago from 1913 to 1932, except for a period of military service in World War I. During this period he was an instructor at John Marshall Law School from 1913 to 1917 and was professor of law at DePaul University College of Law where he taught common law pleading and evidence to an estimated eight thousand law students, some of whom became his judicial colleagues.

In 1932 he was elected Judge of the Municipal Court of Chicago and was re-elected in 1938 and in 1944. In 1952 he was elected State's Attorney of Cook County for one term and then resumed the practice of law with Irvin D. Block and Charles D. Snewind.

In 1958 Judge Gutknecht was elected Judge of the Circuit Court of Cook County, Illinois where he served continuously until his retirement on December 1, 1968.

Judge Gutknecht's enormous contribution to the Bench was evidenced by his acknowledged scholarship resulting from his legal teaching as an instructor and as a professor and by his vigorous and knowledgeable interest in human, social, political and economic affairs, which knowledge was broadened and intensified by his forty peripatetic travels throughout the world. His breadth and depth of knowledge was vividly reflected by his personal library of eight thousand books on philosophy, political science, sociology and travel.

His attainments and contribution to our society can be paraphrased biblically by affirming the fact that he had fought the good fight, that he had finished his course, and that he had kept the faith.

The Illinois Judicial Conference readily affirms the fact that Judge Gutknecht will be sorely missed and that it extends to his family its sincerest expressions of sympathy.

RESOLUTION

In Memory of

The Honorable John V. McCormick

The Honorable John V. McCormick, a retired Justice of the Appellate Court of Illinois, First District, Fourth Division, since September 30, 1971, died on November 30, 1971, leaving surviving his widow, Adeline M., nee Ulias, and one daughter, Patricia Ann (Mrs. Francis W. Huston).

Justice McCormick was born in Mineral Point, Wisconsin where he attended the public schools. Thereafter, academically, he completed his undergraduate work at the University of Wisconsin where he attained an A.B. degree in 1914 and culminated his legal education at the University of Chicago where he received the degree of Juris Doctor in 1916.

He was admitted to the Illinois Bar in October, 1916, and commenced the practice of law in Chicago as a member of the law firm of Fulton, McCormick and Fulton.

By reason of his reputation of high legal scholarship and administrative ability, he was appointed acting dean and dean of the Law School of Loyola University for the period from 1924 to 1936. Under his leadership as dean, he attained for the Loyola Law School a high scholastic standing and prominent national recognition.

In 1936, in recognition of his academic prominence, coupled with the support of civic leaders and the vigorous support of both students and former students of Loyola Law School, he was elected to the Bench of the Municipal Court of Chicago where he continued to preside as a Municipal Court Judge until 1953.

In 1953 Justice McCormick was elected as Judge of the Superior Court of Cook County, Illinois and at that time he finished a close second in the Chicago Bar Association poll of judicial candidates and won recognition and praise as being "exceptionally well-qualified" as a Judge.

Less than a year later, in October 1953, the Illinois Supreme Court assigned him to the Appellate Court of Illinois, First District. In 1964 Justice McCormick was elected for a ten-year term to the Appellate Court, First District, and actively participated in rendering opinions for said Appellate Court until his retirement in September of 1971 by reason of conditions of health.

Justice McCormick's legal scholarship and erudition and Jacksonian philosophy are vividly and indelibly reflected and portrayed in his

many opinions contained in the Illinois Appellate Court reports and give to him a judicial immortality.

The judiciary of this State, on a trial court level as well as on an appellate level, suffered an irretrievable loss by Justice McCormick's retirement and death and the members of the Illinois Judicial Conference extend to the family of Justice McCormick their respective and collective sincere expressions of sympathy.

RESOLUTION

In Memory of

The Honorable Donald S. McKinlay

The Honorable Donald S. McKinlay, a retired Judge of the Circuit Court of Cook County, Illinois, departed this life on January 19, 1972 at the age of eighty-four, leaving surviving a son, Donald Carl, a practicing lawyer in Denver, Colorado, and a son, Edward Sinclair, as well as seven grandchildren and two great-grandchildren. Judge McKinlay's wife, Frances Wielenberg, predeceased him in 1947.

Judge McKinlay was born in Chicago, Illinois on December 15, 1887 where he attended public grade and high schools. What is truly remarkable about his academic background is the fact that he did not participate in any undergraduate work and attained his law degree in 1910 by attendance at Chicago-Kent College of Law.

In 1910 Judge McKinlay was admitted to the Illinois Bar and pursued his practice of law until 1928. During a part of this period, he was elected and served as Alderman for the 19th Ward of the City of Chicago for three successive two-year terms, namely, 1923 - 1928.

In November of 1928 Judge McKinlay was elected to the Bench of the Municipal Court of the City of Chicago where he served until June of 1933 when he was elected as a Judge of the Superior Court of Cook County, Illinois and continued in the capacity of Superior Court Judge and Circuit Court Judge by reason of re-elections until his retirement on December 1, 1968 which was precipitated by failing eye sight.

Judge McKinlay had probably one of the longest judicial careers in point of tenure, namely forty years, in the history of the judiciary of Cook County. His judicial bretheren, as well as the members of the Chicago bar, acknowledged his legal competency, his industry and his devotion to his judicial responsibilities. His accomplishments in this regard were most astounding when considered in the light of the fact that Judge McKinlay lost the sight of one eye as a result of an accident when he was twelve years of age.

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

RESOLUTION

In Memory of

The Honorable John C. Melaniphy

The Honorable John C. Melaniphy, a retired Judge of the Circuit Court of Cook County, Illinois, departed this life on September 4, 1971 at the age of seventy-six years, leaving surviving two sons, John C., Jr. and Francis J.; four daughters, Mrs. Joan Bentivenga, Mrs. Patricia Gibbons, Mrs. Margaret Quinlan and Mrs. Josephine Doyle; as well as twenty-four grandchildren. His wife, Gertrude Carpenter, predeceased him.

Judge Melaniphy was born in Chicago, Illinois on December 19, 1894. He attended the University of Michigan and attained an LL.B. degree from the Law School of said University in 1916.

Thereafter, Judge Melaniphy enlisted in June of 1917 in the United States Army, Infantry Division, and was mustered out of the Army in 1919 after attaining the rank of first lieutenant.

After leaving the military service, he was appointed an Assistant State's Attorney of Cook County, Illinois for the period from April 1919 to July 1920.

For the period from 1920 to 1943 he was engaged in the general practice of law in the City of Chicago, during which period he established a reputation as an able and astute trial lawyer.

On July 16, 1943 he re-entered public service by his appointment as Assistant Corporation Counsel of the City of Chicago and in January 1956 Mayor Richard Daley appointed Judge Melaniphy as Corporation Counsel of the City of Chicago after his holding of that eminent post in acting capacity for almost one year. He continued in that position until his election as Judge of the Circuit Court of Cook County, Illinois on November 4, 1964 where he performed his judicial functions with distinction until his retirement on December 7, 1970.

Judge Melaniphy attained national recognition, not only as a trial lawyer, but also as an expert in municipal law as evidenced in part by his presidency of the National Institute of Municipal Law Officers, by his personal handling of the acquisition of six hundred acres of land for the enlargement of O'Hare International Airport, by his participation in the establishment of the site of the University of Illinois, Chicago Circle Campus, and by his handling of all important litigation involving the City of Chicago. Needless to say, his vigor and legal expertise contributed enormously in the continued progress of the City of Chicago in municipal affairs.

The Illinois Judicial Conference of 1972, with great respect, extends to the family of Judge Melaniphy its sincerest expression of sympathy.

RESOLUTION

In Memory of

The Honorable Harry H. Porter

Judge Harry H. Porter of the Circuit Court of Cook County, died November 23, 1971, at the age of 71. He had, at the time of his death, the record for longest service of any of the 134 judges of the Cook County Circuit Court.

Harry H. Porter received his early education in Evanston Academy. He was graduated in 1921 from the Northwestern University College of Liberal Arts and in 1924 from the Harvard University School of Law.

He was married to Beatrice Vahle and resided with her at 3250 Central Street, Evanston, Illinois. Two children were born of this marriage, Vahle Porter Carrington and John Edward Porter, who like his father is an attorney.

He opened a law office in Evanston and soon had a successful practice. Early in his career, he felt the lure of public service and in 1928 he was elected a justice of the peace in Evanston. He was elected police magistrate and served three years in that position, during which he recognized the need for a municipal court in Evanston and campaigned vigorously to have one established.

When the Evanston Municipal Court was established in 1932, he became one of two judges elected to that Court. He was elected to a full six-year term in 1933 and subsequently reelected in 1939, 1945, 1951, and 1957. In 1964 he became an Associate Judge in the Cook County Circuit Court and subsequently was elevated to the rank of Circuit Judge. He was chief justice of the Evanston Municipal Court from the time it was established until it was absorbed into the Circuit Court.

Early in Judge Porter's career on the Bench, the United States advanced rapidly and fully into the automobile age. The courts had to deal with new problems such as traffic and traffic safety. Judge Porter was one of the first persons in the State to urge the legislature to make reckless homicide an offense on which drunken or reckless drivers could be prosecuted.

He was active for many years in the national safety program, serving as Chairman of the National Safety Council's committee on tests for driver intoxication and as a member of the safety council's committee on winter driving hazards. He served as Chairman of the

Cook County Traffic Safety Commission and twice was a delegate to the President's Highway Safety Conference.

Judge Porter, despite his many activities in connection with highway safety, found time to be an active participant in civic life, serving as a member of the board of directors of the Evanston Y.M.C.A.

He was a member of the Illinois State Bar Association and a member of the Bar of the United States Supreme Court and the Federal District Court.

As a justice of the peace, police magistrate, and Judge, Harry H. Porter won the admiration and respect of the law fraternity and the community. His high standards of conduct and his integrity reflected credit on himself, his family, and the court system. His presence on the Bench of the Cook County Circuit Court is greatly missed.

This Illinois Judicial Conference realizes the terrific loss sustained by the family of Judge Porter and by the Bench and Bar, and extends to the family of Judge Porter its sincerest expression of sympathy.

RESOLUTION

In Memory of

The Honorable Howard T. Ruff

The Honorable Howard T. Ruff, Circuit Judge of the Circuit Court of the Fifth Circuit of Illinois, died suddenly and unexpectedly on May 27, 1972, at Paris, Illinois. He is survived by his widow, Ruth F., his sons, Paul H. and Donald E., his daughter, Janet M., and his father, Dr. G. O. Ruff, all of Paris, Illinois.

He was born at Paris, Illinois, on December 9, 1913, and was a lifelong resident of Paris. He was educated at Paris High School, the University of Illinois, class of 1935, and University of Illinois Law School, class of 1937.

Following graduation from law school, he opened his practice in Paris, saw service in World War II, and in 1946 was first elected County Judge of Edgar County. He was successively re-elected and in 1964 became Associate Judge of the Circuit Court under the 1962 constitutional reorganization. He served in that capacity until becoming Circuit Judge in 1971 under the 1970 reorganization and continued until his death.

He was a member of the Illinois State Bar Association and the Edgar County Bar Association, together with various civic and fraternal organizations.

The passing of any judge is a melancholy thing, but the loss of one so young and vigorous as Judge Ruff is especially saddening. Many more years of active life were due him.

The Illinois Judicial Conference of 1972 extends its heartfelt sympathy to the family of Howard Ruff.

RESOLUTION

In Memory of

The Honorable Edward J. Turnbaugh

The Honorable Edward J. Turnbaugh, Circuit Judge of the Circuit Court of the Fifteenth Circuit of Illinois, died at Elgin, Illinois, on January 25, 1972. He is survived by his widow, Florence S., and his son, John R., of Elgin.

He was born in Freedom Township, Carroll County, on November 18, 1906, of a pioneer family in that area. He was educated at Rock Island High School, Augustana College, Rock Island, and the University of Illinois; he graduated from the University of Illinois Law School in 1930 and was admitted to the Bar in May of that year.

His judicial service was long and varied. He was first police magistrate of the City of Moline, 1937-43. In 1943 he became Judge of the City Court of Moline and served until 1946 when he was elected County Judge of Rock Island County. He remained in office until 1954. In 1959 a vacancy occurred in Carroll County and Judge Turnbaugh removed to that county and won a contested election for County Judge. In 1960 he won again and remained there through the judicial reorganization of 1962. He retired in 1970 and at the time of his death was staff attorney for the Illinois States Attorneys' Association at Elgin.

He was a member of the American Bar Association, the Illinois State Bar Association and the Carroll County Bar Association. In addition he served as a member from the County Judges' Association on the Joint Bar Judicial Article Committee, 1950-1954, and in 1954 received the Distinguished Service Award from the Illinois Welfare Association.

We mourn the passing of this long-time jurist and extend our deep and sincere sympathy to his family.

REPORT OF DISCUSSIONS

Topic I—LECTURE ON SELECTED TOPICS OF EVIDENCE

Prof. Prentice H. Marshall
Lecturer

Prof. Robert G. Spector
Lecturer

Competency of Witnesses
Qualification of Witnesses
Limitations on Direct and Cross Examination
Impeachment and Rehabilitation

Lecture

Professor Prentice H. Marshall

This is the fifth and last lecture in series on general topics of evidence. We started in 1968 with materiality and relevancy, burden of proof, and inferences and presumptions. In 1969, we discussed hearsay and the use of extra-judicial declarations. In 1970, we turned our attention to exhibits and worked with real and demonstrative evidence. Last year, we covered the Dead Man's Act and privileges.

Today, we are going to discuss the broad topic of witnesses. I intend to talk briefly about competency, apart from the Dead Man's Act, qualifications, the limits on direct and cross examination, and impeachment and rehabilitation. We will then direct our attention to opinion testimony by experts.

I have always regarded the examination of a witness as a lawsuit within a lawsuit. Whenever we call one to give testimony, the potential is present that we will try that person.

We are going to proceed on the assumption that the content of the testimony, other than for the problems which attend opinions, is not objectionable. It would meet standards of materiality and relevancy. It would not collide with the hearsay rule. It would not be privileged, and it would not be barred by the Dead Man's Act.

We are going to concentrate then on the standards or rules which relate to the examination and the elicitation of testimony from a witness. I think the best approach is to start right at the beginning of the witness' appearance in court.

The first thing we do in most instances is compel the witness to attend the trial or hearing. Of course, we do this by subpoena, properly served. The Illinois authorities suggest that in civil cases the witness is entitled to an advance tender of the witness fee and mileage. This does not appear to be so in criminal cases. If the court's process has been properly served and the witness refuses to abide the subpoena, then it is appropriate for the court to issue a bench warrant or a body attachment calling for his immediate production in open court. Indeed, in addition to that rather abrupt method of producing him, contempt sanctions can also flow from the witness' disregard of the process.

In addition, under our present Illinois Supreme Court rules and Civil Practice Act, we permit the compulsion in civil cases to be exercised by way of notice, insofar as parties, officers, directors and managing agents of parties are concerned. I don't need to subpoena my opponent in a civil case. I can serve notice on his counsel, and that is sufficient to require his appearance. It is akin to the use of notice for the taking of depositions. As far as non-parties are concerned, however, if I want to be sure they are there, I still must resort to process.

Once we get the witnesses in the courtroom, in either civil or criminal cases, they will be excluded upon timely motion. The Illinois cases suggest that it is almost a matter of right that the witnesses be excluded. Those cases also suggest that the motion should be made before any evidence is elicited. There are other cases which say that the motion should be made before opening statements because the content of the opening statement will disclose to the prospective witnesses what the proof will be. In my practice, and I expect in yours, the motion is generally made before the opening statement.

The separation of witnesses presents some logistical problems. In most of our courthouses, there may be a single witness room or there may be just a single sort of public lobby area where the excluded witnesses sit on benches. It's pretty hard to keep them apart. Nevertheless, there is authority to the effect that counsel may request not only that witnesses be excluded but separated so that they may not confer about the case as it progresses.

Now, of course, the consequences of a violation of a rule of exclusion can be the exclusion of the testimony. If it appears that witness "A" has been in the courtroom in violation of your excluding order, then the opponent to witness "A" may object to that testimony being received. It is akin to a competency objection. We just aren't going to

hear this witness. It is frequently invoked in civil cases. There is an alternative, of course. You can declare a recess and permit opposing counsel to interview the witness in order to ascertain the extent to which he has picked up the flow of testimony from her presence in the courtroom. But you can, as I say, hold that the witness will not be heard.

In criminal cases there is a different dimension of this—the defendant's right to the compulsory process for the attendance of witnesses. There is a recent Illinois Supreme Court decision in which the Court divided over this problem of excluding a witness in a criminal case in face of the defendant's right to compulsory process for the attendance of witnesses. I am confident that you exercise it wisely in criminal cases when you find that a defense witness has been in the courtroom during the trial. I think you should conduct some sort of a *voir dire* hearing to ascertain whether there really has been a substantial risk of contamination of testimony. If you conclude that there has not been, I suggest that you permit him to testify and not run into some constitutional problems. He can always be cross examined about the fact that he was present in the courtroom and heard the other witnesses testify. I think that this will reflect significantly on his credibility as a witness.

One final note on excluding witnesses. The parties in both civil and criminal cases are entitled to be present. There is authority to the effect that in civil cases, if one of the parties is a youngster, the parent can remain in the courtroom even though the parent may end up testifying. You are all acquainted with the rule in criminal cases that the State is entitled, in your discretion, to at least one representative, normally the investigating officer, who will sit at the counsel table with the prosecutor and will frequently testify in the case.

A JUDGE: The request I hear frequently on excluding witnesses is to direct the lawyer at the end of the day that he can't talk to that witness.

PROFESSOR MARSHALL: Judge, I don't think it's proper for you to say that he cannot talk to the witness at all, unless he is on the stand under cross. You also have the dichotomy between the defendant in a criminal case and other witnesses. Even though he is on the stand and is going to be cross examined the next day, the Court has held that he is entitled to confer with his counsel overnight. In case the witness hasn't been called, I think that I can properly interview that witness for the purpose of preparing him and me for the ordeal tomorrow. However, there is authority to the effect that it is improper for me to communicate to him what the testimony has been. And if it's disclosed on cross examination that I did so, then a motion to strike his direct testimony is proper. For example, the cross examiner asks, "Mr. Witness, last evening did you visit with Mr. Marshall?"

"Yes." "And did he tell you what Smith testified to yesterday?" "Yes. We discussed Smith's testimony." A motion to strike his direct testimony is proper on the ground that the exclusionary order has been violated.

Regarding the oath or affirmation, we still insist that the witness be sworn. Despite some of the cynicism that exists in our society today, the obligation of the witness to transmit data under oath is still a truth seeking device. I'm sure there are witnesses who are willing to perjure themselves, but my experience has been, and particularly in civil cases, that people are very reluctant to testify if they feel that they are incorrect or that their testimony might not be believed. The oath is essential.

I want to talk to you about the competency of witnesses generally. What must the witness bring to the courtroom in order to be permitted to transmit data upon which our fact finders will rely? They must have the ability to observe that which they are now transmitting. They must have the ability to recollect that which they are now transmitting. They must have the ability to communicate to the fact finder on both direct and cross examination, and they must appreciate the obligation to speak truthfully.

When we say they have to have ability to observe what's being transmitted, we take the extreme cases. We are not going to permit the blind person to testify that he saw what color the light was or the deaf person to testify that he heard a certain sound. We insist that our witnesses have that physical and mental ability to observe that which they purport to have observed and which they desire to transmit to the fact finder.

We also insist that they have the ability to recall accurately or with reasonable accuracy. We are getting into areas of credibility here, of course. Our inclination today is to err on the side of admissibility and leave the problems of credibility to the jury, or to the judge in the bench trial. Nevertheless, we do insist that there be a showing that this witness is actually recalling that which he purports to recall.

An extreme example of the requirement of communication is the witness who speaks only in a foreign tongue. Unless we have a translator, that testimony is not going to make one iota of contribution to the resolution of a dispute. So absent a translator, that witness would be incompetent.

There is an interesting Illinois Supreme Court case, a criminal prosecution, in which the victim of the crime had been so seriously injured that she could not communicate in any way other than raising and lowering her leg. She would flex her knee to answer "yes" and straighten her leg to answer "no". Direct examination was conducted by leading questions, and she raised and lowered her knee, but the

cross examiner found himself helpless. He did not want to ask only questions subject to "yes" or "no" answers. The Illinois Supreme Court concluded that she was an incompetent witness because she could not respond intelligently and fairly to cross examination.

The appreciation of the obligation to testify truthfully is a concomitant to the obligation of oath. Our courts have held that children five and six years old, are competent witnesses. We inquire of them out of the presence of the jury as to whether they do understand the necessity to testify truthfully, whether they know that false statements are wrong, irrespective of what may or may not be their beginning religious or moral beliefs. Of course, in that same so-called *voir dire* hearing, we also undertake to determine whether they have the ability to perceive and recollect. If we are going to challenge competency, the cases indicate that the challenge should be made as soon as the witness is called to the stand or as soon as the incompetency emerges.

In the case of the youngster, the objection is made as soon as he or she is called. The hearing to determine whether the child is competent is held out of the presence of the jury. The material which is elicited in that *voir dire* hearing may be reelicited in the presence of the jury as going to the credibility of the witness and it may be reelicited not by just the cross examiner, but the direct examiner as well. He may inquire in the presence of the jury as to whether this little boy or little girl understands what it is to tell the truth and why it is necessary that people tell the truth about one another, designed to enhance the credibility of the tyke in the presence of the jury.

We have the so-called first hand knowledge rule. In some respects, this is a corollary of the hearsay rule. But even in the area of exceptions to the hearsay rule, we require the witness who is transmitting the hearsay declaration to have first hand knowledge of the happening of the declaration. What we are really talking about is a reinforcement of the ability to perceive and transmit. We don't want the witness communicating imaginations. We want them communicating that which they have seen and heard and smelled and so forth. The line between first hand knowledge and credibility, again, is a difficult one. A witness testifies, "I saw the car for a second. It just flashed past, but, in my opinion, it was going seventy miles an hour." You must make a determination, a legal determination, as to whether, if believed, that perception was long enough for the witness to form the judgment which he or she now seeks to transmit. If you conclude that as a matter of law no reasonable person could form that judgment with that limited exposure, you can exclude the testimony upon the ground that the witness has not had a sufficient opportunity to form a first hand judgment or appraisal of the data.

It is really akin to the rule that we apply on motions for directed verdict. For instance, the plaintiff in resisting the motion urges that

you must accept as true certain evidence that was given, but the testimony is contrary to human experience. It's just unbelievable, and we are not going to run the risk that the jury will believe it. The same sort of standard applies here. If you conclude that the witness just could not have formed the judgment or collected the data that he claims, you can exclude the testimony on this ground. However, it is a rule which should be applied with some degree of caution.

Now, let's talk about how we examine witnesses. We will get into the form of direct and cross examination, refreshing recollection and things of that sort. I think these are topics which are more troublesome than the ones I have touched on thus far. As far as the form of testimony is concerned, we are pretty well committed in this country, and in Great Britain as well, to eliciting testimony by question and answer—specific questions, specific answers, short questions, short answers, step by step. This method of examination is a mosaic affording the opposition the opportunity to object after the question is asked, the opportunity to object if an inadmissible answer is given, and the opportunity to strike.

The psychologists tell us that we are wrong. They claim we would probably get a more accurate account if we put the witness on the stand, got his name, rank and serial number, and said, "Tell us everything you know about the subject of this lawsuit." Our psychologist brothers say that we would probably get a more accurate account if the lawyer didn't intrude. However, there are certain types of evidence or types of data which we exclude. We exclude the irrelevant, we exclude hearsay, we exclude privilege and so forth. And so, you can't just put the witness on and say, "Tell us everything you want to or everything you know about it", and then go back and perform surgery on the narrative answer. It's for this reason I think that we proceed by question and answer form rather than lengthy narrative rambling answers.

As far as the form of the question is concerned, the most vexing problem is leading. I don't know why trial lawyers are unable to conduct a direct examination without leading, but I expect that you find that that's one of their biggest failings. I know that in the work that I do in trial advocacy with my students at the law school, this is one of our biggest problems. Why they want to lead is beyond me. Maybe they want to hear their own voice or put a nuance on the facts that the witness can't. In any event, we frown on it on direct examination. Indeed, as a general proposition, we prohibit it on direct examination if timely objection is made.

I might say in passing that I always regarded an unleading direct examination as more persuasive with the jury than a leading examination. I think the jury wants to hear what the witness has to say and not what I have to say, and that from a tactical standpoint, save an extreme situation, it is better to conduct a nonleading examination.

Now, we do permit leading on the initial examination in certain situations. First, the witness is eligible to be called as an adverse witness under section 60 of the Practice Act. If he is a party, officer, director, managing agent or foreman of a party, he is adverse. You may call him or her and examine the subject adversely as if on cross examination. That means leading questions can be used. You can err in this regard in granting permission to call the witness adversely, and likewise, you can err in refusing it. Our statute is pretty explicit as to the types of people that are eligible for this treatment. The courts have been inclined to construe it rather conservatively by not permitting adverse examination beyond its bounds, but also to regard it as a right of the party who desires to conduct the adverse examination.

We also have Rule 238 that is concerned with the so-called hostile or turncoat witness. There is some dispute as to whether Rule 238 does or does not apply to criminal cases. I think the same rule applies in a criminal case. The situation that is presented under Rule 238 is an occurrence witness from whom a statement has been obtained. If the witness surprisingly testifies contrary to the former statement, he may be declared hostile and examined as if on cross examination, which means leading questions. He may also be impeached.

In the criminal case, for those who feel that Rule 238 is not applicable when that situation arises, the witness can be declared a court's witness or a hostile witness. Again, it is permissible to examine that witness adversely.

We permit leading questions when the witness is extremely young or where the witness only speaks a foreign language. In these situations, we permit our lawyer to do some of the communicating for him, by the way of leading questions. We also permit leading questions on the direct or initial examination for the purpose of refreshing the witness' recollection.

At this point, I would like to discuss the general contents of refreshing recollection as distinguished from past recollection recorded.

First, let's talk about refreshing recollection. We have a witness on the stand who, in the tension of the trial, forgets. He has testified to a portion of the transaction, but now forgets. The balance or perhaps the transaction is of such complexity that one couldn't really expect the witness to remember all of it. For example, in the case book that I use in law school the example that is given in this area involves a woman who filed a complaint against a storage company for loss of her personal effects. She's trying to testify orally to the personal effects which she stored with the defendant, and it's quite important that she do so from a damage standpoint. She's got to be able to itemize those things.

Before she came to court, she and her lawyer made a list of the

things that she lost. She would jog her recollection from time to time. One day, there was the sofa and the chair. Another day, she'd remember the picture and then there was a silver candelabra and a cigarette box and so forth. When she comes to court, she is put on the stand, and she testifies that she delivered her personal effects to the storage company. "Now, Miss Plaintiff, will you tell us what it was that you delivered?" "Well, I delivered my sofa and the winged chair and the bed and the picture of my grandfather." She's ticking these things off, but she soon runs out of gas. We permit her lawyer at this point to refresh her recollection. One of the devices that we permit is the leading question. "Now, might I ask whether you had a candelabra?" "Oh, yes. Yes I did." "Does that help you any?" "Yes, it does. There was the candelabra and there was also the silver service and my mother's creamer." Then she bogs down again. "Might I ask you, did you own a collection of Shakespeare?" "Oh, yes. There were the books." She goes on again. She now recalls the books and she's actually recalling as she's on the stand. We are just jogging her memory. It's what the psychologists call remembrance by association. We can do it with leading questions, but we can do it other ways as well. We can do it with a photograph. We can do it with a memorandum which she wrote. We can do it with a memorandum I wrote or a newspaper article. Almost anything can be used to refresh the witness' recollection. Having jogged that memory, we now proceed to hear from the witness, his or her present recollection of the incident in question. If a tangible item is used; e.g., picture, memorandum, newspaper clipping, whatever it is, if something is handed to the witness for the purpose of refreshing recollection, the cross examiner is entitled to see it. The cross examiner is also entitled to use it on cross examination. Furthermore, he is entitled to offer it into evidence for purposes of impeachment if, in the cross examiner's judgment, it does not reasonably tend to refresh recollection. The direct examiner cannot offer it. The item is not substantive proof; it's an item used to jog the memory.

In the *Scott* case, 29 Ill.2d 89, a case decided before we had broad criminal discovery, a police officer testified that the night before the hearing he had gone over his reports to refresh his recollection for the purpose of testifying. We requested those reports for use on cross. The trial judge denied them to us, saying he hasn't used them on the stand. The Illinois Supreme Court said it doesn't make any difference whether he used them on the stand or not. If they were used to refresh his recollection, the cross examiner is entitled to see them.

Past recollection recorded is a hearsay exception. We are not going to get back off into hearsay, but I want this distinction to be clear in your mind. Here, the writing comes in as substantive proof of the truth of the matter asserted in it. Here, we require either that the witness have prepared the memorandum or at least affirmed it shortly after its preparation. We also require that the memorandum have been

prepared at or about the time of the incident that it recites.

Finally, in past recollection recorded, we have a witness who cannot recall. The psychological gimmick doesn't work. We show him the memorandum. If he's honest with us, he says, "I'm sorry, I don't recall the incident." "Do you recall seeing the fellow slip on the sidewalk five years ago?" "I'm sorry, but I don't. I have no recollection of that at all. But, I do know that I wrote that report. That's my signature. That's my handwriting. I was in the practice of making reports like that and they were honest when I made them and I accurately recorded it." It's sort of a business record type of approach as well. That's past recollection recorded. There, the witness must have either prepared the report or affirmed it immediately after its preparation. It must have been made contemporaneously with the events it reports. Not so with past recollection refreshed. The prophylactic that we employ is vigorous cross examination.

Now, there is abuse in both of these areas. I used to observe it when I was a beginner. I did some traffic court work, as most of us have done in our days. Police officers would testify. They would take the ticket and they would use the ticket purportedly to refresh their recollection. But it really wasn't. They had stopped this person six months ago and they stopped so many people that, in most instances, they really didn't recall stopping this particular defendant on the outer drive that night. But they were acting like they did. They were not using the recollection recorded foundation. They were going under the guise of present recollection refreshed. It really used to offend me, but now that I have grown a little bit older, I realize that there are some practicalities in the trial of certain types of lawsuits.

New York has said that the ticket is the complaint, and it's also the past recollection recorded. The ticket will come in as evidence to prove the truth of the allegations made in it. From a conceptual standpoint, it is kind of interesting.

Well, so much for the distinctions between those two. We got off on that topic because of the use of leading questions as a device to refresh recollection. Now let's go back to the form of questions generally.

We do not permit an inquiry which assumes facts which are not in evidence. We hold the examiner to a rather close order of proof and this is a vexing problem. Lawyers get a little bit sloppy in their direct examination. "When did you first meet the defendant?" An objection is made. "It assumes that he's met the defendant, Your Honor." "When, if ever, did you first meet the defendant?" I think that oldtimers frequently abuse youngsters with this objection. It is something we have to be leery of because a certain amount of data can be pumped into a case through this form of leading question even though the witness never really approved the suggestions which are in the

questions. It is really the lawyer testifying. He's putting facts into evidence where there has been no testimony.

Argumentative questions, we also frown upon. We are not inclined in this county to permit the lawyer to argue with the witness. You see much more of it in Great Britain where the rules with regard to the examination of witnesses are much more relaxed that they are here.

We might observe in this area that the objection to the form of the question must be made when the question is asked, or else that objection is gone, regardless of how flagrant the violation of the rule. If the answer is given, unless so fast that no one could reasonably get the objection in, it's too late to object to the form of the question.

As far as answers are concerned, we have already seen that we discourage narrative testimony, i.e., long rambling answers. I suppose the key to the answer is that the answer will be responsive if the examiner wants it to be responsive. It is not the opponent's objection that the answer is not responsive to the question. If I'm conducting an examination, whether it is on direct or cross, I'm entitled to a responsive answer from the witness. If I don't get it, I can disclaim the answer and move to strike it solely on the ground that it's not responsive. By and large that motion should be granted if in fact his answer was unresponsive. There is a little discretion left in you, as is always true of rules of evidence. But it is my objection as the examiner. If I'm examining Judge Benefiel and he gives me an unresponsive answer, opposing counsel has no standing to object to that answer on the ground that it's unresponsive. If it turns out to be a hearsay unresponsive answer, then opposing counsel can object to that upon the ground that the substance of the answer is inadmissible. "It's a hearsay answer, Your Honor, and I move to strike it." But he cannot object solely on the ground that it's unresponsive. That is the examiner's objection and his objection only.

Let me give you this as an exmaple, first on direct and then on cross: I have got Judge Benefiel on the stand. I ask, "What's your business or occupation?", and his answer is, "I'm a judge and the light was red." Now, that's an unresponsive voluntary answer. Opposing counsel objects and moves to strike it on the ground that it's nonresponsive and voluntary. I say, "Your Honor, I'll accept the answer." And I'm entitled to have it. Now, if his answer had been, "I'm a judge, and my wife told me that the light was red," and opposing counsel objects on hearsay grounds, I'm not entitled to a hearsay answer, so that portion should go out.

On the other side of the coin, when I asked him, "What's your occupation?" and he says, "I'm a judge, and furthermore, I want you to know the light was red." But I'm trying to prove that it's green. Now I say, "Your Honor, with all due respect to Judge Benefiel, the latter

portion of his answer is volunteered and nonresponsive. I disclaim it, and I move to strike it". It should go out. From a legal standpoint, if the clock were to stop right there, of course, the effect is that there is no red light evidence. It has been stricken out. On a motion for a directed verdict, at that point, there would be no red light proof.

Let us turn now to cross examination. I think that cross examination has two basic purposes. First, to blunt, discredit, or weaken the testimony which has been elicited on direct. And secondly, if there is additional relevant testimony that can come from this witness, then to elicit that, if it's helpful to the cross examiner. He is trying to blunt the direct testimony if it has hurt him, and he's trying to pull out additional good testimony if it's present. If he can't accomplish this, and this gets into trial tactics for lawyers rather than judges, then he shouldn't conduct a cross examination. All of us know that. Yet all of us see it violated everyday in our courts when lawyers get up and cross examine in a senseless, meaningless way. They talk about the length of trials. I'll bet if you kept a stopwatch or a log, you'd find that about twenty percent of your trial time is consumed by meaningless cross examination, nothing but repetition of the direct. A slightly different tonal inflection in the examiner's voice maybe, but that's about it. If we could get the lawyers to stop those useless cross examinations, we'd all save a lot of time.

However, I'm presupposing a meaningful cross designed to blunt that which was elicited on direct, or to weaken it, or to elicit additional helpful facts.

The first problem we confront is the scope of the cross examination. We are talking about evidence regarding content or subject matter. Illinois is a state which simply says that the scope of the cross examination is limited to the scope of the direct as far as evidentiary subject matter is concerned, except in the case of parties and officers and managing agents of parties. The federal courts and a majority of the states follow that rule.

Impeachment presents an entirely different problem. Here we have what's known as the open rule or the British rule under which my opponent may cross examine in respect to any relevant information. Any relevant data may be elicited on cross examination of any witness. That's the so-called open approach, and that obtains in only a few jurisdictions in this country. The majority rule, and this is the Illinois attitude, is that the subject matter of the cross will be limited to the scope of direct.

Now, on the other hand, if the witness is my client, the plaintiff, and I call my client and elicit only one subject, my client can be cross examined with regard to the entire case. There is no scope limitation. This appears to be true in criminal cases as far as the defendant is concerned.

We have another concept that comes in the criminal case that has never been fully resolved, and that's the privilege against self-incrimination.

To what extent does a defendant waive the privilege when he testifies in his own behalf? We all know that he doesn't have to testify at all if he doesn't choose to. If he does testify and he confines his direct examination to a very narrow piece of the litigation pie, his alibi or his condition of sobriety, has he exposed himself to a more searching, broader cross examination, or is he entitled under the Fifth Amendment to confine the cross examination to the subject matter of the direct? In civil cases, there is no problem; the party or the officer of the corporate party is subject to a broad, open cross examination.

Let's talk now about another phase of the content of the answer, opinion testimony by laymen and experts. The history of the rule against opinions is interesting. We took something from the British. We took some words from them and, to a great degree, we have tended to misuse them. The British rule against opinions was first articulated back in the mid 1700's and 1800's. It was a rule against conjecture, the baseless opinion, the prejudgment, the notions of the witness, e.g., the fellow must be guilty or he wouldn't have been accused. The witness would come in and testify that in his opinion the defendant was guilty. There was no basis, the witness knew no facts. It was pure conjecture. We took that rule against conjecture, which is actually sort of a first hand knowledge rule, and we held onto the word *opinion*, and we expanded it to say we are not going to permit our witnesses to testify to inferences or conclusions or opinions or anything based upon the data which they have observed. All we want from them are the facts, and not opinions.

Well, of course, you just cannot draw a line between fact and opinion. One can argue that when I take the stand and testify that the light was red, really what I'm saying is that in my opinion, based on my visual perception, the light was red. But we do want our witnesses, and particularly our lay witnesses, to transmit to us as best they can the most basic data because we want our fact finder to engage in most of the inference drawing.

When it is necessary in order that a witness be able to communicate, we permit the witness to express or testify in opinion or conclusionary terms. This is so if the subject matter of the opinion or conclusion is one upon which laymen are regarded as qualified or laymen frequently form and express opinions. For example, odors. It smelled like limburger cheese. It smelled like he had been drinking, like perfume, so forth. It's conclusionary, but if we are going to say, "Wait a minute, we want you to describe the salami odor," we want the basic data the witness would never be able to communicate. We want the basic odor of the smoke or perfume, or whatever it happens to be.

Value is another example. In my opinion, my car is worth a thousand dollars. The courts have consistently said laymen always have judgments as to what the value of their property is.

Speed in today's society, particularly automobile speed, is another matter upon which laymen frequently form judgments. But here we begin to see a little kind of quasi-expertise requirement coming in. We want to know how frequently this witness has driven a car. "Have you observed the speed at the time you had been driving? Have you driven with others? Have you observed the speed at the time they have been driving?" We qualify them as lay opinion formers. Then we also want to find out from them, as we saw earlier, the circumstances under which they observed the basic data, namely, the moving vehicle from which they have drawn the conclusion of the speed of the vehicle.

However, in those situations, we permit their opinion testimony. Conditions: slippery floor, dark; conditions of people: ill and intoxicated, insane, agitated, angry. Running through all of these, there is this combination of necessity and also the fact that laymen frequently do form these types of opinions. If we didn't permit the witness to testify that he looked angry or he acted angry or he acted agitated, how is he going to communicate what he saw? Well, he was flushed. His voice was elevated. He shouted. Now, we are getting more basic and the cross examiner is always entitled to try to elicit this. He may ask the witness to tell him what he observed about the person. "Why do you say he was angry? Was his face flushed?" "Yes." It may not be a very good cross examination, but the cross examiner is entitled to probe deeper, and it's a balancing test that you have to go through. Has the direct examiner done a reasonably fair job of trying to lay before the fact finder and the cross examiner the data upon which this conclusion is based? It is necessary to permit the witness to speak in these conclusionary terms in order that we get the data? Is it a subject matter upon which laymen customarily form judgments?

Illinois has one of the greatest cases in all of Anglo-American jurisprudence on the subject of lay opinions. It is *Carter v. Carter,* 28 N.E. 948 (1891). The witness was permitted to testify he was in the room next to Mrs. Carter, and heard the rustle of crinoline, the squeak of bedsprings, and some noises that sounded like kisses. Based upon that basic data, he formed the opinion that she was engaged in an act of sexual intercourse in the room next door. The sounds of love. A great case.

There are some interesting questions on the scope of cross examination. There are times when it is difficult to perceive whether the examination is going beyond the factual scope. The rule stated in full is that the cross examination shall not exceed the scope of the direct and all reasonable inferences which could be drawn therefrom. There are a couple of different types of situations which deserve mention. One is

where a witness has testified to a conclusion or an opinion. For example, there are several well-known cases in which a witness testified that in his opinion, the testator did not know the extent of his property or the natural objects of his bounty. There was a cross examination of that witness concerning transactions that the witness engaged in with the testator. Now, this really is an underlying probing of the basis upon which the opinion was formulated. All of the cases indicate that that is an appropriate cross examination.

Then there is another situation that developes most frequently in the area of an adverse examination. We have examined the party under section 60. The general attitude is that the re-examination of that party by his lawyer at that time should be confined to the subject matters brought out on the adverse examination. His further direct is deferred until his own case or deferred until rebuttal. However, there is an interesting Missouri case that involved this: The defendant was called under their equivalent of section 60 and merely asked whether he owned the vehicle in question. The purpose of the inquiry was to go to the presumption of agency which arose out of the ownership of the vehicle. You will recall in Illinois, and this is true in most jurisdictions, if you establish that "A" owned the vehicle and "B" was driving it, there is a presumption that "B" was an employee acting in the scope to his employment. The witness answered that he owned the car. His lawyer then undertook an examination with respect to "B's" relationship to "A", and "B's" employment, duties and so forth. All were received over objection that the examination was beyond the scope of the adverse. The Missouri court said it was permissible because the obvious purpose of the direct was to draw the inference of agency, so it is an appropriate subject matter for examination at that time.

Now, let's talk about expert witnesses for just a few minutes, and then we will spend time on impeachment. The problem of expert opinion testimony is, I think, significantly different than that presented in the opinion testimony of laymen. Here we permit the expert to interpret basic data, if in your opinion, discretion and judgment, it would aid the fact finder. There is really a threshold relevancy problem involved in expert proof, namely: Will this proper testimony assist the fact finder in regard to any of the contested issues? Will the purported expert bring to the trial a practical ability which is beyond the understanding of the average lay jury, or the average lay judge? We are professionals in law, but we are not professionals in everything. We must first ask ourselves when expert testimony is offered whether the proper testimony is based on a legitimate field of knowledge. We answer this question quite frequently by resorting to judicial notice; i.e., judicial notice that medicine is a legitimate field of expert knowledge, radar principles are, blood chemistry in blood alcohol, fingerprints. Today, even accident reconstructionism is a legitimate field of expert knowledge. Having made that initial inquiry, we ask wheth-

er we are dealing in a specialized field of knowledge. We also ask whether the testimony of the expert is based upon that specialized field of knowledge. And I think here the accident reconstruction cases are very good examples of what we are talking about. There is a case out of the Fourth District Appellate Court that concerned itself with whether a police officer could testify to speed and other aspects of impact other than point of impact, based upon his examination of the scene following the collision. The Fourth District concluded that he should not be permitted to testify to speed because that determination involved opinion of physics, force, motion, mass and so forth. It did not appear that the police officer utilized that knowledge in arriving at his conclusion. All he was really giving the jury was the layman's hunch as to what the speed was, in contrast to the real professional, college-trained accident reconstructionist who does apply those principles of physics in arriving at his opinions.

All of us are a bit troubled with the emergence of the accident reconstructionists because we have the feeling that we lived through it once before in the zoning field. You try a zoning case and you can always get a so-called zoning "expert" to testify to either side of the proposition. One has the uncomfortable feeling that this is occurring as well in the accident reconstruction field. But the fact of the matter is that the good accident reconstruction expert does apply scientific principles with which we are not familiar, at least to the extent that we know how to utilize them. We have heard of Newton's laws of motion, but we don't really understand them, and the jury doesn't either. We allow this expert to apply those principles to the data elicited in the case. Of course, we insist that our expert be qualified through education, training and experience. And we insist that he apply the specialized knowledge and his experience in the resolution of the problem that is submitted to him. He must base his opinion on the facts in the case.

There are three principal ways by which those facts are transmitted to him and, hence, to the jury. First, they may be facts which he has personally observed. The classic example of this is the doctor. He examined the patient. He makes certain objective findings. If he is the treating physician, he is also entitled to rely upon the subjective complaints of the patient. On the basis of that data which has been personally communicated to him and observed by him, he forms an opinion as to diagnosis, prognosis, possible or likely cause of injury and so forth. Another example is the metalurgist who examines the piece of metal with regard to metal fatigue. He personally examines the exhibit. It may have been offered and received into evidence as well, but he personally observes the facts upon which he expresses his opinion.

A second, infrequently used method is the case in which the expert expresses an opinion based upon testimony which he has heard in

the courtroom, so long as the testimony is not in conflict. If the testimony is conflicting on a given set of facts, then the cases say we would be permitting him to judge the credibility, and we are not going to tolerate that. But if the facts are relatively undisputed, and he has been in attendance in court, there are some cases that say it is permissible to ask him his opinion based on what he has heard in the courtroom.

A more frequent device is the so-called hypothetical question. The ground rules for the hypothetical question are as follows. First, on direct examination of the expert the hypothesized facts must be supported in the record. This is essentially a problem of order of proof and assuming facts not in evidence. Second, the hypothetical question should include undisputed facts which are material to the expert's opinion. The hypothetical question does not need to include all of the disputed facts. I don't have to ask him to hypothesize that the light was red and green at the same time. I ask him to hypothesize that it was red, that was my proof. On cross examination, the expert may be asked to assume additional facts which are not in evidence, if the cross examiner represents to the court that the facts will be forthcoming. It is discretionary as to whether you are going to permit it at this time. You may say, "I want you to prove those and bring this expert back." But if he represents to you that he will adduce evidence in support of his assumptions, the expert may be cross examined, in your discretion, in regard to assuming facts which have not yet been adduced.

In the last couple of years, there have been some cases that are concerned with the utilization of expert testimony when eyewitnesses are present to testify to the same facts in regard to which we want the expert's opinion. *Plank v. Holman*, 46 Ill.2d 465, 264 N.E.2d 12 (1970), is the most important one in which the Supreme Court held that if an eyewitness to a collision is available, the eyewitness must be called in preference to the expert's reconstruction, not in exclusion of, but in preference to. When the eyewitness' testimony is adduced, there then remains a discretionary matter submitted to you as to whether the testimony will aid the resolution of the dispute with regard to eyewitness testimony.

Plank involved a situation where the widow of the decedent, an eyewitness, did not want to testify to the occurrence because if she did, she would open the door to the defendant's testimony under the Dead Man's Act. She wanted to keep the defendant off. So rather than testifying with regard to the occurrence, she called a reconstructionist who testified favorably to the plaintiff. The Supreme Court concluded that she should be compelled to testify. She was an available eyewitness. The defendant did not fall under the quality of availability because he was incompetent under the Dead Man's Act. But she did not receive that incompetency, and she should be called, even though the consequences were to open the door to the defendant's testimony.

So, we put her on and she testifies to what she saw. Then the defendant comes on and he testifies as to how it happened. Then the expert is called. There is a discretionary question submitted to you as to whether the jury will be aided by the expert testimony in resolving the dispute, or whether this is purely a matter of credibility for the jury to decide.

Now, there is also a Fourth District Appellate Court case that involves the question of whether the tail lights of a truck were on at the time of impact. The precise details are not too important, but, as I recall the case, an expert was called to testify that in his opinion tail lights were on at the time of the impact because the melting of the filament was indicative that the light was illuminated at the time it was shattered. There was an eyewitness, however, who testified that the lights were off at the time of impact. The question presented was: Should the expert's testimony have been received in the face of the eyewitness' contradictory testimony? The court held that it should not.

There are some earlier cases which tend to contradict this simple approach that if there is an eyewitness, we won't permit expert proof. There is a case involving intoxication, for example, where an eyewitness testified, "In my opinion, 'X' was not intoxicated." Expert testimony with regard to blood-alcohol was nevertheless received. Concededly, those are apples and oranges situations. I bring them up to you together merely to point out that there is a problem in Illinois with regard to the admissibility of expert testimony in the face of eyewitness testimony. And you have got to be reasonably cautious about it. I think that as far as accident reconstruction is concerned, *Plank* gives you the basic guide lines.

A JUDGE: Isn't the ken of the jury involved in your determination, too? If it goes beyond the ken of the average jury, aren't you expected to inquire into that area?

PROFESSOR MARSHALL: Yes, that's an element of basic determination with regard to the admissibility of expert proof and in this situation is a factor that's taken into account; i.e., whether this expertise will aid the jury in resolving this conflicting testimony.

A JUDGE: What about the expert treating physician, who relies not only upon his own examination, but on some of the things that are done by other hospital personnel?

PROFESSOR MARSHALL: The reported cases say that the expert can rely upon the opinions transmitted to him by other consulting experts. The radiologist is the primary one. When you get into the lower echelon people, you do begin to encounter some serious hearsay problems.

A JUDGE: The resident who took the history?

PROFESSOR MARSHALL: I would be inclined to permit the doctor to rely upon the resident's history.

For the last thirty minutes, we will consider impeachment. When we talk about this, we are generally speaking of adverse reflection on the credibility of any disinterested witness, expert witness, or party witness. Impeachment is designed to impair the credibility of all of them.

The basic sources of impeachment is cross examination which is always available, because cross examination is something we are entitled to as a matter of right. On occasion, we may impeach by resorting to so-called collateral evidence. Here, in a very real sense, we have begun the trial of the witness. We look at the witness' ability to testify accurately and truthfully, his willingness to testify accurately and truthfully, the likelihood that he has testified accurately and truthfully. In this latter category, what we do is inquire into the identity and character of this witness that we are trying to impeach.

As generality, we say that we cannot impeach our own witness. Of course, section 60 is an exception to that because we call a party adversely. The rationale: He's not our witness. He is an adverse party, and we may impeach him. But the impeachment is limited in those circumstances to prior inconsistent statements.

If I called the defendant adversely during my case as a plaintiff, I may not undertake to impeach him by other collateral evidence. I may show that he has made a prior inconsistent statement, but I may not show, for example, that he has been convicted of an infamous crime. On the other hand, if he testifies on his own behalf, I may undertake to impeach him by that latter device.

We also permit impeachment under Rule 238 in the case of the so-called hostile or turncoat witness. Here's a person that we have called. He doublecrosses us. We confront him with his prior inconsistent statement, and we either try to get him to reconcile his in-court testimony with it or we seek to impeach him with it. You must distinguish in the area of impeachment between this type of general attack on credibility and contradiction. The lawyer who calls the witness, even his own party, is not bound or precluded by the testimony which that witness gives, unless (a) it's the only evidence on the point, or (b) if the witness is his client and the testimony is so complete that it constitutes a judicial admission which precludes recovery.

However, in a simple situation, if I called witness No. 1 who testified that the light was red, I'm not precluded from calling witness No. 2, who testifies that the light was green. I would then say to the jury, "Ladies and gentlemen, I submit that witness No. 1 was mistaken. I

know he said it was red, but he was mistaken. I submit to you that the testimony of witness No. 2 is the more credible testimony, and that you should find that the light was green." I'm not precluded from contradicting, but I cannot undertake to impeach witness No. 1 unless he's turned against me, or unless he falls in the category of some other type of adverse witness.

I suppose one of the primary methods of impeachment is cross examination with regard to sensory deficiencies or completeness. The direct examiner has put the witness in the most favorable light and the cross examiner now seeks to establish that the conditions for observation were poor. It was noisy, so one could not readily hear. It was dark, so one could not readily see, and so forth.

The second most common method is the prior inconsistent statement. If a witness has, on a former occasion, made a statement as to a material fact which is inconsistent with his present testimony, or has failed to disclose facts which a reasonable person would have disclosed in the prior statement, that inconsistency or those inconsistencies may be shown in Illinois for purposes of impeachment, provided that the witness is confronted on cross examination with the prior inconsistent statement. The witness must have his attention called to it; generally, to the time, to the place, to the circumstances under which the statement was made, and the content of the statement. If the statement is a written statement, the cases indicate that the witness is entitled to see the written statement.

There are some differences of opinion here. In Great Britain, it is very clear that the witness is entitled to see the statement. This, I think is the better attitude. If the impeachment proceeds on the basis of a statement which the witness has purportedly written or has signed, he should be afforded the opportunity to look at that writing and be sure that is the writing which he signed or wrote. He can disclaim it, and the cross examiner may then proceed to complete the impeachment at a later time. But upon seeing it, it may acknowledge, and it is more fair to the witness to permit him to see that prior inconsistent writing. If he acknowledges prior inconsistency, whether it be oral, a deposition, a statement, or a handwritten statement by him, the impeachment is completed.

The Illinois cases say that if the impeachment is in writing, the cross examiner may proceed to introduce the prior inconsistent statement during his case and complete the impeachment even more, but he is not obligated to do that.

On the other hand, if on cross examination the witness denies having made a prior inconsistent statement (or denies having omitted in the prior statement this material fact which we now seek to elicit as impeachment by omission), then the cross examiner is obliged to complete the impeachment during his turn, - during the defendant's case if the cross examination was conducted by the defendant. During the plaintiff's rebuttal, if it was conducted during the defendant's case. If he fails to prove the discrediting facts, then a great variety of sanctions can flow if the cross examination has been particularly suggestive and unfair, e.g., a mistrial can be declared. At the very least, the cross examination should be stricken and the jury should be forcefully admonished to disregard the earlier cross examination of the witness.

What we are protecting ourselves against is a cross examination by innuendo. We insist that it be conducted in good faith. We also are protecting ourselves against a cross examination based upon facts which are not in evidence and which never come into evidence. Completion of the impeachment is important.

There is a recent Illinois case *People v. Collins,* 49 Ill.2d 179,274 N.E.2d 77 (1971). I think we should spend a little time on it. It's a criminal case.It involved this situation: Police officers obtained from witness "X" a statement, the essence of which is that the defendant confessed to "X" that he, the defendant, has murdered a victim. "X" is not a police official. He is a friend of the defendant. The defendant is indicted. The case comes on for trial. "X" is called as a witness. On the witness stand, he denies that defendant ever confessed to him. Indeed, he denies ever having told the police that the defendant confessed .to him. The prosecutor claims surprise, and the witness is declared hostile. The prosecutor is granted leave to confront and cross examine him on the prior statement, which he does. The witness denies having made the statement. The prosecutor then calls the police officer who took it. The police officer testified, "Yes, he gave me that statement." The statement is then offered and received in evidence. It is received substantively, not just for impeachment. The trial court permits it to come in generally, and does not instruct at the end of the case that it is for impeachment purposes only. The jury finds the defendant guilty. The defendant appeals. The State defends the trial court's action on the basis of proposed Federal Rule 801, which permits those inconsistent statements to come in to prove the truth of the matter asserted.

The Illinois Supreme Court rejected Rule 801. It said that the Illinois rule was still persuasive and still continued to have reason to it, and that in a situation of this kind, it continued to be a fair rule. The prior inconsistent statement was receivable only for purposes of impeachment, and not for the purpose of proving the truth of the matter asserted in it.

I think that *Collins* is a very significant case. Whether the Court will adhere to that view in the event the Federal Rules are approved by the United States Supreme Court remains to be seen. The information that I have is that the proposed federal departure is itself under

some attack before the Court. But as far as witnesses are concerned, those prior inconsistent statements are receivable only for impeachment.

Impeaching statements do not go to the jury room, even written impeaching statements. They are not evidence. They are a reflection on credibility. They should not go out as an ordinary exhibit in the case. It would be particularly so in the *Collins* situation.

Now, you have to bear in mind that there are some extra-judicial declarations which may be receivable substantively as well as for impeachment. The choice example is the party's extra-judicial admission. I make an admission. At the trial, I testify contrary to my admission. Mr. Spector can do one of a couple of things. He can confront me and cross examine me on the basis of my admission, and use it to impeach me. He can offer it in evidence during his case as substantive proof as the admission exception to the hearsay rule, without ever having confronted me, or he can do both. He can confront me, and put me to the test of reconciling my in-court estimony with my earlier admission. This he can turn around during his case and present the admission as substantive proof and argue it both ways to the jury.

This would also be true of a prior inconsistent spontaneous declaration or a prior inconsistent business record. It's hard to do with a prior inconsistent past recollection recorded because the problem on that is the declarant has no recollection. The declarant is supposed to be unavailable, so it's difficult to hypothesize that situation. There are those few areas, however, where this extra-judicial declaration would be substantively admitted. The declarant is present and testifies, and it can be used both ways. But in the main, we confront the deposition and the investigative statement situation. Those are receivable for impeachment purposes only. If they are made by a non-party, he must be confronted during cross examination and afforded the opportunity to explain the prior inconsistent statement.

In this area of impeachment, there is one other case that we should bear in mind that is peculiar to criminal situations. It concerns *Miranda* problems. In *Harris* v. *New York*, 402 U.S. 222 (1971), the defendant was concededly not given his *Miranda* admonitions, and he made a very damaging admission. That statement was suppressed by a pre-trial motion under *Miranda*. The case came on for trial. The defendant testified in his own behalf contrary to his pre-trial admission. The prosecutor confronted him with it, cross examined him on the basis of it, impeached him with it. The question presented to the Court was whether an anti-*Miranda* statement, although not admissible as a confession or admission, could nonetheless be used for purposes of imipeachment. The Court concluded that it could be.

The statement or admission can be used to impeach but not substantively. Of course, we all know that once the jury hears it, they do wonderous things with it, like oysters do with grains of sand.

As far as expert witnesses are concerned, here we permit impeachment by the inconsistent statements of others. The most frequent encounter is the authoritative writings of another expert in the field. I'm sure you are all aware of the current state of affairs in Illinois in this regard, but it's worth repeating.

Up until about seven years ago, Illinois was very conservative with regard to the cross examination of experts on the basis of authoritative writings. If the expert said, "I don't regard Marshall on Orthopedic Surgery as authoritative," or if he said, "I didn't rely on Marshall in arriving at my opinion," that was the end of the matter. If I said, "I didn't rely on Jones," that was the end of Jones.

In *Darling v. Charleston Community Memorial Hospital,* 33 Ill.2d 326, 211 N.E.2d 253 (1965) cert. den., 383 U.S. 946 (1966), the Illinois Supreme Court said that on reflection, it concluded that this was not conducive to experienced experts, and if a person is a legitimate expert, he should be familiar with the authoritative experts in the field. Therefore, he may be confronted and cross examined in relation to the other experts which are contrary to his opinions expressed on direct examination.

How do we accept the writings as authoritative? You may take judicial notice in certain areas which are referred to you in your court. The medical field is, I suppose, the most common. The cross examiner may represent to you, "I'll establish, Your Honor, in my case that Jones on Orthopedic Surgery is an authoritative text." You have the discretion to permit the cross examination to proceed on that representation, even though the witness on the stand denies that Jones is authoritative. Of course, in this setting, we then proceed with the cross examination much in the fashion that we do with regard to prior inconsistent statements. Generally, "Mr. Witness, Jones on Orthopedic Surgery says at page 290 of the Second Edition, published in 1969, the following . . ." It's read to him. "Now, is that contrary to your opinion? Can you reconcile your opinion with that statement?" We may confront him and impeach him by authority in the field.

There are other instances where experts can be confronted with the declarations of others, but not quite as common as that one. For example, take the situation where "A" and "B" have worked together on a given expert examination. The report of "A", the radiologist, contradicts the opinion of "B", the expert, who has not testified on direct; however, "A's" work up was part of the overall work up done in preparation for the diagnosis. For the testimony in that situation, our testifying expert can be confronted with the radiologist's report. Did he take this into account? You see it's a form of hearsay declaration by a

person other that the witness who is now testifying. He can be asked, "Did you take this opinion into account when you arrived at your opinion?"

Interest, bias, hostility, personal involvement really is what is in the lawsuit. Compensation to be paid to a witness, financial interest in the outcome of the case. The parties are the classic example of witness vulnerable to this kind of cross examination. Other examples are the members of the family of the parties or shareholders in the corporation, or partners. Rewards and bounties can be used on cross examination for impeaching; whenever somebody has got a piece of the action, that certainly is an appropriate subject for cross examination. If he denies having a piece of the action, it may be proved collaterally that he does.

The cross examiner is not bound by the testimony of the witness. Personal animosity toward a party may be cross examined. The cases here also indicate that the cross examiner is not bound by the answers given. We don't want to get too far afield in trying collateral issues, but if there is a very strong relevant proof that the witness has stated, for example, that he hates the defendant, this reflects on his credibility. We should permit the jury to know this.

The cases also seem to indicate that if this type of cross examination is based on statements made by the witness, the cross examiner may start out, "Mr. Witness, you dislike the defendant, don't you? Indeed, you hate him." The witness says, "No, I don't." Now, if the collateral evidence is going to be in the form of statements previously made by the witness, the cases indicate that the witness is entitled to know it, much like the inconsistent statement. The cross examiner should then continue, "Isn't it a fact that you told Smith that you hated the defendant at a certain time and place?" If the witness still denies it, then Smith may be called. Smith testifies that the witness did tell him that he hated the defendant. It is an appropriate means of impeachment.

Whenever a witness testifies in a civil or a criminal case, be he a party or non-party, including the defendant in a criminal case, his character as a person is placed in issue and becomes a material issue in the case. His character may be attacked in a number of ways. The first that I will discuss is quite uncommon; at least in my experience it has been. We may challenge it by reputation. If a witness testifies in a civil case, an impeaching witness, or collateral witnesses may be called to testify to the reputation of the witness for truth and veracity in the community in which he lives. The reputation is bad, and based upon that reputation, the impeaching witness is asked, "Would you believe the witness under oath?" His response is, "No, I wouldn't." This is available with respect to any witness in any kind of a case, civil or criminal, regardless of who the witness is, party or non-party.

We can also challenge a witness' character by the conduct of the witness. We are entitled to know who this person is from a business background standpoint. What is his business or occupation? We are entitled to know his habits, and whether they will reflect adversely upon his credibility, particularly if those habitis were engaged in at the time of the incident in question. There is *People* v. *Crump*, 12 Ill.2d 402, 147 N.E.2d 76 (1958), which involved cross examination for a narcotics conviction. There are cases that deal with cross examination with respect to consumption of alcohol, particularly comsumption of alcohol at or about the time of the incident in question. It impairs preception. But the Illinois cases are disinclined to permit a board sweeping cross examination with regard to prior acts of misconduct which have not resulted in conviction. Some jurisdictions permit it. A witness in a case, including a defendant in a criminal case, can be cross examined with regard to prior acts of misconduct, if they tend to reflect upon credibility, even though they have not resulted in a conviction. Illinois has shunned that line of authority. I think rightly so in most instances. I think it's quite unfair for witnesses to have to defend themselves on a myriad of charges. But we do permit a rather searching cross examination with regard to general background and habits as well as business and occupation.

One case involved an actress. She was the plaintiff in a personal injury case, and evidently had done a very good job on the stand on direct. She was asked on cross examination if its wasn't a fact that she devoted a substantial portion of her time to amateur acting. Objections were made and overruled. The Appellate Court said that that was an appropriate cross examination. Her avocation reflected to some degree upon her credibility as a witness.

We now come to the most controversial of all methods of impeaching a person's character, and that's the use of prioer convictions for purposes of impeachment. Let's split it into two categories: 1) All witnesses in civil cases, plus nondefendant witnesses in criminal cases; 2) Defendants in the criminal case. We will treat them separately.

We permit any witness in any case to be impeached by a showing of a conviction of infamous crime. That showing may be made on cross examination or it may be established collaterally by offering, for example, a certified copy of the judgment of conviction. Anyone who testifies exposes themselves to that type of impeachment.

The defendant in the criminal case presents some problems which are unique to him. We all know that the defendant with the provable record is put in a very difficult position so far as testifying in his or her own behalf is concerned. Studies have indicated that the minute it is disclosed to the jury that the defendant has been convicted of anything substantially serious, and particularly in the area of violence, that the presumption of the innocence is just about gone. So the de-

fendants have to make this choice, whether they will tell their story, which frequently is not believable in any event, or whether they will remain silent.

We have tried in Illinois to provide them with some safeguards. First, we do not permit a defendant in a criminal case to be cross examined with respect to prior convictions unless the defendant has elicited that fact on direct. Now, quite frequently, that will occur. The defendant, in anticipation of impeachment, will disclose on direct that he has been convicted of a crime. But unless he does that, the subject may not be brought up orally on cross examination. The method of impeachment is limited to the State offering a certified copy or exemplified copy of the judgment of conviction.

Secondly, the conviction which is used must not offend the constitutional rights of the defendant, and particularly his right to counsel. So that if the conviction was obtained without him having knowingly, and intentionally and intelligently waived counsel, the conviction is not admissible against him.

Thirdly, in *People* v. *Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695 (1971), the Illinois Supreme Court articulated some relevancy guidelines conerning this type of impeachment. In contrast to *Collins* where it rejected proposed Federal Rule 801, the Court in *Montgomery*, virtually adopted proposed Federal Rule 609.

Thus, the state of the matter today is this: First of all, the conviction must not be more than ten years old, or it must not be more than ten years since the defendant was released from custody, if he did time as result of the prior conviction. There is a ten-year cut off for remoteness. Second, the crime either must have been punishable by imprisonment for a period of a year or more, which is somewhat the old infamous crime standard, or it must involve dishonesty. This is a broadening of the area of impeachment, for some of the earlier cases concluded that petty theft and things of that sort were not infamous, and they were were not admissible for impeachment. But under the rule articulated in *Montgomery*, if the conviction does reflect upon honesty, and therefore reflects upon credibility, it is admissible if it's less than ten years old.

Furthermore, the Court in *Montgomery* suggests that judges should entertain pretrial motions to exclude impeaching convictions. They don't say you should grant them all the time, but only that you should balance the value of the impeachment against the importance of permitting the defendant to tell his story and to enjoy the presumption of innocence.

Montgomery arose solely in the defendant situation. There has not been to my knowledge any later decisions that concern themselves with other witnesses. But I would suggest to you the guidelines for

Montgomery should apply to other witnesses as well. A fellow has committed a wrong as a youngster, and he comes in and testifies in a trial, ten, twelve, fifteen years later, be it civil or criminal. I really don't see any reason why he should be exposed to the embarrassment and so forth which attends an impeachment by a display of the conviction. However, *Montgomery* did not speak to the problem of witnesses generally. It was concerned with defendant. If you choose, you can limit it to the defendant situation. Incidentally, the impeaching conviction may be under appeal. This is true in Illinois. It's true in the federal courts. Let me give you the classic example of it, a case in which I had some substantial interest.

When James Hoffa was prosecuted in Chicago for defrauding the Teamsters' Pension Fund, he had been recently convicted in Tennessee for jury tampering. The jury tampering conviction was on appeal Hoffa testified in his own behalf here in Chicago. He was impeached with that jury tampering conviction, which was still under appeal. You might recall that the jury in Chicago was sequestered at Great Lakes Naval Training Station, and, of course, the closing argument of the prosecutor was like an old barroom song. He'd argue for half an hour on the facts, and then he'd say something to the effect, "But, of course, Mr. Hoffa denies this, and what you have to ask yourselves is whether you believe someone who has been convicted of trying to tamper with a United States Court jury." And the jurors recalled their happy ninety days at Great Lakes. You can imagine the impact that the impeachment had.

But that conviction was appealed, and we appealed that on the ground that the impeachment was improper. The Court of Appeals said: No, it isn't. He'd been convicted. It's been proved beyond a reasonable doubt until it's reversed by a Court of Appeals. If it's reversed, it's no longer available for impeachment. If it's set aside as void by collateral attack, it is not available for impeachment.

I have a couple final points to mention. First, examination by the court. Of course, you can question witnesses. Indeed, there are circumstances in which it is compelling that you do so. But you may not become an adversary when you examine a witness. Also, please realize that your examination is subject to objections, and it must be objected to if it is objectionable.

I have tried cases before judges who have asked what I thought were improper questions, and I objected to them. They have told me that I couldn't object to their questions. This is a very delicate situation, of course, in a jury trial. The judge who told me I couldn't object to his questions was wrong. Not only can I object, but I must in order to preserve the record. I think you ladies and gentlemen realize this, but I just wanted to remind you of it.

Our final item is the offer of proof. When testimoney is excluded, the examiner on either direct or cross examination is entitled to make an offer of proof, and indeed in many instances, he must. If it's clear from the face of the question what the purpose of the examination is, and what the anticipated answer would be, then the reviewing courts are inclined to say no offer of proof was necessary. But there is case after case where the Appellate Court states that it doesn't know whether it was reversible or not because there wasn't any offer of proof. The best way to make an offer of proof is by question and answer. In a jury trial, of course, we don't want to do that in the presence of the jury. Since the proof has been excluded, the best thing to do is to take that offer of proff at the earliest avaiable opportunity, the next recess. Maybe the proof will be so crucial that the lawyer will want to make it immediately, and the jury should be sent out or you should retire to chambers. Of course, an exhibit which has been properly authenticated and identified and offered into evidence, if excluded, constitutes its own offer.

Well, we are finishing at the appropriate time. As always, we have enjoyed working with you, and we hope to see you next year.

Topic II—CRIMINAL LAW LECTURE ON SEARCH AND SEIZURE

Professor Charles H. Bowman

Professor Wayne R. LaFave

Part I—Consent Searches by Professor LaFave

My name is Wayne LaFave and seated with me here at the front of the room is Professor Charles Bowman, my colleague at the University of Illinois Law School and my partner in this particular seminar session. We are here to discuss with you the subject of search and seizure, or perhaps I should say certain aspects of search and seizure. As most of you may recall, Charlie and I lectured last year at this time on the subject of search and seizure, covering such matters as probable cause, search warrants, and search incident to arrest. We ran out of time and out of breath before we were able to cover all of the subject matter which was included in the outline we distributed at that time, and we are here today to cover those topics which remain from last year. For about the next hour, I am going to be talking to you about the subject of consent searches, and then, after the break, Professor Bowman will be chatting with you about stop and frisk and other forms of brief detention which are permissible for investigative purposes on evidence somewhat short of the traditional probable cause requirement. We appreciate that these two subjects may seem somewhat less important to you than the matters we discussed last year, in the sense that you undoubtedly confront them less frequently than the more fundamental questions of the constitutional limts on search warrants and searches incident to arrest. However, there are some particularly tricky problems existing in these two areas, and thus we believe that it would be profitable to spend some time today exploring them. Professor Bowman and I will, from time to time, refer by name to certain cases which are either leading cases or cases which contain particularly helpful discussion on the issues involved in this area. We will not pause to give the citations, as the cases to which we will be referring are all set forth with the citations in the lecture outline which you have received today.

With respect to the so-called *consent search*, it may be worth noting at the outset that this particular kind of search has taken on increased importance in recent years. The primary reason why this is so, of course, is the decision in the *Chimel* case. As you well know, the court in *Chimel* held that the police no longer have free rein to search the entire premises incident to the arrest of a person therein. As a consequence, it appears that police are more frequently relying upon the

alleged consent of the arrestee or some other person as a basis for making such a search.

There are a few general considerations which deserve our attention before we get down to specifics. One of these concerns the matter of the burden of proof on a motion to suppress in a case in which it is the prosecution's contention that the defendant or some other authorized party consented to the search which resulted in the discovery of the evidence which the defendant now seeks to suppress. As you all know, section 114-12 of the Code of Criminal Procedure expressly states that "the burden of proving that the search and seizure were unlawful shall be on the defendant." However, it must be kept in mind that the question of who has the burden of proof with regard to Fourth Amendment issues is itself a constitutional question as to which the United States Supreme Court has the last word. The court has made it perfectly clear that in this particular situation the burden does not lie with the defendant. As the court said in the *Bumper* case: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiesence to a claim of lawful authority."

The other preliminary observation concerns a very fundamental question: Precisely what is the nature of the issue to be resolved by a court with respect to a so-called consent search? As we shall see as the discussion progresses, this is a most important inquiry which has a bearing upon the resolution of all sorts of difficult problems. Yet, this is a question which the Supreme Court has not as yet addressed itself to specifically. The dispute is between two different approaches, one being the waiver of constitutional rights approach, and the other being the reasonable search approach. Under the first approach, the view is that whenever we talk about a consent search we are talking about a waiver of constitutional rights, in precisely the same sense as when we discuss a waiver of any other constitutional right, as in the right to counsel, right to jury trial, and plea of guilty situations. Some courts have made it quite clear that they are taking this approach; illustrative is the *Bustamonte* case, where the court expressly states that any consent to search "amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for constitutional waiver." Under this approach, it would of course be necessary to focus the inquiry on the state of mind of the person alleged to have given the consent, for it would be necessary to determine not only that the consent was voluntary but also that it was an intelligent, and understanding relinquishment of a known right.

However, there is some basis for contending that a somewhat different approach is appropriate in the consent search area, and this stems from the fact that we are dealing with the Fourth Amendment

which only bars unreasonable searches and seizures. Thus, so the argument goes, if the police acted as reasonable men in deciding that consent had been obtained, then that is all that is required to comply with the Fourth Amendment. Under this approach, which seems to have been adopted by our supreme court in the *Henderson* case, the basic inquiry is not into the state of mind of the alleged consenting party but rather the state of mind of the police. The language in the United States Supreme Court decisions, such as the *Bumper* case, does not clearly indicate that the court has as yet rejected either one of these approaches.

Although this may become more apparent as we proceed to certain specific issues, it should be noted that the choice between the two theories I have just stated is more than a matter of academic interest. Although this is a rather bizarre case, it illustrates the point rather well. I am refering to the *Elrod* case, in which the permission to search was given to the police by a defendant who appeared to them to be normal in all respects. However, on the motion to suppress, the defense offered evidence to show that the defendant was in fact mentally ill at the time he gave consent. The government contended that that evidence was not relevant, apparently on the ground that the question was only whether the officers acted reasonably. But the court held: "No matter how genuine the belief of the officers is that the consentor is apparently of sound mind and deliberately acting, the search depending upon his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity—consent—is lacking for want of mental capacity, no matter how much concealed."

We move now to an inquiry into what facts are relevant in determining, in an individual case, whether a valid consent has been given. Certainly the first question which should be asked is whether the police have indicated by their words or actions that they have authority to make the search. As the United States Supreme Court emphasized in the *Bumper* case, the prosecutor's burden in this situation cannot be discharged by showing "no more than acquiesence to a claim of lawful authority." Thus, if an officer identifies himself as a policeman and declares "I am here to search your house" or "I have come to search your house," it is almost certain that this will be viewed as coercive. Likewise, if the officer places undue emphasis on his authority as a public officer, this may support the conclusion that the person merely submitted to this authority. The same may be said for a "show of arms" or the presence of a large number of policemen. The appearance of officers in the middle of the night seeking entry also tends to create an atmosphere of coercion.

If an officer appears at certain premises with a search warrant and indicates he is there to execute the warrant, the fact that the person in

possession acquieses to the search does not provide a basis for finding the search was by consent if it later appears the warrant was invalid. This is because, as our court pointed out in the *Reid* case, a person is "not bound to know that the warrant was illegal and object to and resist its execution." The same is true, of course, as in the *Bumper* case, where the police claim to have a search warrant but in fact do not have one. However, if in such cases the person were to respond "you don't need a search warrant; go ahead and search," this may be viewed as consent, as pointed out in the *Wetherington* case.

What about the case in which the police threaten to obtain a search warrant? The view here in Illinois, by virtue of the *Magby* case, seems to be that such an assertion does not amount to coercion. It would seem, however, that this kind of case deserves somewhat closer scrutiny. Although the cases elsewhere are not in agreement, more authority is to be found to the effect that it makes a difference whether the statement of the officer was that they would simply get a search warrant or that they would attempt to get a search warrant. The distinction is that if the officers made a flat assertion that they would obtain a search warrant, then it must be established that they had probable cause to obtain such a search warrant, for otherwise they have secured the consent by a misrepresentation or mistake. However, if they merely indicated they would try or attempt to get a search warrant, then it makes no difference whether they in fact had probable cause. Illustrative are the *Boukater* and *Simons* cases cited in the outline.

Another kind of case in which the appropriate finding is that a valid consent has not been obtained is when it is fair to conclude that the consent which was given was actually the tainted fruit of prior police illegality. Thus, if a person submits to a search of his person after he has been illegally arrested, it is clear that he has not consented to the search but has merely surrendered to the presumed authority of the officer. For example, in the *McGurn* case, where an officer grabbed a man and started to search him, and the man said "don't get excited, you will find it [the gun] on the right side," the lack of grounds for arrest barred any claim that this was a search by consent. Whether a person can consent to a search of his premises while being held in custody unlawfully following an illegal arrest is not entirely clear, but the trend appears to be toward the view that whether or not the consent is valid by the traditional test, it is nonetheless the fruit of the illegal arrest and thus is not effective. That case obviously is not quite as easy as the search of the person case, for it cannot be as readily determined that the obtaining of the consent was an exploitation of the prior illegality.

Another important consideration is whether at the time the individual gives the alleged consent the police have already conducted an

illegal search uncovering incriminating activity. The teaching of the *Clark Memorial Home* case is that under such circumstances the consent is not voluntary in that the individual, already confronted with incriminating evidence, would conclude that it is hopeless not to cooperate. In such a case, the consent once again may be said to be a fruit of the prior illegality.

Yet another consideration is the mental or emotional state of the person who allegedly gave the consent. As I noted earlier in discussing the *Elrod* case, whether we are talking about the actual condition of that person or the condition as perceived by the police depends on whether you are operating under a waiver of rights or reasonable search theory. An illustration of the relevance of the emotional stability of the person is provided by the *Lind* case, where a woman's husband and son returned home after both had been wounded in a burglary attempt. This was followed by a visit from a doctor and then by the appearance of the police, who took both the husband and son to jail. The police then returned to search for the stolen property, allegedly with the consent of the wife. Our Supreme Court noted that this series of events "undoubtedly left Mrs. Lind in a highly nervous state. These untoward events were followed shortly by the alleged request of the officers, and her consent, if obtained, was under the circumstances so tinged with official coercion that it cannot be said to have been freely given."

Consideration must also be given to whether or not the person allegedly giving the consent was in police custody at the time. It has frequently been stated in the cases that the burden on the prosecution to prove the voluntary nature of a consent to a search is particularly heavy where the consentor was under arrest at the time of the consent. The federal decisions, as illustrated by the *Judd* case, are particularly demanding in this regard, for they stand for the proposition that it is virtually impossible for a person in custody to give valid consent. By contrast, the state cases, including those here in Illinois, do not take quite as strict a view. However, even the state cases have been willing to look into the circumstances of the custody. Illustrative is the *Zazzetta* case here in Illinois. The court in that case found that the defendant's consent to a search of his car was not voluntary in view of the fact that the police had already placed him in handcuffs and actually taken the car keys out of his pocket.

If it appears that the person giving the consent was attempting to cooperate with or assist the police in some way, this is a very significant consideration in determining that that consent was in fact voluntary. One kind of case is that in which the person consenting is actually seeking the aid of the police. For example, in the *Shambley* case, the wife called the police because her husband had threatened her with a gun; police were dispatched to the scene, arrested the hus-

band, and placed him in the squad car. One officer then returned to the residence and asked the wife for permission to search for the gun, which was granted. The court had no difficulty in concluding that under these circumstances her actions were "tantamount to an invitation." Of course, *Shambley* may be an easy case becuase the wife was actually the victim of the crime, but even where the wife is not the victim of the crime the same result may be reached where it appears that she thought her assistance would actually help clear her husband. Such was the situation in *Coolidge*, the recent Supreme Court decision, where the wife handed over some guns and clothing belonging to her husband. The court emphasized "that Mrs. Coolidge described her own motive as that of clearing her husband, and that she believed that she had nothing to hide. She had seen her husband himself produce his guns for two other policemen earlier in the week, and there is nothing to indicate that she realized that he had offered only three of them for inspection on that occasion...To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal euspect has constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion."

Evidence of cooperation may also be present even though the person consenting knew that the evidence that would be uncovered would incriminate him. In such cases, it is important to consider whether the individual had already given a voluntary confession, as in *Whitley*, for it is generally accepted that consent to a search is valid when preceded by incriminating statements, there being no reason to assume that the defendant would not voluntarily consent to a search for evidence if he volunteered the much more damaging admissions. Similarly, in *Rogers* the court stressed the fact that the defendant had indicated a willingness to cooperate with the police and aid in the apprehension of other offenders. Also important, as stressed in *Mathews*, is the fact that the person has actually accompanied the police to the place to be searched and has opened or unlocked the premises in order to facilitate the search.

By contrast, an alleged consent should be viewed with considerable suspicion if the facts indicate that the defendant had been continually insisting on his innocence prior to the alleged consent and the search, particularly where the search uncovered clear evidence of guilt. The leading case for this proposition is *Higgins*, where the court reasoned that a defendant who denies his guilt would not voluntarily permit officers to conduct a search if he knows that incriminating evidence will be found, because he would not deny his guilt and unnecessarily lose all benefits of cooperation. The court observed: "No sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." However, it must be emphasized that that reasoning only holds true

where the consentor would know that the police would find highly incriminating evidence if they conducted the search. It has no application in those situations where, for example, the defendant believed that the contraband was concealed well enough to escape detection.

Next, of what relevance is the fact that the person giving the consent either was or was not specifically advised by the police of his Fourth Amendment rights, that is, that he was constitutionally entitled to refuse to permit the police to make the requested search? The various facets of this problem have not received close attention by the appellate courts here in Illinois, although we do have some case authority in Illinois on this point. There is, for example, the *Rhodes* case, where the defendant allegedly consented to a search of his house after he was in custody. The claim was made that the consent was not effective because the defendant was not specifically warned of his Fourth Amendment rights, but the court summarily dismissed that claim, saying that under such circumstances it need not be shown that the defendant was advised of his rights. To the same effect is the *Ledferd* case, where the court noted that there is authority elsewhere both ways on this proposition and then simply concluded that it was not prepared to hold that the people must show under these circumstances that the defendant was advised of his Fourth Amendment rights. Of course, it does not follow from this that Fourth Amendment warnings or lack thereof are irrelevant in determining the validity of a consent here in Illinois. As pointed out in the *Haskell* case, while there is no absolute requirement of such a warning, the failure of the police to give such advise is a factor bearing upon the understanding nature of the consent. That is a rather significant observation, because the reference is not to the voluntariness of the consent but to the understanding nature of the consent. This sounds more like the waiver of rights theory I described to you earlier, and of course if that is the correct theory then it is easier to conclude that there must be some kind of showing that the consenter was actually aware of his constitutional right to refuse consent.

A brief look at some of the leading cases elsewhere may be in order at this point in order to expose the full dimensions of this particular problem, particularly since it is one, as I have suggested, which relates back to the fundamental question of what the basic inquiry is in a consent search situation. One approach is that taken in the California case, *Tremayne*, where the defendant argued, in substance, that evidence obtained upon a search with consent of the accused is inadmissible unless the person consenting was advised he might refuse to consent, for the same reason that incriminating statements obtained upon interrogation of a suspect are inadmissible unless the person making the statement was advised that he might remain silent. The court responded that this argument is based upon the false premise that the accused in each instance is waiving a constitutional right. The

court concluded this is not the case here because the Fourth Amendment provides protection only against unreasonable searches and seizures and does not actually confer a right not to be searched or not to be searched without a warrant. This is a very interesting case because it is one of the few cases which very clearly rejects the waiver of right theory. It is fair to say, however, that the trend of the cases seems to be going in the other direction. One approach is for the court to accept the kind of analogy to *Miranda* which the defendant attempted to make in the *Tremayne* case, resulting in the holding that a consent, at least by a person in custody, is not an understanding and knowing consent unless there is actually a showing that he was informed of his Fourth Amendment rights. Illustrative is the *Marshall* case from Michigan. Most courts, however, are not taking such a strict view. Rather, if they accept the waiver of rights approach, they nonetheless do not go so far as to adopt the *Miranda* analogy in its entirety so as to say that there must be a specific warning to the consenter. Instead, they take the position that there must either be a specific showing (and again keep in mind the burden of proof is on the prosecution) either that the defendant was advised of his Fourth Amendment rights or that he was otherwise aware of his Fourth Amendment rights. The *Witherspoon* case from Missouri is a leading case in that area. Of course, it would be possible for one to accept that general approach but then to say that a request for a consent to search always carries with it by implication notice to the person that he has a right to refuse. However, the *Bustamonte* case and others reflect a movement away from that position, although it is fair to say that it is always important to look at the precise manner in which the consent was sought. As noted in the *Leavitt* case, it may make a difference if the officer asked the defendant whether he had any objection to a particular search, for such an inquiry suggests to the defendant that his objection is significant and that the search waits upon his consent. By contrast, where the defendant is merely told by the officer that the officer would like to look in a particular place, there is not such a suggestion.

Closely related to the subject we have just been discussing is the question of whether the giving or failure to give the *Miranda* warnings to a defendant in custody has any bearing upon the validity of a consent given by that person. One line of cases, as illustrated by *Noa* and *Harris*, take the position that if the defendant was given the *Miranda* warnings and executed a valid waiver with respect to his Fifth Amendment rights, then there is nothing to the argument that the defendant was entitled to a specific warning of his Fourth Amendment rights. The somewhat questionable assumption seems to be that a warning to the 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.

But what if a defendant in custody is not given the *Miranda* warnings, or what if he is given the warnings and does not waive his

Fifth Amendment rights, after which the police obtain from him a consent to search? Under one approach, the lack of the *Miranda* warnings is held to invalidate the consent. Thus, in *Williams* it was held that "the request to search is a request that the defendant be a witness against himself which he is privileged to refuse under the Fifth Amendment," so that the failure to give the *Miranda* warnings invalidated the consent. To the same effect is the *Pelensky* case, where the court said that "the right to counsel, and the *Miranda* warning informing the accused of this right, while imposed to protect Fifth Amendment rights in *Miranda* is more pervasive. It is not linked solely to the protection of Fifth Amendment rights but applies in every "critical" stage of the proceedings. Certainly a request to produce evidence that is central to the prosecution's case is a critical stage of the proceedings against the accused. The presence of counsel is an effective check on the unknowing relinquishment of Fourth Amendment rights just as it is an effective check on the unknowing waiver of Fifth Amendment rights. Therefore, the production of evidence by an accused without the assistance of counsel or without waiver of counsel where, as in *Miranda*, the defendant is under arrest, cannot be considered a knowing and intelligent act." To the same effect is the *Fisher* case, where the defendant was given the *Miranda* warnings but then indicated that he did not wish to answer any questions and that he would like to consult with a lawyer. Notwithstanding that fact, the police had him sign a consent to search form, which resulted in the court holding that the search violated the defendant's *Miranda* rights. "The very purpose of the *Miranda* warnings are to permit a defendant to refuse further interrogation and to enable him to obtain legal advise as to his rights. The interrogating officers, in any case, when a defendant so expresses himself and lodges such a request, should not continue interrogation nor seek further to procure consensual admissions from him, whether in the form of confessions, consents to search, waiver of privilege or otherwise. The argument of course is present that *Miranda* was a Fifth Amendment case and did not countenance a Fourth Amendment search and seizure claim. This court believes a defendant's Fourth Amendment rights are encompassed by *Miranda*. No one here orally advised defendant, so far as the testimony discloses, of his right not to consent to a search. Certainly this is a vital or critical step in his case, and having asked for counsel he was entitled to advice of counsel as to the consequences of what he was doing and as to what would be required to obtain a search warrant." There is, however, authority to the contrary as represented by the *Thomas* case, where the consent to search was obtained without the *Miranda* warnings. The court observed that the answer to the problem before it depends upon whether in requesting and obtaining the defendant's consent for the search of his apartment the police violated a value which *Miranda* was designed to protect. Quoting from *Miranda*, the court says that what is subject to exclusion when a warning is not given are "statements,

whether exculpatory or inculpatory, stemming from custodial interrogation." The court then goes on to assert that a consent to search, as such, is neither testimonial or communicative in the Fifth Amendment sense, and that the giving of consent to search is more like speaking for identification or furnishing a handwriting exemplar.

Moving now to what might best be characterized as consent by deception, it is important to distinguish those cases in which the officer engages in undercover activity, and thus is not even known by the consenter to be a police officer, from those cases in which the officer's identity is known but he engages in some form of deception as to the purpose behind the search which he desires to make. Taking the undercover situation first, the leading cases are *Lewis* and *Hoffa*. In *Lewis*, an undercover agent entered the defendant's house to buy narcotics, but the court upheld this activity by stressing the fact that the defendant invited the agent in for this particular purpose so that the home was "converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business." In the *Hoffa* case, the undercover informer working with the federal agents, did not reveal to Hoffa his identity as a government informer when working his way into Hoffa's confidence. The Supreme Court held that there was no Fourth Amendment violation here in that the defendant was not relying upon the security of his hotel room when he made statements in the presence of the informer. As the informer was there by invitation, this was only an instance of misplaced confidence by Hoffa.

The *Lewis* and *Hoffa* approach has been followed by the Illinois courts. For example, you have the *St. Ives* case, where a policeman posing as a customer to a prostitute obtained entrance into her apartment. Relying on the *Lewis* case, the court quite properly held that where a home is converted into a commercial center into which outsiders are invited for the purpose of transacting unlawful business, then that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. To the same effect is the recent decision of our Supreme Court in the *Abrams* case, where the defendant and his wife decided to hold a fund-raising party to raise money for a war protest and posted public notices announcing the date, place, time, admission charge and purpose of the party at several locations. Two police officers in plain clothes went to the party and observed the sale of liquor without a license. Our Supreme Court, noting that the party was one of general public interest, that the leaflets of invitation were directed to the public at large without regard to their views on the war in Vietnam, and that the officers had paid the charge for admission, concluded that this entry by the police in their undercover capacity was lawful and thus any offenses occurring within their plain view could be testified to. The police returned to the house on a second occasion, but this time their identity was determined and they were refused admission. Thus the court concluded that the activities of the police in forcing their way into the premises on the second occasion was not lawful and that offenses observed being committed in their presence after gaining entry the second time would not be admissible into evidence. However, the court went on to hold that the acts of the various defendants in engaging in disorderly conduct, battery, aggravated assault, and interfering with a police officer, could result in their conviction notwithstanding the illegal conduct of the officers. "This testimony was admissible because we hold that an accused cannot effectively invoke the Fourth Amendment to suppress evidence of his own unlawful conduct which was in response to the police actions in violation of the amendment." At another point the court says "to countenance, through the use of the exclusionary rule, what can be regarded as an unlawful species of self-help would be to encourage unlawful and retaliatory conduct. It would set a policy fundamentally in opposition to a civilized rule of law."

Somewhat different from the cases that have just been discussed are those in which a known police officer deceives the criminal suspect as to his objectives or intentions. For example, take the *Brown* case, where a police officer, investigating the defendant for the crime of murder, upon learning that the defendant owned a gun, suggested he sell it to obtain money, and offered his services to attempt to find a purchaser. The defendant turned the gun over to the officer, who then had a ballistics test run on it, which disclosed that the gun had been used in the murder. The majority says that this situation is governed by *Lewis* and *Hoffa* and indeed suggests that this is an easier case because the defendant put the gun into the hands of one who was known to be a police officer. The dissent cogently argues, however, that those cases are different and that they stand for the proposition that a police officer may not exceed the reasonably anticipated scope of his consensual intrusion. That is, in those cases the defendant consented to actually reveal his wrong doing to another, and he took the risk that the other person would thereafter tell someone else, but here the defendant had no reason to think that he was revealing criminality to another as the gun was not handed over for the purposes of the ballistics test.

There are some other cases which seem to be more in line with this dissent. For example, in the *Graves* case, police officers obtained a blood sample from the defendant by saying that they wanted to see if he was intoxicated, but they actually wanted to check the blood type for comparison with blood that was found at the scene of a rape. The court held that in such a situation the state is limited to its stated purpose, for that is the only extent to which the defendant gave consent. Similarly, in the *Alexander* case, postal inspectors informed a 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 in *Alexan-*

der 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. It does not necessarily follow, however, that a consent is invalid unless the consenter has been informed in very precise terms as to exactly what the police are looking for. Compare with *Alexander*, the *Bailey* case, where postal inspectors approached the defendant and took him to their office with his consent indicating that they were investigating the fact that a letter he had handled that day had not been properly accounted for. He denied any knowledge of the letter and then told the inspectors that they could search his wallet. They did so and found the marked money which had been placed in the envelope in question. The defendant relied upon the *Alexander* case and asserted that his consent was obtained by trickery and fraud because there was no mention of marked money in advance. The court distinguished *Alexander*, however, by noting that here the purpose of the investigation was fully and truthfully stated, as the inspectors were indeed looking for the letter.

Somewhat related to that point is the fact that it is possible for a defendant to limit his consent in certain ways, in which case the police must confine their search to the boundaries of the consent. For example, take the *Schmoll* case here in Illinois. The defendant, a doctor, was in custody on an abortion charge, and he consented to have investigators for the prosecutor take from his office the records concerning the patient on whom it was claimed he had performed an abortion. However, the investigators did not stop there but went through other records in the doctor's office, resulting in their acquiring information concerning the doctor's performance of three other abortions. The court quite correctly held that the doctor had consented only to the search for and seizure of one of the records and that thus the others were not admissible. To the same effect is the *Dichiarinte* case. The defendant was arrested in his car for a sale of narcotics and in response to a question of whether he had any narcotics in his home he told the officers that they could go to his home and look for narcotics because he did not have any. After the search had been in progress for approximately forty-five minutes, one of the agents opened some personal papers and examined them and found that they were currency exchange receipts, which were thereafter admitted against the defendant in an income tax evasion prosecution. The court concluded that since the defendant had granted permission only to search for narcotics and inasmuch as at least some of the papers were not in plain view but had to be opened and read, and their criminal character was not being apparent on the surface, the defendant's consent did not extend to the acts of the agents in opening and reading these documents. However, do not assume from this that when consent is obtained to

search for specifically designated items that a seizure of other items is never permissible, for that is not the rule. Assuming no initial deception by the police, if they are searching for certain items and come upon other incriminating evidence within the scope of that search, that evidence may be seized under the plain view doctrine. Illustrative is the *Bretti* case, where the defendant consented to a search of his premises in response to a request which was phrased in terms of a search for furs and jewels. While conducting a search the police came upon a driver's license which connected the defendant with the robbery in question, and the court held that the license was admissible in evidence under the plain view doctrine.

I have used the phrase implied consent in the outline to cover that category of case in which an attempt is made to justify the search because the defendant chose to engage in activities notwithstanding prior notice to him that he would be subject to some search or inspection if he did engage in those activities. I suppose another way to state the government's argument here would be that the *Katz* case only protects a justified expectation of privacy and that no such expectation exists when this prior notice has been given. However, this argument has not generally prevailed, which illustrates the point that the government may not take away a person's Fourth Amendment rights simply by advance notice that such is to be done. Thus, in the *Lopez* case, the court held that a weapons search of persons boarding a plane for the purpose of preventing sky-jackings, could not be upheld solely on the ground that a notice had theretofore been posted advising everyone that they would be subject to a search if they entered the boarding area. As the court pointed out, any implied consent here would be inherently coercive, as the government cannot condition the exercise of a defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights. To the same effect are the *McCloskey* and *Watkins* cases, both concerning the search of a dormitory room of a college student. Neither a provision in the lease nor a college regulation stating that these premises would be subject to inspection was a basis for permitting the police to make a warrantless search of those premises.

But the situation may be somewhat different when the defendant is in a special category whereby he does not have precisely the same Fourth Amendment protections as the general public, as in the *Mason* case from California. That case involved the legality of a search conducted pursuant to the terms of a condition of the defendant's probation requiring him to submit to a search by police officers at any time without the necessity of a search warrant. The court upheld the validity of this condition, under which the police found the fruits of a burglary in the defendant's house, noting that in granting probation courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety, and that judges are autho-

rized to impose any reasonable conditions as they may determine are fitting and proper to the end that justice may be done and specifically for the reformation and rehabilitation of the probationer. The court then concluded that the condition imposed in this case was reasonable because it was reasonably related to the defendant's prior criminal conduct (possession of marijuana) and was aimed at detering or discovering subsequent criminal offenses, particularly in light of the high recidivism rate for narcotics offenders. As to the defendant's claim that a probation condition of this kind violates his Fourth Amendment rights, the court responded that persons conditionally released have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities reasonable which would otherwise be invalid under traditional constitutional concepts. Two members of the court dissented, observing that a denial of Fourth Amendment rights can hardly aid in the rehabilitation of a criminal offender, and that any authority to search should be limited to the probation officer, who is more aware of the necessity for surveillance in each individual case than are regular law enforcement officers.

Let us turn now to what I have designated in the outline as third party consent, the situation in which the consent in question was given by a person other than the one who ends up being the defendant in the criminal case. In those situations there are always two separate and distinct issues to be resolved. One of them is whether the consent given was voluntarily and perhaps knowingly made, which involves the factors we have already discussed, and the other is whether this particular individual was in a position to give a consent which will be effective as against the defendant. Our present concern is with the second problem.

It may be useful at the outset to note the manner in which the United States Supreme Court has handled this issue in the few cases of this kind which the court has had occasion to deal with. Let's begin with the *Stoner* case, involving consent by a hotel clerk to the search of guest's room. The Supreme Court employed an agency theory in that case. Since it was the defendant's constitutional right which was an issue, the court said that that right could be waived only by him "either directly or through an agent." In *Bumper,* on the other hand, although the court held that the grandmother's consent was not voluntarily given, it was assumed that had it been voluntary it would have been effective against the defendant because the grandmother owned the house that was searched and the rifle that was seized. The emphasis there seems to be on notions of property rather than notions of agency. Then, more recently, comes the *Frazier* case, where the court upheld the consent given by the defendant's cousin to the search of a duffel bag jointly used by the two men. The decision there was based upon the fact that the defendant "must be taken to have assumed the risk" that the cousin would allow someone else to look inside. This approach, I would suggest, is most consistent with the "new" Fourth Amendment dimensions given in the *Katz* case, where the emphasis is upon the defendant's expectation of privacy.

Turning now to the various situations, the most common situation has been that in which a spouse of the defendant has given consent, and the prevailing view is that such consent is effective. This result has frequently been reached in Illinois on the ground that the spouse has joint ownership or occupancy of the premises searched. Recently, some conflict has developed as to whether that consent will be effective when the interests of the two spouses are not identical. In the *Cabey* case, for example, the court observed: "A new and intruding element which has not been isolated heretofore may be said to distinguish a third class of cases. This element is the consenting party's agreement to the search out of motives of hostility to the other, made with the intent to harm him by an antagonistic consent. Where it is possible to identify this element a serious question would arise whether the right to consent is not spent when it reaches this point of deliberate antagonistic intrusion on the rights of the other who has an equal right to possession or control. This would be especially true where a wife intentionally acts against her husband's interest, since she would not be acting in harmony with the marital relationship from which her joint right of ownership or control is derived, but an antagonism to it." That limitation has been rejected here in Illinois and in some other states, but is is worth noting that the validity of the comments which I read to you out of the *Cabey* case depend upon the underlying theory upon which one is operating. For example, if one actually thought that these cases were to be governed by an agency type of analysis, as suggested in *Stoner,* then it could be forcibly argued that the wife is no longer the husband's agent when she is deliberately acting contrary to his interest. The argument is less forceful when one moves to a property type of analysis, but as noted in *Cabey,* there is some room for the argument that the property right is tied to the marriage relationship and thus the consent must be consistent with that relationship. However, if one moves to the assumption of the risk test of the *Frazier* case, then it does seem appropriate to conclude that one does assume the risk that a spouse might act contrary to ones own interests.

As to the parent-child situation, the courts have generally held that either the father or mother may consent to a search of the child's room in the parent's home, although it may be otherwise where the child has reached adulthood, particularly if the child is paying something in the nature of rent for the use of his room. In such a case he is more in the nature of a tenant. As to consent by a young child, the cases are in general agreement that a child may not give consent to a full-blown search of the entire premises, but does have authority to admit police and other visitors inside the house into areas where visitors are usually received.

As to the landlord-tenant and co-tenant situations, quite clearly the landlord may not consent to search of the tenant's quarters, and this is true even though the landlord has reserved some right of inspection of the premises. The landlord or any tenant may, however, permit search of areas of common usage. Co-tenants may give consent effective against each other, although careful consideration must be given to the extent of a search under such circumstances. Quite obviously two or more persons who are sharing quarters may have an expectation of privacy against each other with respect to certain private areas where their personal effects are kept. Some courts have had difficulty with the case in which the person who turns out being the defendant is standing by asserting that he does not consent while a co-tenant permits the police to make a search of the premises. Here again it may make some difference whether one is relying upon an agency or expectation of privacy theory.

In the employer-employee situation, the employer may consent to search of a work area but not to places where the employee keeps his personal belongings. This is certainly consistent with the expectation of privacy theory. A somewhat different approach may have to be taken where the nature of the employment is unusual, and thus, in the *Tidwell* case, the court properly concluded that the captain of the guards in the Cook County jail could give consent to search of one of the guard's lockers. An employee may waive his employer's rights only if he holds a position of substantial responsibility and authority as to the place searched.

As to the bailor-bailee situation, it is important to scrutinize the facts of the particular bailment carefully in order to determine what the expectation of privacy actually is. One important consideration, of course, as in the *Sartain* and *Holzhey* cases, is whether a part of the bailed goods were secured against intrusion. The vehicle cases have been particularly difficult, but as suggested by *Casey* and *Potman*, it is useful to consider again what the nature of the bailment was and particularly whether the bailee was expected to enter a certain area of the car in connection with his use of it. Perhaps the most difficult kind of case in which to apply the Supreme Court's assumption of risk theory is that in which the police do something with the bailed goods which the bailor would never have contemplated the bailee doing on his own. This point can best be illustrated by looking at the facts of two recent cases concerning items of clothing that were left at cleaning establishments. In the *Howe* case, a manager of a cleaning establishment permitted police officers to examine certain clothing that the defendant had brought in for cleaning, and upon examination it was determined that the clothing had been stolen. The court rejected the 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. Compare that situation, if you will, with the *Clarke* case, in which 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 victims clothing. The majority of that 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 that he had assumed the risk. Considering the nature of the police investigation, that seems to be stretching it a bit.

Finally, I must say a word about the apparent authority doctrine. It is illustrated by the *Gorg* case from California, where the police asked the owner of a house if they could search the premises and were given authority to do so, but it later turned out that the owner did not have all of the authority he claimed to have and that he could not give consent to search a particular room which belonged to a tenant. The California court took the position, however, that the police had made a reasonable inquiry into the authority of the owner of the house and were entitled to act on the basis of the authority which he claimed to have. This is consistent with the notion that the Fourth Amendment only prescribes unreasonable searches, which we have noted many times today is one of the two competing theories in this whole area. It should be noted that the United States Supreme Court in the *Stoner* case asserted that it would not follow "strained" applications of the apparent authority doctrine, but this is an understandable statement given the facts of that case. There the government claimed that the police could assume that the hotel clerk had authority to search a guest's room because he asserted that he did have such authority. This may be distinguished from the *Gorg* case in that in *Stoner* the situation was one of a mistake of law rather than the mistake of fact. If it is a true mistake of fact, and assuming that it is the reasonable search theory which controls, then it would seem to me that the apparent authority doctrine should prevail.

However, it has not prevailed in Illinois, as is illustrated by the *Miller* and *Rodriguez* cases. In *Miller*, the defendant was arrested for abortion at a private home where he was employed to care for a bedridden invalid. At the time of the arrest the officer asked the owner of the home if he could search an automobile in the garage, a vehicle which the officer had previously determined was registered in the name of the owner of the home. The owner gave her consent, and the officer searched the trunk of the car and discovered a bag containing medical instruments and supplies. It was established at the trial that the car was actually owned by the defendant and not by the owner of

the house. Relying upon the *Stoner* case, our court held that the articles found in the car should have been suppressed regardless of the officer's good faith in making the search and his reliance upon the consent given by the owner of the house. Similarly, in *Rodriguez,* the defendant was arrested for burglary and the police then went to his apartment and asked the woman living there (who he had previously identified as his wife) whether they could search the apartment. The woman indicated that she was not married to the defendant but that she had been living with him for some time. Given the fact that the defendant had referred to the woman as his wife and that she had told the police that she lived there, the trial court indicated that this would be a basis for finding that the woman had authority to consent. However, during the course of the trial additional facts were brought out showing that while the woman slept with the defendant there at night she actually resided with her child at her mother's home, her clothes were kept at her mother's home, and she did not pay any portion of the rent for the hotel room in which she consented to the search. Because of these additional facts brought out during the course of the trial, the appellate court held that the consent was not authorized. I would suggest that in both of these cases the police acted in an entirely reasonable fashion and that they should have been allowed to act upon the facts as the reasonably appeared to them.

Part II—Search and Seizure by Professor Bowman

I'm going to talk about stop and frisk. Before I get into the cases which are in the outline, I'd like to give you a little background of stop and frisk so you will understand why the Supreme Court's 1968 *Terry* decision was such a tremendous opinion. It has quite a long background which I'll go through quite briefly and then get into the cases.

I think the main problem in the stop and frisk area is the eternal conflict between the concern of citizens about representatives of the sovereign power interfering with their personal liberty and freedom of movement, and, on the other hand, their desire to have the same representatives protect them against the depredations of the criminal element in the community and protect them in their persons and their property. That has been an eternal conflict. And so what can the police do? How far can they go?

The early common law permitted the detention of unknown persons wandering around at night until they could satisfactorily explain whom they were and why they were abroad at night. This was carried over into the colonies in this country. Massachusetts, without formalizing it until rather recently, followed the same rule. Anyone unknown wandering around (of course, in the early days in the small communities, everyone knew everyone else) was asked by the authorities who he

was and what was he doing. I suppose that's the basic question that we talk about in stop and frisk. What are you doing? Why are you here? And yet, it has always been said that any restraint at all, any stopping of a citizen, is an arrest. You are interfering with his freedom of movement, so you have to have probable cause in the traditional sense.

When we get into investigating unusual movements of people unidentified, we expect our policemen to ask them what they are doing. If probable cause is required, how can the police operate? Although Massachusetts had an earlier formulation of it in their statute, in 1972 the Uniform Arrest Act permitted the detention without arrest for a period of up to two hours to investigate. However, the Uniform Arrest Act was only adopted in three states, Rhode Island, New Hampshire and Delaware. So it really never caught on as far as the legislatures were concerned.

In the late forties, practically all the states adopted what we now call the shoplifting statute. This statute permitted a merchant, his agent or employee, to detain a person in the store that they reasonably suspected had wrongfully taken merchandise until they could ascertain whether or not it was wrongfully taken. Most of those acts are the same today. Ours is in 10-3(c) of the Illinois Code. You will note, it says specifically that this is not an arrest. Most of the shoplifting statutes say specifically that this detention would not be an arrest. Of course, it does not require probable cause because if it did, they could probably make a citizen's arrest. In many of the states which adopted the shoplifting statutes, the constitutionality of the statutes was reviewed. None have ever been held unconstitutional. It never went to the U.S. Supreme Court. So we never had any controlling decision nationwide as to what a stop meant as far as probable cause was concerned.

During the 1950's, many of the highest courts of the states, including California and New York, held that the police have the inherent power under suspicious circumstances to stop and detain briefly a person to inquire as to his identity, where he lives, and what he is doing. This is similar to the common law. Still, there was no statutory formulation of this guideline as far as the police were concerned. But it was held by the courts to be an inherent power. In Illinois, in a couple of cases (which I'm sure you are all familiar with, although they are not in our outline) the courts indicated that the police in this State have this inherent power.

In 1963, the Joint Committee to Revise the Illinois Criminal Code, in the first tentative draft (which was publicized, and which we discussed with lawyers and people all around the State before we went to the legislature), we made a proposal which included a stop and frisk provision that, under reasonable circumstances, a law officer could

stop and detain for a reasonable time a person to inquire as to his identity and his home address, why he is where he is, and the circumstances of his presence. We didn't put in a time limit on it, but we did say any period of detention longer than four hours would be prima facie unreasonable, and therefore, it would be on the police to prove that it was reasonable to detain them longer, thinking about the early morning hours when you couldn't check out the story and might need a longer time. But at least the burden would be on the police to prove this.

We expected considerable opposition from the civil libertarians, and we weren't disappointed. We got it as soon as it was published. One thing we didn't expect or anticipate was the opposition of the Chicago Police Department as articulated by then Commissioner O. W. Wilson. They were very much opposed to it. The rest of the State, the Illinois Police Association, endorsed it. They wanted it. But the Chicago Police Department did not. Since we had a lot of other things in the Code of Criminal Procedure that we wanted to get through the legislature, we thought it best not to fight them all, so we just deleted it and never submitted it to the legislature. I suppose we should not have been to surprised at the opposition of the police, because, several years prior to that in Wisconsin, a similar provision had been defeated because the police opposed it. I think you can understand that they wanted to keep their own practices, and they didn't want any statutory formulation of it.

In 1964, the New York legislature adopted a so-called stop and frisk law. It was similar to the Illinois proposal of 1963, except they restricted it to felonies and certain specified serious offenses. In 1966, the American Law Institute Advisory Committee on Model Code of Prearraignment Procedure adopted a very detailed provision in their first tentative draft on stop and frisk. They provided for a detention of twenty minutes. But I can assure you as having been a member of that committee, even that detailed and limited provision was only adopted over the vigorous opposition of a strong minority. It never got any further. I think it was finally adopted in the final draft in some revised form, but in 1966 we didn't have *Terry*, so the final form was qualified by *Terry* in 1968.

Now, I have given you this brief outline of the background of the stop and frisk controversy so that you would understand why in 1968, just four years ago, the turmoil, controversy and confusion existed in the courts and among lawyers throughout the country.

Only the New York statute, at that particular time, specified the guidelines for the police in detaining a person short of arrest other than the shoplifting statute. One hand, the proponent said well, this is not arrest, it's only a slight intrusion into the freedom of movement, the personal liberty, and we don't need the traditional probable cause.

We can do it on suspicion. On the other hand, it was argued that any detention is an arrest, and it must be on probable cause. And so the controversy raged, and the Supreme Court had many opportunities to decide the question. Some of you may remember Patrick Henry in this community. They had a chance to decide it at that time, about 1957-58. But the government conceded that when they stopped Henry, this was an arrest. Most lawyers around the country couldn't understand why they conceded that the minute you stop a person on the street, this is an arrest. Because you stop a person for any reason, to tell him his shirt tail is hanging out, or his muffler needs fixing or something else, it is not an arrest. But the Supreme Court never decided it because the government conceeded it was an arrest.

But, finally in 1968, just a few short years ago, they did. *Terry* involved the downtown business district of Cleveland. A policeman, McFadden, with thirty years experience on the force and nineteen years as a member of the detective division, civilian clothes, patrolled that area on foot, primarily for shoplifters. But it was a high crime area, armed robberies, burglaries and so forth. About 2:30 in the afternoon, he observed two men on a corner conferring with each other. And then one of them would walk down, look through a window of a store, and go three or four paces, and then return and confer with his partner. Then his partner would walk down, look intently through the window and the doorway, and then come back. On the way back, they would peer into the window in the store. They did this six or eight times. By this time, McFadden was interested in what they were doing. He stopped, and started watching them. Then a third man came down the street. He stopped and conferred with them briefly, and then he went on down the street, peering into the store as he passed and turned the corner and disappeared.

After he had disappeared, the first two repeated the performance about three or four times. McFadden became really interested because he thought they were casing the joint to hold it up immediately or at some later time. When they walked down the street, he followed them. They turned the corner and met the third guy about halfway down the block. McFadden went up and asked them who they were and what they were doing. Terry mumbled something, not very clearly as McFadden later testified. He immediately whirled him around, patted him down, felt something hard in his topcoat pocket, reached in and pulled out a gun. Of course, then, he had all three of them put their hands up against the wall and searched the second man that Terry had been talking to. He felt a metal object, reached in and it was a gun. The third man did not have a weapon. McFadden called the police station. They were charged with unlawful possession of weapons and convicted. The Supreme Court of Ohio affirmed. The U.S. Supreme Court granted certiorari.

So in June of 1968, they decided (for the first time in all the years of the controversy about the limits of police officers' actions in stopping and delaying citizens) what the police could do. The Supreme Court in *Terry* held, "that where a police officer observes unusual conduct which leads him reasonably to conclude in the light of his experience..." (Note that) — "that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policemen and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

Rather a long sentence, but that in a nutshell is the holding of the Court in *Terry*. Note that it deals only with the search or "the frisk"; the limited search which they said is all that police can do. They said further, "We decide nothing today concerning the constitutional propriety of an investigative seizure upon less than probable cause." So they seem to be saying, we are deciding the authority to make the frisk, the limited search, but not in making the stop.

In the concurring opinion Mr. Justice Harlan says by implication they have to rule on, and they *are* ruling on, the right to make the initial stop or seizure, because how are you going to make the frisk without making the stop? They talk about initial inquiries, and to do this, you have to stop the person you are questionning.

The significance of *Terry* I suppose is, at least as far as the traditional controversy is concerned, the matter of labels. We had always said, this is not an arrest, therefore, you don't need probable cause. It is merely a stop. It is not a search because it is a mere patting down. You don't need arrest to do that. The Supreme Court in *Terry* said we don't care what labels you use, we are dealing with the Fourth Amendment protections. The Fourth Amendment does not say anything about an arrest; it does not say anything about a stop. It doesn't use the word "frisk." All that the Fourth Amendment covers is the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and that it shall remain inviolate. It then states no warrant shall be issued but on probable cause.

The Court said McFadden had no warrant in this case, so we are not dealing with the second part of the Fourth Amendment. We are only dealing with the first part, that is, is this a search or seizure; and, secondly, is it reasonable? That's all we are dealing with under the Fourth Amendment. We don't care what labels you use.

First of all, they addressed themselves to whether or not this is a seizure when you stop a person. And they said anytime you restrain a person of his freedom of movement and liberty, this is a seizure under the Fourth Amendment. We don't care whether you call it a stop or what you call it. It's a seizure. It is entitled to Fourth Amendment protections.

Secondly, when you, in public on a public street in the middle of the afternoon, in downtown Cleveland subject a citizen to patting down his outer clothing (we don't care whether you call this a frisk or search or what you call it) it comes within the protection of the Fourth Amendment. So it is a search.

Now, having disposed of that controversy which had been raging for so long, they said: But this is only the beginning of the inquiry. The next one is since we are not dealing with a warrant so we don't have to talk about probable cause, all we have to do is ask, whether it is reasonable, because the first part of the Fourth Amendment doesn't mention probable cause at all. It says the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall remain inviolate. It doesn't say anything about probable cause. So they said the question is whether or not this search was reasonable. And then they went on to say what I just read, that under the circumstances this is reasonable.

This opinion left a lot of questions to be answered. I will briefly try to run through some of them. They are all in your outline and are grouped so that you can see the areas of problems that we still have.

On the same day, they decided two other cases, companion cases, *Sibron* and *Peters*. *Sibron* involved a narcotics pusher known to the police. The police officer on patrol during his shift followed him around for about eight hours, and noticed that he talked to a number of known narcotics users. Finally, he went into a little cafe or roadside restaurant, talked to a couple in there, and then started eating. The officer went in and said, "Step outside, I want to talk to you." As they got outside, the officer said, "You know what I want." Sibron said, "Yes." And he started to reach into his inside jacket pocket. The officer reached in and pulled out an envelope. He opened it. It contained narcotics.

The Supreme Court reversed. They said he did not have probable cause to arrest Sibron. All that he had observed was Sibron just talking to other people, known addicts, of course. Maybe Sibron was an addict too. But there was nothing that would lead to probable cause in that. So he had no probable cause to arrest. He did not arrest him. He did not do what they had specified in *Terry*, which involves a two stop procedure. They emphasized (this is *Terry*) that first you have to pat him down. That's the first step, the patting down of the outer clothing

regardless of what you call it, frisk in the terminology of the police. Then, if you feel something that feels like a weapon, then you are entitled to reach in, as McFadden did in *Terry*. You can reach in under the surface of the outer clothing and extract the object. But the Supreme Court said in *Sibron*, the police officer didn't do this. He didn't pat Sibron down at all. He just reached in and pulled the envelope out. And obviously, Sibron didn't have a weapon when the police officer got the envelope. Yet the police officer went ahead and opened the envelope.

The other companion case decided the same day was *Peters*. This involved a New York policeman off duty in his apartment on the seventh floor of an apartment building. He heard some noises outside. He had just stepped out of the shower. He opened the door, looked out. He saw two strange men tiptoeing around, listening at the door of the apartment opposite his. He had never seen them before. He had lived there for about five or six years. So he got suspicious. He went back, called the police, dried himself, put on some clothing, got his service revolver, went back, opened the door. They were still tiptoeing around. When they saw him, they started running, headed for the stairway. He chased them, and caught one of them on about the fifth floor. He quickly patted him down, felt something hard, reached in, pulled it out. It was burglary tools.

The Supreme Court majority said that he had probable cause to arrest the man at that point. They didn't really deal with the case on the stop and frisk basis, although a couple of the concurring justices indicated that even if he did not have probable cause to arrest under *Terry*, which they decided the same day, he should have investigated. He should have patted him down because he suspected burglary, robbery or something else. When he felt something hard, he should have investigated further, even though it turned out not to be a weapon, but burglary tools. He had a right then to charge him with possession of this contraband or illegally possessed articles. Peters was convicted. The Supreme Court affirmed the conviction.

This emphasizes two things again. Even though *Peters* was based on probable cause to arrest, he didn't arrest Peters. He just stopped him, grabbed him, patted him down, reached in, got the burglary tools. He didn't say "You are under arrest," or anything else. But when he forcibly stopped him, I guess he was under arrest. But under *Terry*, it would have been a stop rather than arrest. And that was one of the problems that some of the concurring justices had.

Within two months after *Terry*, the Illinois legislature adopted a stop and frisk statute. It was approved by the Governor and became effective on August 21, 1968. The stopping part of it is contained in section 107-14; the frisk is in 108-1.01 of the Code of Criminal Procedure. The stop provision provides that when a peace officer "reasonably infers" from the circumstances that a person has committed, is committing or is about to commit an offense, he may detain him for questioning and inquire of his identity, his residence, and an explanation of his actions. It specifies that the questioning must take place in the area of the detention and it has no time limit. It just says he may detain him.

The frisk portion, section 108-1.01, says when he "reasonably suspects." I don't know why in one they said when he "reasonably infers," and in the other they said when he "reasonably suspects" that he is in danger, he may frisk the person for weapons. We wondered about that, whether or not it was more restrictive or more expansive then *Terry* or whether it attempted to be.

Sometime in 1971, it finally got the the Illinois Supreme Court. In *People v. Lee*, the Illinois Supreme Court says the Illinois provisions are not more restrictive and not more expansive than the holding in *Terry*. You don't have to worry because of the difference in language that is used in our statute. You still go back to *Terry* and the language used there and what is permitted by *Terry* because our statute as interpreted by the Illinois Supreme Court is not intended to be more restrictive or expansive than *Terry*.

Having said this, it still leaves some questions. I'm going to run through them briefly. You have the citations in the outline. I might say first under temporary seizure for investigation, the grounds are reasonable belief that criminal activity may be afoot. In what respect does this differ from the probable cause required for an arrest? Our courts just say probable cause exists when, under the circumstances, a reasonably prudent man would come to the conclusion that a crime has been committed or is being committed, and the person to be arrested has committed it.

How does the test for a stop differ from probable cause? Because the Supreme Court said that something less is required than that which is needed for the traditional arrest, which they recognized as being the taking of a person into custody so that he may be forthcoming to answer for the commission of an offense. Some of you may recall that that's the way we submitted the definition of arrest before the legislature in 1963. They always have to amend things, so they amended it and said an arrest is taking a person into custody. Policemen take people into custody a lot of times, take them to the hospital for their own treatment and so forth. It is not arrest. They don't intend to hold them to answer for an offense. And the Supreme Court recognized this difference, that arrest traditionally is the taking into custody so that he may be forthcoming to answer for the commission of an offense or a alleged offense. They said that traditionally the probable cause, or the probability required, is that it must be more probable than not that a crime has been committed, and that the person to be arrested has committed it.

Now, what does a stop entail? What degree of probability? The Supreme Court in *Terry* said a substantial probability. They didn't say more probable than not. They merely said a substantial probability. And, of course, many writers and authors and courts have speculated on this. Might be as low as thirty-three percent instead of fifty-one percent for arrest? It has to be more probable than not, which means at least a minimum of fifty-one percent probability that a crime has been committed and that he has committed it. A stop, may be thirty percent, thirty-three percent, maybe even twenty percent. That is a substantial probability.

So we are dealing with a relative concept. And the Supreme Court never said what degree, they just said a substantial probability. And you can make your own decisions when it comes before you as to what, under all the circumstances, constitutes a substantial probability. Something else they said about McFadden, they said he would have been derelict in his duty if he had not investigated further this peculiar behavior. People window shop. That's what windows are for. But this was very peculiar; a man of his experience would have been derelict if he didn't investigate further. As the cases come before you, you can think whether the policeman should have looked into this further or shrugged his shoulders and left? Well, I'll get into that now.

First of all, you have information from a known but untested informant. Not a reliable informant, not one that has given reliable information in the past, but you know him. In the *Boykin* case, an assistant principal of the school said one of the boys had a gun. He had never given reliable information before. The Illinois Supreme Court said why would he say that one of the boys had a gun unless he had reason to suspect it. Why would he tell police officers this? So they said that the officers had a basis to wait for the boy when he came out of his classroom and to frisk him.

The *Mason* case involved telephone information from a service station owner. But there he said they *may* have narcotics on them in a certain location in the car. The chief of police went there. He said that he knew the service station owner, and he had given information to officers before, but the chief, personally had never received any. So as far as he was concerned the station owner wasn't a reliable informant. The chief went out, found the guy. He didn't question him or anything, and he didn't frisk him. He just arrested him, took him down to the station. Down there, they searched him and found marijuana on both the driver and the passenger. I put it in the outline *not* because it is a stop and frisk case; but because of the next case, an anonymous informer. In *Mason*, if the chief had started talking to him first and asked him some questions and then frisked him, would this have been valid? Well, the problem there is because in *Terry* we were dealing with weapons, we were dealing with the possibility of violent crimes.

And some courts have said that *Terry* only deals with violent crimes. In going back to *Sibron*, he is not going to hurt you with a couple of pills or some heroin. You only have a right to frisk when you think you are in danger. So if it is not a violent crime involved, you have no right to frisk. This is what Justice Fred Lee said in *Williams v. Adams*. This was a case of a tip from an anonymous informant. He called the police and said this guy has a gun and he has narcotics on him. You notice the two. Now, as far as the gun is concerned this is violent. Somebody might get hurt. The police didn't know who called.

Ordinarily, a policeman would say why should I go out chasing down these things, it's probably a rumor or somebody just trying to make trouble. But anyway, they went out. They found Williams and his passenger friend. They frisked Williams, located a gun in his waistband, which they took. This is in Bridgeport, Connecticut. They placed him under arrest. Then, of course, they made a search incidental to the arrest, in which they found narcotics in his clothing and under the floorboards of the car, and under the floorboards, they also found another pistol and a machete.

This was on an anonymous tip, no reliable informant or anything else. The District Court in which Williams brought *habeas corpus*, affirmed his conviction and dismissed the *habeas* petition. The Court of Appeals of the Second Circuit reversed, and said the officers had no probable cause. This was not a reliable tip. The probability of finding the thing was not very great. He just had no reason to do it. It went to the Supreme Court, and last Monday, on June the 12th, 1972; the U.S. Supreme Court reversed the Court of Appeals, and affirmed the conviction. I haven't seen the opinion yet.

Mr. Justice Rehnquist wrote the opinion for the majority six to three opinion. (I won't tell you who dissented; you can guess if you want to.) Rehnquist said, "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." In *Mason* where the chief of police arrested the chap, you might wonder, well, if he had first made a couple of inquiries and frisked him, wouldn't this be valid under *Williams? Williams* is an important decision. I hope you get a chance, as soon as you can, to read it. I'm looking forward to reading it to see exactly what they held, because narcotics was involved, also. And as I mentioned, Judge Friendly, in his dissent in the Court of Appeals said, "I would have great reluctance to hold that *Terry* applies to a nonviolent crime", meaning narcotics. And so we have that problem, the same thing that *Terry* points up. They said in *Terry* we hold nothing today in regard to what is necessary for a seizure unless it is probable cause. Well, does this mean, taking all the cases together (cases that have followed, and analyzing *Terry*) we have a case when they

say criminal activity is afoot? Is dispensing drugs and pushing drugs criminal activity? May you have cases where you can stop and question, not for a violent crime, where you are entitled to frisk? But do you still have a right to seize and question in regard to a crime that has been committed, is being committed or is about to be committed, which is nonviolent in nature—simple theft, shoplifting, that type of crime? We give them authority to do that in the shoplifting cases and in shoplifting statutes; and that's nonviolent. So what I'm suggesting to you is that the problem that we still have remaining (which the Supreme Court has not answered) is: Do we have types of criminal activities that are not violent in nature where a frisk would not be authorized, which cause danger to the officers, but where you still have a right to stop the person and investigate in order to prevent a crime or to apprehend a criminal? And I suggest that you give serious consideration to this because it may well be that officers have the right to frisk, and I think they should, because the Supreme Court said, "Wherever criminal activity may be afoot." This doesn't involve just violent crimes, as many judges, and Judge Friendly, whom I respect very highly, suggested. I think you can have a stop without a frisk, but how can you have a frisk without a stop. I have difficulty with that, even though in *Terry* they said that is what they were holding. But I do think you can have a stop without a frisk. I get into trouble with that second part of it.

I'm going to skid over the other ones in part "C" of the outline.

What I want to get to is the airline hijacker case, *Lopez*, on the implied authority aspect. Airlines hang a big sign, "Passengers May Be Searched," and when the passenger attempts to go aboard a plane, does he thereby consent to search. That is one aspect of *Lopez*, which was covered yesterday. But there are other aspects. Actually, airline employees stopped Lopez after their magnetometer detected him carrying metal. And remember now these are airline employees, not law enforcement officials. They stopped him; restrained him of his liberty and freedom of movement. They called a couple of U.S. Marshalls assigned to the anti-skyjacking detail, who then escorted him very courteously to a nearby private room without any questioning. They frisked him. You do have a stop. You do have a frisk. But you don't have any initial inquiries which were mentioned in *Terry* where the Court said, "and where the initial inquiries do not dispel the officers' fears, then he may conduct a limited search." In *Lopez*, you didn't have any initial inquiries. And some courts have wondered if this is necessary. Do you have to make any initial inquiries? In *Lopez*, they just frisked him. They felt in his inside jacket pocket a metal container. They pulled it out, a little metal container about six inches long. They opened it. It had narcotics inside. They charged him with illegal possession. He was convicted. The question on a motion to suppress was whether the whole operation was illegal.

At the hearing on the motion to suppress, a psychologist who had been active in the government's program for devising their anti-skyjacking program, testified. He said that together with the use of the magnetometer to detect metal carriers, they had developed a profile of hijackers or possible hijackers. They trained the airline employees in the use of this profile. First they detect the metal carriers. Then they use a profile to determine whether they should be frisked and further detained. Then he gave some actual statistics. He said of an actual sample application of five hundred thousand passengers boarding planes, the magnetometer detected fifty percent, which would be two hundred fifty thousand metal carriers. By use of the profile, .05 of this number of metal carriers were actually frisked. That would be twelve thousand five hundred that were actually frisked. Of this number, one out of fifteen or approximately six percent, that is .06 percent, actually had weapons, which would come down to seven hundred fifty. Out of five hundred thousand, only seven hundred fifty actually carried weapons. Such a small percentage that it almost looks like a dragnet operation. You go out and you inconvenience all these people just to get a small percentage that might be violating the law.

Well, in *Lopez* the court took note of these statistics, and then they went back to *Terry* in which the Supreme Court used the balancing test that they did in *Camera*, which was one of the health inspector cases. In balancing the inconvenience to the citizen against the possible hazards that might result from lack of further investigation, the court in *Lopez* says it is just common knowledge — I don't think they used the word judicial notice, but they said it is just common knowledge that the hijacking that we are having involves dangers to innocent people, the passengers, and to the crew. The hazards are so great that in balancing, the inconvenience to the citizen is very light, because most passengers are willing to be frisked and searched. They said that with the profile, even though a small percentage carry weapons, that it is okay to stop and frisk. But then in *Lopez*, the airline, had changed the government's system by their own directive, which they had issued, they had altered the profile, which actually weighted it in favor of watching for blacks, for Cubans, for Latin Americans, Chicanos, so it was weighted against a certain class. For that reason, the court in *Lopez* said: No, you can't use that. If you had used the government profile as it was devised, even with the small percentage, that would have been all right. But when you weighted it against a certain class, there is no reason for that.

I would like to discuss brief detention at the station. We say in our statute, section 107-14, that the questioning shall be done in the area in which he is detained. What if they take him down to the station to question him or for a lineup or fingerprinting? They haven't placed him under arrest. They don't have probable cause. What I'm talking about is contrary to what we have always discussed before

about arrests and probable cause. I'm saying you don't have probable cause; because if they did, they would arrest him.

How can they interfere with his freedom of movement? Well, first of all, *Davis* v. *Mississippi*, for fingerprinting. This was a rape of an elderly lady down in Mississippi, one of the rural counties. She could only describe her assailant as a young black male. They lifted a fingerprint off of the windowsill, and it didn't check out with any that the FBI or anybody else had. So they were just looking for somebody that would match the fingerprint. So what they did was to pull in all of the young black males in the county, which in this particular rural county was quite a number. They pulled them all in and fingerprinted them. Davis' fingerprints matched the one that was on windowsill. The U.S. Supreme Court reversed this conviction. They said that fingerprinting is an accurate method, probably the most accurate method of identification. But they said they had no reason at all to suspect Davis or any of the other young black males when they dragged them in. So this in effect is a dragnet. You just can't use this type of operation to find someone that may have commited a crime. They reversed.

The next one is for questioning, the *Morales* case. There they took Morales down to the station, not under arrest. They told him he wasn't under arrest. But they gave him his *Miranda* warnings. You don't have to talk if you don't want to, and if you don't want to talk, you can leave. They gave him the whole *Miranda* warnings. And then they started questioning him. And shortly thereafter, he confessed.

The court said this was all right. They didn't have probable cause to arrest. It is true they had him down at the station, but they had a reason for questioning him under *Terry*. All he had to do was say I don't want to answer any questions and leave. He didn't. He agreed to answer questions, and he confessed. They said that was all right.

Wise v. *Murphy* for a lineup. There the magistrate issued an order for a lineup in a rape case after a person had been identified from photos. That is, the victim looked at a bunch of photos and said, "I think this is the man". She wasn't too sure. They went out, picked him up, brought him in. Put him in a lineup of six or seven other fellows. This is not the case they mentioned in *Wade*, where in a rape case they were talking about the suggestive nature of lineups may be fatal. I'm sure you will recall this. They mentioned one rape case in which they had a lineup of seven people, and six of them had pants on. But in *Murphy*, they said that this is really similar to *Davis*. It's a kind of fishing expedition. The magistrate really did not have sufficient cause to issue the order to bring in Wise and put him in a lineup.

In *Biehunik*, the police commissioner of Buffalo, New York, ordered a lineup of sixty-two policemen in order to determine whether or not they were the ones who had committed brutal acts on people in an apartment building from which a sniper had fired on the police. Then

they had raided the apartment building. Some of them were accused of brutality. The commissioner ordered all that were in the vicinity on duty, all sixty-two of them, to lineup and to appear in uniform. The policemen obtained an injunction against the lineup. The high court reversed it and said, here you are not really dealing with prosecution, you are dealing with disciplinary action. Also, the image of the police is such that they should try to identify the particular ones engaged in this unpolicemanlike conduct so that the others will not be falsely accused. So the commissioner had reasonable cause or a reason to order the lineup, and they should do it, even though they didn't know precisely which of the sixty-two had done it.

Dionisio concerned voice exemplars for the grand jury investigation, to compare with other wire tampering recordings that they had. The court refused it and said no, your jury is on a fishing expedition here because the grand jury really doesn't have any evidence as to whether or not these are the people that did it. And it's very similar to *Davis*. It's just a dragnet type of thing where you are bringing people in trying to find somebody who did it.*

Bailey, which is a Chicago case, handwriting samples. This was a conspiracy to defraud the U.S. Government in the E.O.C. funding, funding Chicago street gangs. Some were charged with conspiracy, others were charged with other offenses. They sought a court order for certain of the defendants, not all twenty-three of them, but certain ones to give handwriting samples so they could compare them with forged instruments. The court refused to issue the order. They said you are just on a fishing expedition. These people are charged with conspiracy. They are not charged with forgery. And what you are trying to do, just as in *Davis*, you are bringing them in and you are trying to do things which are really just fishing expeditions. You are trying to get evidence against people that you don't have, as McFadden did in *Terry*. You con't have that reasonable or substantial probability that this particular person has done anything. And I suggest that in all of your cases you have to make this distinction; that's the reason I wanted to get to this group of cases, that there is a distinction. You just can't go out and stop everybody in the block and search them or frisk them. But you can't do that under *Terry*. You have to have some substantial probability, whether it's twenty-five or thirty or thirty-three percent or forty percent. But you must have some substantial probability that this person is engaged in or about to engage in, or has engaged in criminal activity. And you can't go on this *Davis* dragnet type of thing to bring in innocent citizens to try to get evidence to convict him.

Thank you very much.

*Reversed on a writ of *certiorari*, *U.S.* v. *Dionisio*, 410 U.S. 1 (1973); concerning handwriting exemplars ordered by the grand jury see *U.S.* v. *Mara*, 410 U.S. 19 (1973).

Part III—Search and Seizure Lecture Outline

NOTE: Last year we distributed an outline dealing with all aspects of this subject, but we only had an opportunity to discuss with you certain matters (i.e., protected areas and interests, probable cause, search warrants, search incident to arrest). What follows is an updating of the last portion of that outline, covering the topics we will be discussing with you today. The cases cited are leading cases or cases which contain particularly helpful discussion of the issues involved.

I. "CONSENT" SEARCHES

A. General considerations.

1. Burden of proof: notwithstanding Code § 114-12, burden is on prosecution, Bumper v. N.Car., 391 U.S. 543 (1968).

2. Nature of the inquiry: is it the state of mind of the person allegedly consenting, under a waiver-of-rights theory, as suggested, e.g., in Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971); or is it whether "the officers, as reasonable men, could conclude that defendant's consent was given," under a reasonable-search theory, as in P. v. Henderson, 33 Ill.2d 225, 210 N.E.2d 483 (1965); Supreme Court has not opted, see, e.g., Bumper v. N.Car., supra. Choice of theory can determine outcome; see U.S. v. Elrod, 441 F.2d 353 (5th Cir. 1971).

B. The nature of consent; the relevant factors.

1. Claim of lawful authority: Bumper v. N.Car., supra.

a. Statement by officer that he is there to search: Amos v. U.S., 255 U.S. 313 (1921).

b. Presence of many police: U.S. v. Alberti, 120 F.Supp. 171 (S.D.N.Y. 1954).

c. Appearance at night: U.S. v. Roberts, 179 F. Supp. 478 (D.D.C. 1959).

d. Invalid search warrant: P. v. Reid, 315 Ill. 597, 146 N.E. 504 (1925), or false claim of warrant, Bumper v. N.Car., supra; except where response is no warrant needed, P. v. Wetherington, 348 Ill. 310, 180 N.E. 843 (1932).

e. Threat to obtain search warrant: compare P. v. Magby, 37 Ill.2d 197, 226 N.E.2d 33 (1967) (not coercive) with U.S. v. Boukater, 409 F.2d 537 (5th Cir. 1969) and Simons v. Bomar, 230 F.Supp. 226 (M.D.Tenn. 1964) (coercive unless there was probable cause or it was only said they would seek a warrant).

2. Prior illegal police action.

a. Illegal arest, then consent to search of person: P. v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930). To search of premises: P. v. Haven, 31 Cal. Rptr.47, 381 P.2d 927 (1963).

b. Illegal search, then consent to further search: P. v. Clark Memorial Home, 114 Ill. App.2d 249, 252 N.E.2d 546 (1969).

3. Mental or emotional state of the person. P. v. Lind, 370 Ill. 131, 18 N.E.2d 189 (1938).

4. Custody of person and circumstances thereof.

a. Arrest a factor which makes prosecution's burden particularly heavy, e.g., P. v. Kaigler, 368 Mich. 281, 118 N.W.2d 406 (1962). But, while federal courts say "consent" by one in custody almost per se invalid, Judd v. U.S., 190 F.2d 649 (D.C.Cir. 1951), this view not generally taken by state courts: P. v. Peterson, 17 Ill.2d 513, 162 N.E.2d 380 (1959).

b. Circumstances of custody: P. v. Zazzetta, 27 Ill.2d 302, 189 N.E.2d 260 (1963) (defendant handcuffed; keys taken from him).

5. Cooperation of the person or lack thereof.

a. Cooperative attitude: consenter as victim, P. v. Shambley, 4 Ill.2d 381, 122 N.E.2d 172 (1954); consenter seeks to clear another, Coolidge v. N.H., 403 U.S. 443 (1971); consenter has confessed, Whitley v. U.S., 237 F.2d 787 (D.C.Cir. 1956); consenter aiding in apprehending others, P. v. Rogers, 8 Ill.2d 279, 133 N.E.2d 16 (1956); consenter assists in search. P. v. Mathews, 406 Ill. 35, 92 N.E.2d 147 (1950).

b. Lack of cooperation: denial of guilt, Higgins v. U.S., 209 F.2d 819 (D.C.Cir. 1954), except where it believed evidence will not be discovered, Grice v. U.S., 146 F.2d 849 (4th Cir. 1945).

6. Warning by police of Fourth Amendment rights.

a. In Illinois: no absolute requirement that in-custody consenter be advised, P. v. Rhodes, 41 Ill.2d 494, 244 N.E.2d 145 (1969); P. v. Ledferd, 38 Ill.2d 607, 232 N.E.2d 684 (1968); failure to give such advice a factor bearing on understanding nature of consent, P. v. Haskell, 41 Ill.2d 25, 241 N.E.2d 430 (1968).

b. Elsewhere: (i) no right to warnings, on ground this not a waiver of rights situation, P. v. Tremayne, 20 Cal.App.3d 1006, 98 Cal.Rptr.App. 193 (1971); (ii) duty to inform of rights, P. v. Marshall, 25 Mich.App. 376, 181 N.W.2d 578 (1970); (iii) middle ground: record must show that consenter was advised or that he otherwise knew of rights, S. v. Witherspoon, 460 S.W.2d 281 (Mo. 1970), and mere asking for consent not sufficient, Bustamonte v. Schneckloth, supra, tho it may depend upon how the question is put, Leavitt v. Howard, 332 F.Supp. 845 (R.I. 1971).

7. Warning by police of Fifth Amendment rights.

   a. As a substitute for warning of Fourth Amendment rights: U.S. v. Noa, 443 F.2d 144 (9th Cir. 1971); U.S. v. Harris, 453 F.2d 1317 (8th Cir. 1972).

   b. Lack of warnings or no waiver after warnings as rendering consent ineffective: S. v. Williams, 432 P.2d 679 (Ore. 1967); U.S. v. Pelensky, 300 F.Supp. 976 (Vt. 1969); U.S. v. Fisher, 329 F.Supp. 630 (Minn. 1971). Contra: P. v. Thomas, 12 Cal.App.3d 1102, 91 Cal.Rptr. 867 (1970).

8. Consent by deception.

   a. Undercover activities: Lewis v. U.S., 385 U.S. 206 (1966); Hoffa v. U.S., 385 U.S. 293 (1966); P. v. St. Ives, 110 Ill.App.2d 37, 249 N.E.2d 97 (1969); P. v. Abrams, 48 Ill.2d 446, 271 N.E.2d 37 (1971).

   b. Deception as to purpose: C. v. Brown, 437 Pa.1, 261 A.2d 879 (1970); Graves v. Beto, 424 F.2d 524 (5th Cir. 1970); Alexander v. U.S., 390 F.2d 101 (5th Cir. 1968); U.S. v. Bailey, 447 F.2d 735 (5th Cir. 1971).

9. Scope of consent: P. v. Schmoll, 383 Ill.280, 48 N.E.2d 933 (1943); U.S. v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971) (search limited to items police said they were seeking); but see Bretti v. Wainwright, 439 F.2d 1042 (5th Cir. 1971) (other incriminating items can be seized if found within search of proper scope).

10. "Implied" consent: Compare U.S. v. Lopez, 328 F.Supp. 1077 (E.D.N.Y. 1971) (boarding plane); McCloskey v. C., 217 Pa.Super.432, 272 A.2d 271 (1970) (lease provision); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971) (college regulation); with P. v. Mason, 5 Cal.3d 759, 488 P.2d 630 (1971) (condition of probation).

C. Third-party consent.

1. The Supreme Court.

   a. Stoner v. Calif., 376 U.S. 483 (1964): hotel clerk could not consent to search of guest's room; Court emphasized that it defendant's constitutional right which in issue, which only he could waive "either directly or through an agent."

   b. Bumper v. N.Car., supra: though grandmother's consent was held coerced, Court seems to assume that she could have given consent effective against defendant in that she owned house searched and rifle seized.

   c. Frazier v. Cupp, 394 U.S.731 (1969): defendant's duffel bag being used jointly by him and cousin, kept at cousin's house; held, cousin could consent to search of entire bag, without regard to whether they had separate compartments: decision based on fact that defendant "must be taken to have assumed the risk that [the cousin] would allow someone else to look inside." (Note relationship to Katz expectation-of-privacy test.)

2. The situations.

   a. Husband-wife. Most courts hold spouse may consent, e.g., C. ex rel. Cabey v. Rundle, 432 Pa.466, 248 A.2d 197 (1968), some contra, S. v. Hall, 264 N.C.559, 142 S.E.2d 177 (1965). As to former, most rely upon joint ownership or occupancy theory, e.g., P. v. Koshiol, 45Ill.2d 573, 262 N.E.2d 446 (1970), implied authority of other spouse. Consider significance of these when spouse calls in police because angry at husband, compare U.S. ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970), with C. v. Martin, 264 N.E.2d 366 (Mass. 1970), and P. v. Koshiol, supra, or where wife permits search into husband's personal effects, S. v. Evans, 372 P.2d 365 (Hawaii 1962). As to paramour, see P. v. Smith, 108 Ill.App.2d 172, 246 N.E.2d 689 (1969).

   b. Parent-child. Parent may consent to search of child's living quarters, P. v. Stanbeary, 126 Ill.App.2d 244, 261 N.E.2d 765 (1970) (father); P. v. Thomas, 120 Ill.App.2d 219, 256 N.E.2d 870 (1969) (mother); but consider where "child" has reached adulthood, S. v. Kinderman, 136 N.W.2d 577 (Minn. 1965). Child cannot consent to full search of house, P. v. Jennings,

142 Cal.App.2d 160, 298 P.2d 56 (1956); but may admit police as other visitors, Davis v. U.S., 327 F.2d 301 (9th Cir. 1964).

c. Landlord-tenant; co-tenants. Landlord may not consent to search of tenant's quarters, Chapman v. U.S., 365 U.S. 610 (1961), but may permit search of areas of common usage, Gillars v. U.S., 182 F.2d 962 (D.C.Cir. 1950). Co-tenants may give consent effective against each other, P. v. Walker, 34 Ill.2d 23, 213 N.E.2d 552 (1966), but consider how extensive that search may be. And what if other party is present and objects? See Dorsey v. S., 2 Md.App.40, 232 A.2d 900 (1967); Tompkins v. P., 59 Cal.2d 65, 27 Cal.Rptr. 889, 378 P.2d 113 (1963).

d. Employer-employee. Employer may consent to search of work area, but not places where employee keeps personal belongings, U.S. v. Blok, 188 F.2d 1019 (D.C.Cir. 1951), except where high-security employment, P. v. Tidwell, 133 Ill.App.2d 1, 266 N.E.2d 787 (1971). Employee may waive employer's rights only if he holds position of substantial responsibility and authority as to place searched, Annot., 31 A.L.R.2d 1078, 1088-91.

e. Bailor-bailee. Depends upon facts of particular bailment, extent to which control surrendered, and particularly extent to which bailee had access to particular area searched. Compare Sartain v. U.S., 303 F.2d 859 (9th Cir. 1962) (surrender of briefcase and key), with Holzhey v. U.S., 223 F.2d 823 (5th Cir. 1955) (locked cabinets). Car cases difficult; consider Casey v. U.S., 191 F.2d 1 (9th Cir. 1951) (car left with attendant in public garage; Potman v. S., 259 Wis. 234, 47 N.W.2d 884 (1951) (car left with repairman). On extent to which bailor assumes the risk, compare S. v. Howe, 182 N.W.2d 658 (N.D.1970); with Clarke v. Neil, 427 F.2d 1322 (6th Cir. 1970).

f. Apparent authority. See P. v. Gorg, 45 Cal.2d 776, 291 P.2d (1955), holding police entitled to assume owner of house had authority to search room he purported to have, thus it not relevant whether person using room in fact a tenant, servant, or guest. Compare Stoner v. Calif., supra, where Court rejected "strained" application of apparent authority doctrine. Query if Stoner requires results reached in P. v. Miller, 40 Ill.2d 154, 238 N.E.2d 407 (1968); P. v. Rodriguez, 79 Ill.App.2d 26, 233 N.E.2d 414 (1967).

II. STOP AND FRISK: OTHER BRIEF DETENTION

A. Stop and frisk and the Supreme Court.

1. Terry v. Ohio, 392 U.S. 1 (1968): officer suspected three men were casing store for robbery, approached them and asked questions but received only mumbled response, patted them down, found weapons; weapons admissible.

2. Sibron v. N.Y., 392 U.S. 40 (1968): officer saw suspect in area frequented by addicts for eight consecutive hours, saw him talk with addicts; officer called him out of restaurant and told him he knew what officer was after, officer reached in suspect's pocket as suspect did; heroin found not admissible.

3. Peters v. N.Y., 392 U.S. 40 (1968): in apartment building where he lived, officer saw strangers tip-toeing, seized one when they fled, found burglary tools in opaque envelope; tools admissible, but upon ground that lawful arrest made.

4. Adams v. Williams, 407 U.S. 143 (1972): Frisk of person seated in car undertaken by officer after informant told him that the suspect was carrying narcotics and had a gun at his waist; weapon found in frisk admissible, and narcotics later found admissible on ground that they were discovered in a search incident to arrest.

B. Stop and frisk in Illinois: Our statutes, Ill. Rev. Stat. ch. 38, § 107-14, Ill. Rev. Stat. ch. 38 § 108-1.01, are not more restrictive: P. v. Lee, 48 Ill.2d 272, 269 N.E.2d 488 (1971).

C. Temporary seizure for investigation.

1. The grounds: reasonable belief "that criminal activity may be afoot" (Terry). In what respect does this differ from the grounds for arrest? See 67 Mich.L.Rev. 40, at 73-75 (1968), suggesting that while arrest usually (but not always) requires a more than 50% probability that a crime has been committed and that this person committed it, a stopping is permissible on a "substantial possibility" that a crime has been committed and that this person is responsible.

a. Known but untested informant: cf. In re Boykin, 39 Ill.2d 617, 237 N.E.2d 460 (1968) (information that student in school had a gun); P. v. Mason, 1 Ill.App.3d 302, 274 N.E.2nd 216 (1971) (telephone information from service station owner).

b. Anonymous informant: P. v. Taggart, 20 N.Y.2d 335, 283 N.Y.S.2d 1 (1967) (anonymous call that man on street with children had gun).

c. Information from victim or witnesses; problem of general description: P. v. Mickelson, 59 Cal.2d 448, 30 Cal.Rptr. 18, 380 P.2d 658 (1963) (suspect stopped in car 20 minutes after and 6 blocks away from supermarket robbery on basis of tall man-dark hair-red sweater description); P. v. King, 175 Cal.App.2d 386, 346 P.2d 235 (1959) (car stopped 2 miles from robbery on basis of description that robbers fled in dirty two-tone green car with loud muffler); C. v. Hicks, 209 Pa.Super.1, 223 A.2d 873 (1966) (description that burglar was Negro with brown coat and mustache held to justify stopping of Negro in light coat and needing shave 5 blocks away); P. v. Staples, 1 Ill.App.3d 922, 275 N.E.2d 259 (1971) (stop-frisk 6 days after general description from robbery victim).

d. Calls for assistance: Bell v. U.S., 280 F.2d 717 (D.C.Cir. 1960) (cry for help, stopping of man running out of nearby alley); U.S. v. Zemke, 457 F.2d 110 (Ind. 1972) (officer stopped to assist cyclists, took cycles to gas station to check serial number).

e. Direct observation; problem of whether activity may be criminal: compare P. v. Henze, 253 Cal.App.2d 986, 61 Cal.Rptr. 545 (1967) (sitting in park dividing up coins no basis for stop);with P. v. West, 144 Cal.App.2d 214, 300 P.2d 729 (1956) (suspect carrying large bundle of clothing carelessly wadded together while staying in the shadows); Brooks v. U.S., 159 A.2d 876 (D.C. 1960) (men known to have prior larceny convictions observed carrying record player with store tags on it); U.S. v. Lewis, 362 F.2d 759 (2d Cir. 1966) (suspect carrying carton which appeared to have come from nearby railway express terminal, at 1:15 a.m.).

f. Airline hijacker detection system: U.S. v. Lopez, 328 F.Supp. 1077 (E.D.N.Y. 1971).

2. Other possible limitations.

a. Nature of the crime: is Terry applicable only to crimes of violence? Williams v. Adams, 436 F.2d 30 (2d Cir. 1970); S. v. Goudy, 479 P.2d 800 (Hawaii 1971); Harless v. Turner, 456 F.2d 1337 (Utah 1972).

b. Crime prevention v. crime detection: is Terry applicable only to former? Williams v. Adams, supra; S. v. Goudy, supra.

D. Protective search.

1. The grounds.

a. Reasonable belief that "the persons with whom he is dealing may be armed and presently dangerous" (Terry): nature of crime suspected; other circumstances.

b. "Where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety" (Terry): must frisk await some investigation?

2. Procedures.

a. The two-step process: always required?

b. Extent of frisk of person: p. 13 in Terry v. theory of Terry. See S. v. Woodford, 26 Ohio Misc.51, 269 N.E.2d 143 (1971).

c. Protective search of possessions and surroundings.

d. Discovery of something other than a weapon: admissible? See dissent in P. v. Sibron, 18 N.Y.2d 603, 272 N.Y.S.2d 374 (1966).

E. Brief detention at the station.

1. For fingerprinting: Davis v. Mississippi, 394 U.S. 721 (1969); indicates ok on somewhat less than grounds for arrest if warrant obtained.

2. For questioning: P. v. Morales, 22 N.Y.2d 55, 238 N.E.2d 307 (1968) holds ok on somewhat less than grounds for arrest where detention brief, crime most serious, and all other investigative leads exhausted. Remanded, Morales v. N.Y., 396 U.S. 102 (1969).

3. For lineup: Wise v. Murphy, 275 A.2d 205 (D.C.App. 1971); Biehunik v. Felicetta, 441 F.2d 228 (2d Cir. 1971).

4. For voice exemplars: cf. In re Dionisio, 442 F.2d 276 (7th Cir. 1971).

5. For handwriting samples: cf. U.S. v. Bailey, 327 F.Supp. 802 (N.D.Ill. 1971).

Topic III—LECTURE ON INDIVIDUAL RIGHTS UNDER THE 1970 CONSTITUTION

Professor Vincent F. Vitullo

By way of introduction, I'm Vincent F. Vitullo, Professor at the University of DePaul College of Law. The topic assigned to me is Individual Rights Under the Illinois Constitution of 1970.

Basically, our discussion will be centered around the Bill of Rights, Article One. There are a few other incidental articles which we will consider, since they have already received so much attention. But, basically, we will treat the Bill of Rights.

As usual, I never could do things the way they are supposed to be done; the first point of departure for our discussion will be the last section of the Bill of Rights, art. I, sec. 24. Comparing that section with art. II, sec. 2, you will see two provisions which on their face seem to be rather analogous. Section 24, loosely paraphrased, says that the rights enumerated in the Bill of Rights are not exclusive. There can exist other rights, yet to be determined judicially which the individual can possess. Section 2 of article 2, on the other hand, seems to give the same break to the State. It says that the powers granted to the State in the constitution are not exclusive, and the State may possess other powers to be judicially or legislatively determined in the future.

This is a codification of what has been the basic notion behind state constitutions. We have to bear in mind that a state constitution is not an enabling document. A state does not need a constitution to delegate authority to it in order to govern. This theory is in sharp contrast to our theory of federal government, which is a government of mere delegated authority.

The State of Illinois as a basic sovereignty in the federal system, has the right to govern itself, constitution or not. The constitution, therefore, is primarily a limiting document. From the State's point of view, the state government may do anything that it determines to do through its executive or legislative branches, except to the extent that the state constitution limits it.

Of course, we realize that the federal constitution also acts as a limiting force in that the federal power is limited to the power granted by the document. All remaining power rests in the basic sovereignty, the state. This theory of all power emanating from the state is expressed in the Tenth Amendment of the Constitution of the United States. These two (but that's not the end of it) sections in Illinois' 1970

Constitution, based on the same theory, explain it is simply not permissible to argue that because a right or power is not granted in the constitution, it cannot exist. The constitution itself says it's still possible for it to exist. So I think we should keep that in mind as we approach some of the other problems in the document.

I think we can approach the rest of the Bill of Rights pretty much in the order in which it is written. There was a good deal of discussion during the convention concerning the language of the preamble, even though the delegates of the convention themselves acknowledged, and the draftmen's notes indicate, the preamble was not created to establish substantive rights. It is intended, at best, to present the frame of mind you should have in interpreting the substantive sections.

Section 1 of the Bill of Rights looks like it should have been kept in the preamble. By itself, it is merely hortatory in nature, and again does nothing more than to provide a constitutional sermon on doing legal good and avoiding legal evil. However, section 1 might have some relevance in interpreting sec. 2. So if you look at section 1 and section 2 *in pari materia*, you get a statement of constitutional principle.

Section 2, on the other hand, is a section which has considerable substance to it. The most noteworthy aspect of sec. 2 is that it introduces into Illinois constitutional law for the first time the formal concept of equal protection. Equal protection did not appear in prior Illinois constitutions. Due process did, of course. And due process has received a long and rather liberal interpretation in this State. However, we have never dealt with equal protection as it has evolved on the federal level since the 1950's. I do not mean to suggest that the concept behind equal protection is new to Illinois jurisprudence. The idea that like cases should be treated in like manner, that people in like positions should be treated equally, is something which our law has recognized by case decisions. In addition to that, we have traditionally had a provision in our constitution prohibiting special legislation. In the Constitution of 1970, this provision is to be found in art. IV, sec. 13. So art.I, sec. 2, should in fact be read in conunction with art. IV, sec. 13. As a matter of fact, the Illinois Supreme Court has recently done just that in *Grace* v. *Howlett*, 51 Ill.2d 478, 283 N.E.2d 474 (1972). One of the more interesting comments in the case involving the no fault insurance statute was made by the court in connection with these two sections.

As you may recall, the court held that that particular statute violated the State's ban against equal protection and against special legislation. It constituted an unreasonable classification. The case is of interest here because it points out that while equal protection and the ban against special legislation have much the same background, they are, to a certain extent, different. When you consider art. IV, sec. 13,

you not only find a ban against special legislation, you find an expressed constitutional mandate to the courts to determine when a general statute is applicable and when it is not. You find an expressed mandate to the courts to determine when special legislation might be permissible. In *Grace*, the court seems to be saying that art. I, sec. 2 has added a new dimension. There is a great responsibility on the judiciary to supervise legislative classifications. The court did not discuss the matter any further than that. But, I suggest, it raised a question as to what may have happened to the traditional presumption that a legislative classification on its face is reasonable, and that those who are objecting to the classification have the burden of establishing its unreasonableness.

It is possible that the burden may have either been watered down or perhaps eliminated. It is conceivable that we might now be in the situation where the legislative classification comes before the court without any presumption of reasonableness. Perhaps, it must sustain itself strictly on its own merits. I suggest this as a possibility. I don't think anyone is in a position to say at this time how far the interaction of these two sections will be extended. The provisions against special legislation obviously apply to the legislature. Equal protection, on the other hand, is a generic ban against governmental action which violates equal treatment of people in the same situation.

Consequently, it would seem that there is now not only a duty on the court to evaluate the classification set by the legislature, but it would be equally unconstitutional to have an unreasonable classification created by common law.

All in all, while I do not think any of this is going to create any earthshaking kind of revolution in Illinois jurisprudence, I do think this does constitutionally provide a theoretical basis on which we could construct a theory that the courts now have a more emphatic mandate to scrutinize whatever classifications the law attempts to impose on individuals in this State. In a sense, you simply have to be legally more critical.

Sec. 3 of art. I is a traditional section in Illinois constitutions. It comes to us in the constitution of 1970 with no significant change. The Bill of Rights Committee of the Convention did that consciously in an attempt to incorporate the law, as it had previously developed, into the 1970 Constitution. There was no intention to introduce anything new.

Sec. 4 presents a similar problem with a rather novel twist. Sec. 4 has much of the language of prior constitutions. The most interesting aspect of this particular constitutional formula is the reference to truth as a defense in liable actions. This language was utilized with good motive and for proper purposes.

The committee was rather perplexed in dealing with this problem. A liberal wing of the committee wished to strike this language altogether so as to bring the Illinois Constitution more in conformity with overriding federal law on the subject. There was a conservative wing which felt to strike this traditional language would be to go too far, perhaps further than federal law required. Unable to get a consensus within the committee, the committee did nothing.

However, after reading the committee report, I do not think it is fair to say that the committee intended to maintain the law as it had been. I suggest after reading the report, that there was no intent on the part of the draftsmen in this situation. The committee created a vacuum. Consequently, our law in that area is rather closely tied to whatever federal law will tolerate.

The reference to federal law concerning this section is to the rule laid down in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964); that is, that the presumption is precisely the reverse of that established in the Illinois Constitution. Under our traditional law, a person who published something which can be considered defamatory has the burden of establishing by way of defense that not only is it true, but that his motives were good and his purposes proper.

After *New York Times* v. *Sullivan*, it is precisely the opposite. Those matters are presumed. The plaintiff has the burden of establishing that the defendant was publishing false materials. The plaintiff must prove not only that they were false, but that the defendant was publishing them with a specific evil intention. The federal law obviously preempts this area, and our constitutional provision therefore, as it now stands, is relatively meaningless.

Sec. 5 of the Bill of Rights is another section traditional in nature, with one minor change. A comma was added in order to emphasize the fact that the right of assembly is a separate constitutional right, not just a corollary of freedom of speech. I can't see how this will have any practical impact in actual decision-making. Even this new construction is rather a codification of federal law. But the committee seemed to be quite liberal-minded and wanted to emphasize the fact that there was a right to assembly which did not depend on freedom of speech.

Sec. 6 is one of the sections which could have considerable significance. To a certain extent, it is traditional. When I say "traditional," I mean it contains the traditional prohibition against unreasonable search and seizures. But in two major respects, the section is novel. It expressly deals with electronic eavesdropping, and makes unreasonable electronic eavesdropping unconstitutional. This last statement is, in a sense, an interpretation on my part. The first sentence of the section states:

> "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."

I am assuming that the adjective "unreasonable" modifies eavesdropping as much as it does search and seizure. But I concede that question could be open to argument.

In any event, the language is broad: "eavesdropping devices or other means." And it was made consciously broad. The committee report indicates that the committee not only intended to cover the kind of technology which we haven't discovered yet, but they also intended to cover unaided eavesdropping. You could be eavesdropping by purely mechanical means, or you could be eavesdropping with the old human ear unaided by any contraption whatsoever. Any such unreasonable eavesdropping violates this constitutional ban.

In addition to that, you will notice there is a right to be safe from unreasonable invasions of privacy, which is perhaps, depending upon how it is interpreted, possibly a more startling innovation than the question of electronic eavesdropping. The problem is that privacy is not defined. There are several approaches that could be taken to this problem: First, we could interpret privacy as the term has been interpreted in federal litigation involving search and seizure. The protection afforded by the section could prohibit invasion of a zone where one has a reasonable expectation of being secure against surveillance. This is the *Katz* v. *United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), sort of thing. And maybe it could be confined to simply a basis for excluding evidence in criminal prosecutions.

On the other hand, the committee report is cast in rather broad language and talks generally about being secure against governmental surveillance. It is therefore possible that this section could be interpreted to establish a general ban against any unreasonable government surveillance. To illustrate what I mean, certain of my neighbors, Mr. Accardo, for example, has had an opportunity or occasion in the past to complain about all the people from the Internal Revenue, Federal Bureau of Investigation, and other federal agencies. All sorts of people are hanging around his premises without any visible means of support. This clutters up the neighborhood and gives the place a bad name. One of them actually saw a firearm hanging above the fireplace, and that was the basis for prosecution of illegal possession of firearms. People subject to this type of harassing surveillance have, in the past, attempted to enjoin continuing police surveillance as an invasion of their constitutional rights of privacy. However, these attempts have met with little success. I don't know of any such general prohibition. But there is a distinct possibility that this section has created a new right. Perhaps before anyone can enter into a program

of general surveillance, they may be required to get a warrant and establish the reasonableness of such surveillance. In the alternative, the subject of the surveillance might be in a position to maintain an action to have the surveillance stopped.

Sec. 6 applies to State activity, governmental activity only. However, it need not be interpreted to apply only to criminal action. It could apply to any sort of governmental surveillance. Keeping of a dossier in the Secretary of State's Office might conceivably be violating someone's right of privacy. Any of the myriad governmental agencies that regulate economic matters may be affected by this section.

This discussion is purely speculative, and I mention it only in terms of possibilities. I am not here suggesting that this will happen. But I am suggesting that we have something of a new ballgame when we consider sec. 6. That word "privacy," I presume, does mean something in the constitution. I expect privacy will be interpreted to establish rights over and above those established in traditional search and seizure problems.

A JUDGE: Professor, do you want to give us your opinion of how that phrase might be construed in light of the current decision of Judge Covelli on the ethics bill, the ethics legislation, where he held in part that it was unconstitutional because it invaded the privacy of all of us who have to file the ethics report with the Secretary of State?

PROFESSOR VITULLO: I'll repeat the question that has just been asked.

The question is this: Judge Cohen wants to know if this constitutional provision would have any possible impact on the case in which Judge Covelli ruled that the State ethics bill violates the right of privacy—if I remember correctly—of wives and close relatives of the State employess. Is that the precise issue?

A JUDGE: That's it.

PROFESSOR VITULLO: I think what sec. 6 does is greatly support the proposition that there is a right to privacy in this State. Whether it goes that far, of course, is always open to argument. But when you consider this in conjunction with sec. 12 of the Bill of Rights, which also talks about privacy, you can make a very formidable public policy argument against this intrusion into privacy, if we can only define what that means.

So I would say it is strong ammunition to support Judge Covelli's decision in the case. However, I don't think we can honestly say it is determinative of the issue. But it does demonstrate that the State is subject to a restriction in terms of privacy and cannot do whatever it will with individual citizens in this sense. It cannot provide surveillance at will or generically.

A JUDGE: With regard to the question of the ethics rule that Judge Covelli had, is there a conflict between that provision and interpretation as provided in disclosure against Article Thirteen. The first section of Section Two says all candidates for or holders of State offices and so forth shall file a verified statement of their economic interests as provided by law.

PROFESSOR VITULLO: Well, that article talks about candidates.

A JUDGE: Or holders of State office.

PROFESSOR VITULLO: The problem in Covelli's case, as I understand it, pertains to disclosures by members of the immediate family, wives and the like. When you have a conflict like this, the more specific provisions should prevail. So the specific constitutional requirement that candidates and holders do supply such information would prevail over the general prohibition in relation to the violation of privacy.

When you are not dealing with that narrow class and you are talking about other individual citizens, it is arguable whether sec. 6 is applicable or not. But it does give a strong impetus to this concept of privacy which has had a very little foothold in this State up to the present time.

I might add the concept of privacy at best is ill defined. It's so vague that it's almost unusable in certain respects. Dean Prosser takes the position that it has been used to cover matters which could have been covered by traditional authorities anyway. Whatever it means, it's here and it's here in a big way.

Sec. 7 is the section which created the most heat in this morning's discussion, preliminary the problem of hearing and indictment. The problem seems to run something like this: In terms of what the Bill of Rights Committee was trying to do, they initially drafted a totally different section which made it mandatory to have a preliminary hearing no matter how a criminal action was begun, even in cases where it was begun initially by indictment. A preliminary hearing was a constitutional mandate.

Now, that proposal did not work on the convention floor. It was changed to its present form. But since it was changed in the heat of political combat, and as a result of apparent political compromise, it did not come out as a model of clarity.

Apparently, we agree. The problem was described something like this: The committee thought it was setting up two alternatives. You bring an action by indictment, in which case a preliminary hearing is not necessary, or you begin an action on complaint or information, in which a preliminary hearing is necessary. They didn't contemplate the

situation where you had both, and that the action initially begun on the basis of an information, sometimes by a preliminary hearing, sometimes not, but then followed by an indictment because, traditionally speaking, the purpose of a preliminary hearing was to decide whether the person should be bound over to the grand jury or not. Faced with this sort of quandary, the questions came up: What happens if you have a matter begun by a complaint, no preliminary hearing, but you have a subsequent indictment? I suggested during this morning's discussion that in that situation you might consider the indictment as the beginning of a totally new action; therefore, it would not be necessary to have a preliminary hearing. A very persuasive counter-argument was brought against that: The whole purpose of preliminary hearings in the past was to decide when you should bind somebody over to the grand jury for indictment, anyway, so this should be all looked upon as a nonseverable, inseparable process.

Many judges suggested quashing indictments where there hasn't been an appropriate preliminary hearing immediately following the defendant's being taken into custody. Another issue raised was what is the effect of a ruling at a preliminary hearing that there is no reasonable cause shown to hold the defendant? Does this bar a subsequent indictment? A minority of those talking this morning thought it might. But most thought it was a totally different matter. At the time there wasn't reasonable cause that either a grand jury or a subsequent preliminary hearing could decide at a later date that there was cause to hold the defendant.

A JUDGE: I might suggest—

PROFESSOR VITULLO: At this point, it's your turn to jump in.

A JUDGE: I might suggest that I had a case exactly like that. And the matter is on appeal now.

I decided that on a finding of no probable cause, where there was no other evidence offered for the grand jury, that the finding of no probable cause was a bar, and dismissed an indictment. I further held, because I thought the matter should be clarified, that that portion of the statute that says a commencement of a prosecution is, by an indictment or an arraignment, contravened this portion of our new constitution and that now the commencement of a prosecution could either be by indictment or by preliminary hearing. At any rate, the matter is now up on appeal, and I would hope that it should be clarified soon. But I held that if the State wanted to go further, after a finding of no probable cause, they needed additional evidence or new evidence to go further.

PROFESSOR VITULLO: In effect, you are saying the State can't do anything further on that same evidence. They can't begin a new action against the defendant on that same evidence.

A JUDGE: I further held the State had a right of appeal. They could appeal the no probable cause finding, if they felt that it was an incorrect finding. But if they wanted to go further after the no probable cause finding, they needed some more evidence. You have to consider the case that I had, however. I had a case in which the State's evidence consisted in the main of a confession by a defendant as to a murder, which was exculpatory. That was the sole evidence of the case as to the murder.

The preliminary hearing judge, on the basis of this confession, found no probable cause. That's all the evidence the State had. The State took that confession and went to the grand jury the next day or the same day, and the grand jury found probable cause. The matter came to me as the sitting judge in the criminal division. A motion to quash an indictment was filed. And after considerable argument and briefs submitted, I found that the State in this particular case could not go to the grand jury after a finding of no probable cuase. They needed some additional evidence, because otherwise, the new constitution didn't mean anything.

PROFESSOR VITULLO: Well, there was one interesting comment made in response to that argument, and that is if this is what art. I, sec. 7 means, then we might just as well recommend to the legislature they abolish the grand jury in most situations at least, because most of the cases are not commenced initially with an indictment.

Therefore, the grand jury becomes virtually meaningless in this context. This is kind of interesting because there was a strong element in the Constitutional Convention that wanted to do just that, abolish the grand jury.

A JUDGE: I might add that counsel for the petitioner did considerable research, and he found only two other constitutions in the entire United States that used the same language as this particular provision of our constitution. But in those constitutions they had an explanation. They specified that if the state was going to go further, they needed additional evidence. The language was the same as our constitution in two states, but they made an explanation as to what the state needed to go further.

PROFESSOR VITULLO: Of course, I suppose that you could argue that when you pick up language which has been used in other states, you are also picking up the interpretation of that language. The adopting body, legislature or convention, is supposed to know the interpretation given to it. However, in our convention, it is quite obvious the precise language of this section was the result of political compromise reached on the floor of the convention. As a consequence, it is almost impossible to determine any sort of legislative intent behind it.

My understanding is that in most of the downstate counties, they don't have a court reporter at the preliminary hearing. How would you determine whether or not the State did or did not present evidence before the grand jury?

A JUDGE: That is indeed a problem. In my case the State actually stipulated that there was no additional evidence presented to the grand jury. This was all the evidence. The same evidence was considered by the preliminary hearing judge.

PROFESSOR VITULLO: Another peculiar aspect of the problem is that the committee report, as I recall, did not discuss the function of the preliminary hearing to determine reasonable cause to bind over to the grand jury. But it did discuss at length the use of preliminary hearing as a discovery device. And the minutes make it clear, for example, that the hearing is supposed to be adversary in nature. The defendant has a right to cross examine the prosecution witnesses, has a right to introduce evidence on his own behalf, and the rules of evidence are to be as permissive as they are before the grand jury itself.

So, in that area at least, their intention was spelled out. At least we know this much: They intended a totally new kind of animal. Perhaps it would be better if they hadn't used the words "preliminary hearing," and invented some other lable to attach to it. I don't know if that's the problem or not. But so far, the group this morning, and I gather you are in agreement, it is difficult, if not impossible, to take each section literally and apply it to legal matters as they are normally run. The thing just doesn't seem to fit our state of affairs.

A JUDGE: There is a case pending in the Supreme Court right now, Madison County, where the man was arrested and brought in one day and indicted the next. And the court subsequently dismissed the indictment saying he did not have a preliminary hearing, although he is indicted the day after he is brought into the court on his warrant on his arrest. The preliminary hearing was discussed. They didn't set the date. He was indicted the next day. And it was dismissed the next week because he did not have a preliminary hearing.

PROFFESSOR VITULLO: That case brings up the issue as to when is the action actually begun? When do you have the "initial charge" in a traffic case? Is it when the ticket is issued?

JUDGE WENDT: Time of arrest, isn't it?

PROFESSOR VITULLO: We are going to have to face it.

JUDGE WENDT: In these financial crimes and things like that, of course, the man isn't arrested. They present all these checks and evidence to the grand jury. I imagine that at that time, then a warrant is issued for his arrest, I think that would be all right. But otherwise, I agree with them.

A JUDGE: If you arrest him first, you must have a preliminary hearing on a complaint.

PROFESSOR VITULLO: We concluded this morning that you must have a preliminary hearing whenever prosecution is begun by arrest. The only time you avoid the preliminary hearing is when the first thing that's done is the indictment itself, and the defendant is arrested afterwards.

A JUDGE: There's a committee report which you have already referred to. In reading them, you get the idea that the majority of the committee was of the opinion that there should be a preliminary hearing in every case even after indictment. The committee report suggests that there will be relatively few cases that start with an indictment, but even in those cases, there should be a preliminary hearing after the indictment.

PROFESSOR VITULLO: That is what the report said, but their initial draft was different than the one we are looking at now. The language was changed to avoid that result. There are some people who wish to abolish the grand jury altogether. But the convention did not accept that either. They accepted this compromise, which, admittedly, has its difficulties. Many of the delegates were hopeful that the legislature would exercise the power granted to them and limit the grand jury drastically, or abolish it altogether. I think we have exhausted this topic. Can I ask that we move on, and then return to this during the discussion period afterwards.

Those are the issues, and hopefully the cases that have been referred to will come up and the Supreme Court will give us some guidance on how those things will be worked out.*

Section 8, Rights After Indictment, is rather in standard constitutional language, and is in effect simply restating the rights already guaranteed under the federal constitution anyway. There's nothing there which deserves any particular comment at this time. We need not expect anything new to come out of it.

Section 9, Bail And Habeas Corpus, involves some changes in language, although it is hard to understand precisely the significance of the change. One thing that I find noteworthy in the section is that the only offenses which are nonbailable are capital offenses. Consequently, if we should ever abolish capital punishment, every offense would be bailable. If that time ever arrives, we might have some species of a problem. Bail has to be proportionate to the offense, which is our way of saying there should not be excessive bail. Other than this comment on capital cases, again, it doesn't appear to be doing anything new.

*See: *People v. Kent*, 54 Ill.2d 161, 295 N.E. 2d 710; *People v. Hendrix*, 54 Ill.2d 165, 295 N.E.2d 724.

A JUDGE: The legislature has provided by statute that in a case of capital offense where the death penalty could be imposed the burden of proving the man is entitled to bail is on the defendant. How do you comment about the constitutionality of that?

PROFESSOR VITULLO: I think it's a good question. Even in the face of this language, I think that provision is probably unconstitutional. It's one thing to say that if the State can establish a strong presumption at a preliminary hearing, for example, that it can be nonbailable. It's something else to say to the defendant you have to show you're likely to be not guilty before bail. Some curious defense attorney is going to raise the problem.

Section 10 is a verbatim reproduction of what has appeared in prior constitutions. And again, the constitutional documents indicate the delegates expressly intended not to change anything.

Section 11 concerning punishment of criminal offenses introduces into the constitution the concept of rehabilitation as the goal of criminal punishment. As a matter of fact, it doesn't mention any other goal or objective, such as protecting the community. Now, what this will mean, if anything, is rather hard to say. This could be just another hortatorical statement, or perhaps it could be used as basis for a more emphatic review by appellate courts of sentencing, or perhaps it could be a basis for the court's increased involvement in questions concerning prisoner rights. If the offender's return to civilian life as a meaningful citizen is to be the objective of incarceration, you may have people making good arguments. I suppose that the part of the bar which goes toward reform will be considering this section for use as ammunition in one way or another. But the language is unique, and all I can say at the present time is that the only constitutionally permissible objective in punishing a criminal is to rehabilitate him. And, consequently, if you have a court reporter, be careful what you say.

A JUDGE: What about the section that says both, according to the seriousness of the offense and with the objective? It says according to the seriousness of the offense. What does that mean?

PROFESSOR VITULLO: The more serious the offense, I assume, the more rehabilitation he needs.

If someone representing a prisoner wants him released because the institution has no rehabilitation program and he is degenerating rather than getting better, what could you do? You could order his release, I suppose; transfer him to a different institution; order the institution to establish programs. I don't know.

A JUDGE: There's a federal court in the east that did something like that. They set up procedures that the prison had to follow. The court took an active role in the prison itself.

PROFESSOR VITULLO: It seems to me that you have a chance to either decide this is merely hortatory language or it is a mandate to do something about the jail. Right now it is rather difficult to precisely predict the effect of the section.

In sec. 12, we come to my favorite part of the constitution. The section explains that there must be a remedy for every wrong. This has caused more interesting litigation and has been the basis for more arguments in the practice, including what is a wrong . . . . You may remember *Zepeda* v. *Zepeda,* 41 Ill.App.2d 240, 190 N.E.2d 849 (1963) cert. den. 379 U.S. 945, and other cases with metaphysical types of reasoning. This language has appeared in prior constitutions. It's quite traditional in Illinois, and I have traced it back to *Marbury* v. *Madison,* 1 Cranch 137 (1803), where John Marshall used this concept as one of the reasons for creating the Doctrine of Judicial Review. In a sense, according to Marshall's viewpoint, the concept that there must be a remedy for every wrong is the heart of the common law tradition. Consequently, this section in a sense merely codifies the common law tradition in this State. On occasion, you will see this section referred to by the Supreme Court when it is doing something novel. The court waxes eloquently about how circumstances have changed, new wrongs are created, new remedies have to be created, the law has to be relative. The section has also been used to help curtail the legislature when the legislature has unreasonably limited remedies.

The most significant change in my opinion is the inclusion in this section of a new word, and that is "privacy," again not defined. But this section talks about remedies, wrongs, generically, not merely wrongs created by the State. So this section applies to invasion of privacy on the individual level. As you know, up to the present time the right to privacy in civil actions has in effect been recognized in this State, but to a somewhat limited extent. The only cases I can recall are cases involving the commercial appropriation or exploitation of a person's name or likeness. One of the earlier cases was *Erick* v. *Perk Dog Food Company,* 347 Ill.App. 293, 106 N.E.2d 742 (1952), involving a little blind girl whose picture was used to sell dog food. Perk claimed if you bought the dog food and you sent in the labels, a certain amount of assistance was given to an organization assisting the blind. She recovered in that case.

But we really haven't gotten into the more exotic kind of privacy cases which have appeared in other jurisdictions. So the question I'd like to raise is, what have we adopted here? Have we, on the constitutional level, adopted some sort of full blown codification of everything's that's been done in terms of privacy in all of the common law jurisdictions? This is a very conjectured thing, I admit. But since the Bill of Rights Committee hasn't helped us much, I submit that it is a rather reasonable possibility.

As a reference, you may want to consider chapter twenty-two of Dean Prosser's handbook on torts, one of the classics in the field. He summarizes the court actions involving invasions of privacy. Dean Prosser has four headings. We have already discussed one, this business of commercial appropriation of someone else's good name or likeness, etc. But he also has a few others that are rather interesting. The second one is putting someone in a false light — publicizing them to be something that they are not — even though it isn't anything particularly harmful. As a matter of fact, it might be rather flattering. For example, if somebody should broadcast the fact that Professor Vitullo is a bon vivant playboy, a sophisticated man of the world, that certainly wouldn't be true; but at least I would be flattered. I don't know if I'd sue. Basically speaking, however, under this general category, a person so described who is not a Hugh Hefner-type might take offense and have a cause of action. He might not recover much, but he'd have a cause of action.

Other categories that Prosser describes are invasion of an individual's seclusion — the glare of publicity. Everything being said is true. It isn't particularly distorted, but I just don't want to be in the newspapers. I don't want to be on the TV tube and on the radio. The fact that I have really inherited five million dollars is my business. I don't want it publicly known.

The last category that Prosser discusses is broadcasting or publicizing of true but embarrassing facts. This reminds one of the Illinois doctrine that the truth is a defense only when publicized with a proper motive. All of these actions, of course, are subject to overriding federal law. Many of these cases, particularly the cases about the glare of publicity, were cases that arose before *New York Times* v. *Sullivan.* We have to bear in mind that while these are interesting categories to think about, the First Amendment guarantees of freedom of speech are still applicable and will somewhat limit the usefulness of these actions.

Let's suppose that the Jackie Onassis case were before you. She is suing a free lance photographer who keeps bugging the family,—popping out of nowhere at all times of the day and night. They can't leave the family apartment in New York without this guy being on the scene. The allegation is it is frightening to the children, providing emotional upset, that type of case. Let's set aside the possibility that one could argue the emotional anguish. Let's talk in terms of does a person like Mrs. Onassis have a right to walk the streets without being subjected to this sort of scrutiny, with the resulting embarrassment. After you get through the Mrs. Onassis problem, you could say, does anyone of us have the right to walk the streets without being photographed?

If a newspaper photographer came up and took a picture of me because he was doing a story on people walking on Lake Shore Drive, and my picture got spread all over the paper, could I object to that and base my objection on sec. 12? We know that if a commercial operation tried to use it in advertising, I could either object, or collect money for it, one or the other. What precisely does sec. 12 mean? The constitutional commentary is of no help whatsoever. In exploring the scope of this, I get the impression that the convention felt that privacy was such a good thing, that they had to put it in wherever they could. Where it will lead, I don't know.

Another change in this section is that former versions of the same section contained the words "ought to." There ought to be a remedy to every wrong. "Ought to" was dropped in this constitution, and "shall" was put in. The section says: "Every person shall find a certain remedy in the laws for all injuries and wrong...."

The report indicates that the committee did this with the intention of emphazing the point. So I suppose if you are militarily minded, one might say the judiciary has a constitutional mandate to be more active in terms of creating remedies to meet wrongs as wrongs appear in our society.

Section 13 brings us to the right to trial by jury. Here the only change in relation to prior constitutions is that previously the words "except for cases commenced before justices of the peace" were used since J.P.'s were eliminated in the '64 amendment, that language is eliminated in the 1970 Constitution also. Therefore, this stands as one of the strongest guarantees to a right to a trial by jury in the country - no exceptions as to dollar amount, no exceptions as to minor criminal offenses. Exceptions of that nature are relatively common in some states.

The section states that the right to a trial by jury, as heretofore ....The word "heretofore," has been interpreted to mean the right to a trial by a jury as it existed at the time the particular constitution was adopted. Now, we picked up our guarantee of a right to a trial by jury in 1818 when we became a State. Theoretically, that term "heretofore" could apply to the right to a trial by a jury as it existed at mature common law in the nineteenth century - twelve men, unanimous verdict.

I at least have found nothing in our jurisprudence which would indicate or provide any real ammunition for any other interpretation of this section. I suggest that even though the federal constitution might permit us some experimentation, our own constitution would seem to have committed us to the classic jury situation. And again, it doesn't differentiate between criminal and civil actions either. The classic jury situation is guaranteed across the board.

Section 14, the Imprisonment For Debt section, is noteworthy only in the sense that it demonstrates one situation where this State acted before the federal government required it to act. You may remember in the case of *Williams* v. *Illinois*, 399 U.S. 235 (1970), it was held as a matter of federal constitutional right that you could not be imprisoned for inability to pay a fine. The case also explained that you could not be compelled to work off the fine under circumstances that would exceed the statutory limit on being sentenced. Our constitution came into effect before the case was decided. We had already codified the protection against imprisonment for debt when the U.S. Supreme Court required the protection in *Williams*. This matter has been discussed at length at other conferences, and I don't propose to go any further.

Section 15, the Right to Eminent Domain section, has one significant change in terms of constitutional theory. It provides a guaranteed right to trial by jury in eminent domain cases. Prior constitutions did not provide that right, and the courts had held that you did not have the right as a constitutional matter. The statute, of course, gave you that right. And the committee reports indicate what they intended to do was take the statutory right and raise it to the constitutional level. There were attempts to change this particular section further by both expanding the measure of damages and expanding the zone of injury that could be compensible. The attempts to change the language to achieve that result were defeated. So I suppose one could say that the obvious convention intention was to keep the eminent domain law in this State the same way it had developed, subject only to the change that now the right to a trial by jury is constitutionally guaranteed.

Section 16 is the traditional prohibition against ex post facto laws guaranteed both in all former constitutions and in the federal constitution. I don't think it deserves specific discussion.

Sections 17, 18 and 19 are the antidiscrimination sections which do call for some comment. Section 17 was adopted in the form the committee recommended, and its purpose and intent is fairly well documented. Sections 18 and 19 were added on the convention floor. The only background explanation of what any anomalies in that language might mean will require a study of the debates when they are available, and that may not be much help.

Section 17, you will note, is a blanket prohibition against discrimination, race, color, creed, national ancestry and sex. Since we are dealing with the State constitution, we don't have to worry about interstate commerce or anything of that nature. It is a blanket prohibition, as I read it, affecting both individuals and the State itself. To this extent, this constitutional protection is actually broader in theory than the present federal remedy. On the other hand, section 17 is expressly concerned only with the use of property, sale of property and

employment. It does not cover public accommodations, private clubs, any other area in which discrimination might occur. And to this extent, this remedy is considerably more limited than the federal remedy.

The legislature has the right to establish reasonable restrictions and exemptions, and we will find out what that means on a case by case basis if the issue is ever raised. However, it is unlikely that the legislature will do anything concerning this section in the near future. Those concerned with discrimination problems realize that the legislation in this area can only be restrictive and can not help them since the ground covered by section 17 is so broad.

Another interesting thing about section 17 is that it expressly says that it is self-executing. It does not require implementing legislation. Aggrieved individuals have a constitutional right of action. The reason why I am emphazing this point is that sections 18 and 19 do not contain any such language, raising the possibility of an argument that 18 and 19 require implementing legislation to make them effective. The countervailing argument to that is section 12. Sections 18 and 19 discuss constitutional wrongs. Section 12 says there has to be a remedy for every wrong.

The same thing would also apply to other rights created in the constitution, for example the individual rights under the environmental article. Is the absence of this self-executing language a critical issue? Again, my preference would be to use section 12 to cover those gaps and not get hung up on the need for implementation. But I think there is in fact a valid argument. It is entirely possible the lack of self-executing language in sections 18 and 19 was just inadvertence on the part of the individual delegates who submitted these sections to the convention. They apparently were not members of the committee, and they simply were not precisely aware of what they were doing.

Section 18 refers to discrimination concerning sex as a blanket prohibition; it does not speak of reasonable exceptions. As a matter of fact, it says that equal protections are not used as a basis for discriminating in terms of sex. Equal protection is a matter of reasonable classification. And one could again argue that this is an absolute, flat prohibition against using sex as a characteristic for any sort of classification. This is a rather hard line to swallow, I think, if it is carried to ridiculous extremes. Notice, however, that section 18 applies only to the government. It requires State action. It's not by its terms applicable to individuals, although section 17, which also prohibits sexual discrimination in housing and employment, is applicable to individuals. I suspect that section 18 was lobbied through by a teacher's union, from the way it is phrased and the thrust behind it. However, I am not sure.

Section 19, the section concerning the handicapped, also came from the floor out of nowhere. Notice, however, that section 19 does have a good escape clause, that is mental and physical handicaps may be considered where they have a rational connection with ability to do the job, or ability to rent the premises. Now, while this does permit rational distinction to be drawn, it does present some rather interesting questions. If one is laboring under the mental handicap of not having a grammar school education, may he be excluded from a job as a floor sweeper, even though he never completed the third grade? Is that job related, or is that a mental handicap within the meaning of the section? I don't know, frankly. I can hardly wait until you tell me what the law is.

However, this, I think, may have some immediate impact on some employers who have literacy tests and also physical examinations for jobs where there is no obvious connection between the standards used and the job to be done. I think you now have a constitutional mandate to become a forum for airing some of these problems.

Section 20 is the individual dignity section, which, according to the committee report, is hortatory in nature. It is not intended to do anything substantive because it says anybody who does any of these bad things is condemned. I don't know how you are going to consign a defendant to the custody of the devil, but refer to a higher jurisdiction or a lower one, I guess.

Section 21, Quartering of Soldiers, is the traditional language that has been with us since the beginning of the republic. I seriously hope we never have any occasion to interpret this section in any serious way.

Section 22, the Right To Bear Arms, is in this day and age, a new constitutional right. As a citizen of Illinois, you now have a right that you didn't have before, subject to the police power; you have a right to bear arms. "Subject to police power" is obviously the joker in the deck. The committee report contains good documentation of this. They have collected precedents from other jurisdictions with similar constitutional language. For example, some jurisdictions have held that it is perfectly proper to prevent people from carrying firearms that are concealed. It is a reasonable regulation, not a prohibition. Other jurisdictions have held that it is perfectly reasonable to prohibit people from carrying firearms openly in certain situations because it creates a disorder; it scares people. You can be stopped from concealing it, stopped from showing it. The legislature can prohibit certain kinds of firearms; machine guns are the classic example. Things being what they are, might it be reasonable to prohibit handguns? Would this violate this constitution? They can compel registration. Every jurisdiction that has faced the problem has also held that the legislature can forbid the manufacture of firearms. That does not violate the right to bear them.

Extending this rationale to its logical extreme, it appears that in Illinois, one has the right to bear arms, except when the police power tells him that he does not have the right to bear arms. This section is also, obviously, a political compromise. If interpreted rationally, it may not be too much of a burden on the need to control this rather dangerous condition.

Section 23 is another one of the hortatory statements. And section 24 is the section concerning enumerated rights, which we began the discussion with.

At this point, I would like to recall that during the campaign for the constitution, we were told that the old constitution was too long, too burdensome, too much of it was immaterial and too hard to understand. We therefore needed a new document which would be simple, clear, short and easy to understand. If you count the number of hortatory sections in this new constitution and then consider the ambiguous sections, you may question as I do whether we achieved our objective.

Two more things I'd like to mention briefly, mostly because they hit the press so much, which appear in other parts of the constitution.

Article II is the environmental article; it creates a new, modern requirement to a healthful environment. I notice it doesn't ban pollution as such. But what it says is that one has a right to a healthful environment, whatever that means. It includes a clause which permits the legislature to place reasonable regulations and restrictions on that right. However, again, the article has difficulties in application. The report of the committee that submitted this article indicates that the purpose of the committee was not to create any new remedies, but rather to cure the problem of standing. That runs contrary to a lot of the publicity that has been generated about the article. But according to the official report, it is not a new remedy, but merely a remedy to permit individuals to sue when they are affected.

If you will recall, Illinois has been rather tough on the question of standing to sue. Our traditional case law demands that before one can bring an action to complain about a general condition (public nuisance, if you will), he must establish that he has a special injury or is specially affected in a manner which distinguishes him from the public in general. As a consequence, it seems to me, if you were a pollutor, you are much better off polluting the whole community than your neighbor's property. If you pollute everything, it is a public nuisance; and only the representative of the public, the State's Attorney or Attorney General, could bring an action to stop it.

In response to this problem, several years before the constitution was adopted, the legislature passed a statute which gives an individual a right to notify the Attorney General of the existence of a public nuisance. And if the Attorney General declined to act within a period of

six months, the individual might then bring the lawsuit himself in *ex rel.* proceedings. In theory the action was in behalf of the public, not by the individual interests. Therefore, while it was not generally known, the question of standing had in fact received a statutory cure. However, it was felt that we needed this new constitutional mandate to do something about the environment. While this was intended to cure the question of standing, there are some other problems that it does not speak to directly. If one is to sue about an unhealthy environment, I suppose what he has to establish is that it is his environment that is unhealthy, not someone else's.

For example, do I have a standing to sue or complain about the pollution conditions in Peoria, Illinois? I live in the Chicago area. I suppose if I could produce scientific evidence to show that the wind currents or the water drainage table was such as to affect me directly, I could cure the standing problem that way. But I would expect that the courts would not accept a proof and that the courts would not say that any citizen can complain about any environment in the State which is not his environment.

The other question is what is the forum - individual lawsuit in the circuit court or administrative process. We do have an environmental protection agency established by statute before this constitution was adopted. The same clause of the constitution says any legislation not consistent with this document survives and is in effect. One could argue, therefore, I think, that the environmental protection agency is simply an exercise of the legislative authority under the second section to provide reasonable restriction to this remedy. And if the legislature wishes, it can tell the aggrieved party he must exhaust his administrative remedies first. I would suggest that this would be a much more rational way to provide a remedy in the environmental protection area. One agency with state-wide jurisdiction can make uniform rules, and handle the highly technical problems in a proper manner. This is a much more practical method.

There were several delegates to the convention, who are people respected in our profession. They are saying we intended to give the individual a right to go into the circuit court on his own, and not be incumbered by the governmental bureaucracy. If that's what they meant, I wish they had said it. I suggest that these problems exist in article XI. Hopefully, within a relatively short time, you will get authoritative interpretation and know precisely where we stand on the question of standing.

The last thing I wish to comment on is a right to education provided for in article X. This article is, I think, noteworthy because the definition of the right has been changed from a common education, as it was understood in the nineteenth century. The article specifically provides for free education "through the secondary level". But more

important, the article makes it the express obligation of the legislature to provide this education through the public school system. It seems to me that this constitutional mandate is directly relevant to the cases which are now attempting to strike down local school district financing as a permissible means of providing education. There is litigation out of Texas.* There is litigation going on in Illinois. It would seem to me that since our constitution says this is a State matter, and it is the State's obligation, that we have a much stronger argument going for a ruling that it simply isn't permissible to use local funding as the exclusive device for supporting education. I suggest that the argument would seem to be much stronger because of article X than it would be otherwise.

That's I think about the extent of my coverage, sort of a casual guided tour to certain individual rights incorporated in the new document. Some of these rights are not exactly new, but I think it is important that we know those that are not new and those that are new. Some of them are not only new, but rather startling. We have thought about them, perhaps we will be better able to cope with them when we are confronted with them in the form of real problems.

That's about it, gentlemen. I think you are free, or if there is anything else you want to discuss, we can have an open forum now on anything discussed here so far, or anything else relative to the constitution you want to share.

(Several discussions followed)

*See, *San Antonio Independent School District* v. *Rodriguez*, __U.S.__, 41 L.W. 4407 (March 21, 1973)

Topic IV—TORTS

Hon. Paul C. Verticchio
Chairman and Discussion Leader

Hon. Joseph J. Butler
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material
   1. Questions For Discussion
      a) Directed Verdicts
      b) Special Interrogatories
      c) Voir Dire
      d) Jury Size and Quorum
      e) Settlements
   2. *Pedrick* Aftermath
      a) *Pedrick* v. *Peoria and Eastern R.R. Co.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967)
      b) *Lewis* v. *Stran-Steel Corp.*, 6 Ill.App.3d 142, 285 N.E.2d 631 (1972)
      c) *Murphy* v. *Vodden*, 109 Ill.App.2d 141, 248 N.E.2d 327 (1969)
      d) Shepard's Northeastern Reporter Citations, *Pedrick* v. *Peoria and Eastern R.R. Co.*, supra
   3. Special Interrogatories
      a) Ill.Rev.Stat. 1971, ch. 110, sec. 65
      b) I.L.P. *Trial*, secs. 331-339. Pages 60-65 of the Advance Reading Material
      c) *Cohen* v. *Sager*, 2 Ill.App.3d 1018, 278 N.E.2d 453 (1971)
   4. Voir Dire
      a) Ill.Rev.Stat. 1971, ch. 110A, sec. 234
      b) *State* v. *Manley*, 255 A.2d 193 (N.J. 1969)
      c) Recent Developments, *Civil and Criminal Procedure—Voir Dire Examinations*, Villanova Law Rev. Vol. 15 (1969-70). Pages 79-85 of the Advance Reading Material
      d) Southern California Law Review Vol. 44, Page 916 (1970-71). Pages 86-91 of the Advance Reading Material

5. Jury Size and Quorum

   a) Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367 (April, 1972). Pages 92-95 of the Advance Reading Material

   b) *Reducing the Size of Juries*, Journal of Law Reform Vol. 5, No. 1 (Fall 1971). Pages 95-111 of the Advance Reading Material

   c) *Trial By Jury In Civil Cases*. Unpublished memorandum prepared by Leonard M. Ring and Richard L. Wattling. Pages 112-117 of the Advance Reading Material

6. Settlement

   West's Ann. Cal. Code of Civil Prac., par. 997-999

7. *Mulvey v. Illinois Bell Tel. Co.*, 5 Ill.App.3d 1057, 284 N.E.2d 356 (1972)

B. Summary of Discussions

Report of Professors Robert E. Burns and Richard C. Groll

The reporters wish to acknowledge the leadership and direction given to the Honorable Paul C. Verticchio, chairman, and the Honorable Joseph J. Butler, vice-chairman, in the planning and conduct of the seminar.

At the initial planning meetings, the committee decided that the topic of Torts would be of an on-going nature; and, therefore, the first session should be devoted to an exploration of procedural aspects in the trial of a tort case. Subsequent sessions, conducted at future conferences, would deal with the various substantive tort areas.

The sessions were conducted in seminar fashion. Discussion generally followed the agenda set forth in the reading materials, and included a series of consensus polls of judges in attendance.

THE PEDRICK AFTERMATH

In the five years since the announcement of the *Pedrick* decision by the Illinois Supreme Court, most judges agreed that they were more inclined to direct verdicts or grant judgments n.o.v. than before. They indicated that without the *Pedrick* standard, the trial judge was less likely to direct a verdict except in rare cases where the attorney had failed to introduce a scintilla of evidence relating to proof of an essential element in the cause of action.

At the beginning of each discussion session, there was some reluctance on the part of the judges to announce that they, following *Pedrick*, engaged in a process of weighing the evidence or evaluating the credibility of witnesses. However, the discussion of the *Pedrick* standard invariably led those participating to the conclusion that weighing the evidence and evaluating the credibility of witnesses was indeed demanded by *Pedrick*. The process of evaluating seemed particularly acute when the motion was granted at the close of all the evidence (or the directed verdict situation as distinguished from a judgment n.o.v.).

Most of the judges felt that *Pedrick* required the trial judge to review the evidence as would, in some fashion, an appellate court. Many judges, however, were not sure five years later whether *Pedrick* was designed to clarify the standard for appellate courts or was, instead, primarily a mandate to spur trial judges.

A considerable discussion was had relating to the interrelationship of the directed verdict and the judgment n.o.v. The majority of judges, armed with the *Pedrick* standard, indicated their preference for directing verdicts rather than reservation of their prerogatives until after the jury had rendered its verdict (i.e., judgment n.o.v.). Most conceded that, if playing odds to appellate review were controlling, expediency should compel reserving judgment to determine whether the jury rendered a verdict consistent with the trial judge's view of the testimony (i.e., thus precluding appellate reversal on the jury question for new trial grounds). Most indicated their practice of direction, even though an identical standard for judgment n.o.v. provides no incentive for early and "courageous" direction without a jury look.

The judges in attendance expressed some concern as to the expectations of Appellate Courts. A few Appellate Court judges in attendance at the seminar session expressed a preference for reviewing *jury* verdicts (as distinguished from plain directed verdicts).

A considerable number of judges expressed some concern for expediency. The argument runs as follows: "If I've been on trial for three weeks and can have a jury verdict in two hours, why should I direct a verdict. If I am in error, the Appellate Court will reverse, grant a new trial, and the process begins anew."

Some judges expressed concern that if they did not grant a directed verdict at the close of all the evidence, but instead waited until the jury returned a verdict inconsistent with their evaluation of the case, the Appellate Court would be more inclined to reverse n.o.v. on the theory that, if trial judges left it to the jury, they must have been "in doubt."

One judge remarked on the practice of one federal judge who reserved decision but on the directed verdict motion makes it clear on the record that, should a jury return a contrary verdict he will then

enter judgment n.o.v. contrary to it. In this way, he indicates to the Appellate Court his sentiment that there was no question to be left to the jury in the first place, while at the same time, covering himself, should an Appellate Court disagree in the thought that a jury question made early direction reversible error.

SPECIAL INTERROGATORIES

The overwhelming majority of the participating judges were in favor of the abolition of special interrogatories. This conclusion followed a discussion of the law relating to special interrogatories and the general verdicts. Many expressed the feeling that the manner in which special interrogatories are handled places the judge in a position where he must "be dishonest" in his dealings with the jury, i.e., not informing them as to the effect of their answers to the interrogatories. A clear majority indicated that the use of special interrogatories on ultimate issues was inconsistent with the jury system as a whole. Some felt that interrogatories tend to confuse jurors.

A rather realistic discussion of the problems presented by special interrogatories ensued. Many felt that problems were aggravated because of contributory negligence law in Illinois. Special interrogatory presents a problem since juries on the whole do not accept a standard of tort law which prohibits recovery by a plaintiff if he is guilty of *any* contributory negligence. Comparative negligence is, apparently, the operating model for a majority of juries even though they profess allegience to the current contributory bar. A significant percentage of the judges indicated that fewer problems with special interrogatories would exist if a comparative negligence standard were adopted.

Given this background, some of those in attendance indicated that the special interrogatory should exist but within the discretion of the trial judge. The argument was that special interrogatories may serve a useful purpose in nonnegligence cases.

In some of the sessions, there was rather a long discussion of the Texas system. Under this system, the jury does not return a general verdict, but rather answers a series of special interrogatories. The purpose of the jury there is to weigh the evidence and evaluate the credibility of witnesses and make essential findings of fact. Armed with the answers to the special interrogatories, the judge applies the law in order to reach judgment based upon the jury findings.

Another problem with regard to special interrogatories is, what does the trial judge do when be believes the general verdict to be "proper" but finds that the answer to a special interrogatory is against the manifest weight or would have to be set aside applying a *Pedrick* standard? Some judges would welcome more appellate clarification.

However, the majority expressed the view that the law should only permit a trial judge to grant a motion for a new trial under these circumstances.

VOIR DIRE

Most of the judges in a discussion of Rule 234 felt that no change was needed. Clarification, however, by the Supreme Court or the Appellate Courts appeared to be in order. The backdrop for the discussion generally centered upon a brief survey as to the length of time it took to select a jury in a "non complicated" tort case. In surveying the judges from Cook County, it varied considerably. One small group of judges indicated that a jury selection process in a noncomplicated tort case should take no more than one-and-one-half hours. Another group of judges found that as a rule of thumb it took one hour to select each panel (i.e., four) of jurors. Another group of judges, more reluctant to discuss time factors, indicated that one day was the rule of thumb.

The first question put before the judges was whether a trial judge could exclude attorneys from asking questions personally, and insist upon submission of written questions to be put to the jury *by the judge alone*. A small percentage of the judges answered affirmatively but indicated they would not use this process. The feeling of a majority of the judges was that in analyzing the rule, emphasis should be placed on the prerogative of the attorneys to *supplement* the examination rather than deal in extensive repetition. The question of what rights the trial attorney has to question jurors was extensively discussed. Many judges indicated that when they attempted to exclude a particular question by an attorney (because it was repetitious), the trial attorney sometimes present pre-1957 Appellate or Supreme Court cases announcing the attorney's prerogative to ask the question. Many judges felt that there should be "clarification" to these pre-1957 (that is, pre-Rule 234) cases.

There was also disclosure by some judges that they initiated the *voir dire* examination by asking a series of questions of the first panel of jurors, and then left the courtroom. Their feeling was that they could settle a few cases in their chambers, while the jury was being selected. They also expressed the opinion that, so long as the attorneys involved stipulated to this process, it could not represent reversible error. Some participating judges felt that, if this could be done by stipulation among the trial attorneys, it would not be necessary for the trial judge to be present at all during the conduct of a trial.

In each seminar session, there was a considerable discussion with regard to the definition and purpose of *voir dire* examination. Many judges argued that *voir dire* served only one purpose; a determination of jury qualifications. Another group felt that *voir dire* served a more

general basis which included an opportunity by the trial attorney to share an adversary expectation that the jury might be favorable to his cause in addition to being merely qualified to serve. As one trial judge put it: "I give each trial attorney two minutes to woo each juror."

One of the more beneficial aspects of the discussion of *voir dire*, was a series of shared experiences as to problems that have been faced by the judges in preserving the jury from infectious prejudices.

Many indicated that with the enactment of Rule 234 in 1957, there was a sharp reduction in the time involved in the selection of a jury. With the announcement of the rule, many judges worked diligently to expedite the time devoted to jury selection.

Many Cook County judges were most impressed with a jury questionnaire process that is utilized in down-state areas. The Cook County judges indicated that the jury questionnaire in Cook County is over a year old when presented to the trial attorneys. In down-state areas, apparently, a new questionnaire is completed on the first day of jury service by each juror. These current questionnaires are then given to the participating attorneys. The trial judge may then legitimately preclude the attorney from propounding questions where the answer is contained on the current jury questionnaire.

Finally, only a handful of judges were in favor of the federal rule which leaves to trial judges the prerogatives to automatically exclude direct involvement of the attorney in the jury selection process.

JURY SIZE

There was much interest in proposed jury reform. An outline was given of the advantages and disadvantages of less than twelve-man juries and the impact of a less than unanimous rule.

Surveys indicated the following:

A majority of those in attendance would subscribe to the principle that if a 12-man jury was to be the optimum size, then less than unanimous verdict should be accepted. There was a clear consensus that a ten-man jury would be constitutional.

A smaller majority of those in attendance advocated the reduction of the jury size from 12 to 6. Of those who favored a six-man jury, there was a severe split of opinion as to whether five of those jurors should control. On the question of whether one could accept a less than unanimous verdict when dealing with a six-man jury, there was no clear consensus.

SETTLEMENTS

Due to the prior discussions, settlements were not discussed in depth. Many judges felt that the problems were incident to the entire pre-trial handling process and could not be isolated from procedure. Most judges felt that, where reasonable offers had been tendered, they would like to have as many prerogatives as possible in order to effectuate a settlement.

Topic V—CHANCERY PROBLEMS

Hon. Donald J. O'Brien
Chairman and Discussion Leader

Hon. Charles E. Jones
Vice-Chairman and Discussion Leader

A. Summary of Advance Reading Material

1. Questions for Discussion

a) Ecological Actions

b) Class Actions

c) Preliminary Injunctions and Temporary Restraining Orders

2. Ecological Actions

a) 1970 Illinois Constitution, art. XI, sections 1 and 2

b) Environmental Protection Act of 1970

c) Statutory and Common Law Nuisance Principles. Pages 125-128 of the Advance Reading Material

d) Excerpts from Graham, *Pollution and the Law in Illinois*, 52 Chi. Bar Rec. 205, 212-213 (Jan. 1971)

e) Leahy, *Individual Legal Remedies Against Pollution in Illinois*, Loyola University Law Journal Vol. 3, No. 1 (Winter 1972). Pages 129-141 of the Advance Reading Material

3. Class Actions

a) Excerpts from Fox, *Representative Actions and Proceedings*, U. of Ill. Law Forum. Pages 97-102, 107-110 (Spring 1954). Pages 143-149 of the Advance Reading Material

b) Illinois Cases
Harrison Sheet Steel Co. v. *Lyons*, 15 Ill. 2d 532, 155 N.E. 2d 595 (1959); *Schick-Johnson Co.* v. *Malan Const. Corp.* 49 Ill. App.2d 277, 200 N.E. 2d 76 (1964); *Kuehn* v. *Bismark Hotel*, 52 Ill. App. 2d 321, 202 N.E. 2d 63 (1964); *Fiscitov* v. *Jones*, 39 Ill. 2d 531, 236 N.E. 2d 698 (1968); *Moseid* v. *McDonough*, 103 Ill. App. 2d 23, 243 N.E. 2d 394 (1968); *Rice* v. *Snarlin, Inc.*, 131 Ill. App. 2d 434, 266 N.E. 2d 183 (1970)

c) Excerpts from Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. Law Review 658 (1955-1956). Pages 151-154 of the Advance Reading Material

d) Fed. R. Civ. P. 23

e) Civil Procedure Rule 22 of the U.S. District Court for the Northern District of Illinois

4. Preliminary Injunctions and Temporary Restraining Orders

a) *Injunctive Relief Without Notice*
Unpublished memorandum prepared by Hon. Norman N. Eiger (Jan. 18, 1972). Pages 157-161 of the Advance Reading Material

b) *Injunction Act Amendment*
Unpublished memorandum prepared by Clark C. King, Jr. (Jan. 31, 1972). Pages 162-163 of the Advance Reading Material

B. Reference Material

1. *Zoning in the Courts*. Unpublished memorandum prepared by Hon. Robert C. Hunt (April 1972)

2. *Rosemont Building Supply, Inc.* v. *Illinois Highway Trust Authority , et al.*, 51 Ill. 2d 126, 281 N.E. 2d 338 (1972)

3. *People* v. *Lloyd A. Fry Roofing Co.*, 4 Ill. App. 3d 675, 281 N.E. 2d 757 (1972).

C. Summary of Discussions

Report by Professors Richard A. Michael and Thomas D. Morgan

The committee on chancery problems selected three topics for discussion at the 1972 seminar: ecological actions, class actions, and problems of temporary restraining orders and preliminary injunctions. Seminar sessions were chaired by Honorable Donald J. O'Brien, chairman of the committee, and Honorable Charles E. Jones, vice-chairman.

In each session, problems were introduced by the professor reporters, but maximum participation by the judges in attendance was obtained. The following are the conclusions reached in the seminar sessions.

I. Ecological actions.

A suit for protection of the environment can come before the circuit court in one of five ways:

1. A suit under Article XI of the 1970 Constitution.
2. A suit under the Environmental Protection Act of 1970.
3. An action by the Attorney General under his chapter 14 statutory authority to enjoin pollution.
4. An action pursuant to a city or county ordinance.
5. A suit brought under traditional nuisance principles.

None of these types of proceedings is completely free from ambiguity. For example, a suit under the Constitution is brought to enforce the private "right to a healthful environment." The question arises whether "healthful" includes the health of animals? Does it cover mental health? May it be extended to damage of property? The response of most judges was that it covers any specific, provable damage—mental or physical—to human beings.

The Constitution says that the right is subject to such procedural limitations as the legislature may provide. There was disagreement as to whether the Environmental Protection Act procedures, passed prior to the adoption of the Constitution, should be construed to constitute such legislative procedural limitations or whether a suit under the Constitution could be brought without regard to proceeding under the Environmental Protection Act.

Considerable debate was generated over the form of remedy which would be appropriate for violation of this constitutional right. While general nuisance damages were conceded to be appropriate, questions arose whether a citizen has a virtual absolute right to an injunction against a polluter who was damaging his health. Some judges argued that he does since a constitutional right is involved. Other judges argued vigorously, however, that any right must be subject to reasonable balancing. It was argued, for example, that to throw a hundred men out of work who had not filed suit would be unthinkable just to protect one plaintiff's alleged right.

In connection with suits under the Environmental Protection Act, it was pointed out that in the majority of cases the case will be handled by the Pollution Control Board and an appeal will be taken directly to the Appellate Court. Two questions relating to circuit judges were discussed, however. First, if the Attorney General files suit for an immediate injunction pursuant to section 43 it was generally agreed that the "hearing" referred to therein should be in the nature of a hearing for a preliminary injunction. This construction makes the Attorney General's proceeding much like one for a temporary restraining

order. Second, it was thought that section 45 of the Act gives a citizen a right of appeal of the Board's determination that his complaint was frivolous. Questions arise, however, such as whether the citizen may amend his complaint in the circuit court to make it less frivolous, whether the findings of the Board as to the claim's lack of merit should have any weight in the circuit court, and whether the circuit court should proceed de novo rather than refer the case back to the Pollution Control Board if it finds the complaint to have some merit.

With respect to the Attorney General's statute in chapter 14, section 12, the judges generally were troubled by the suggestion that a mere complaint by the Attorney General was grounds for mandatory issuance of an injunction which would remain in effect at least until the defendant's answer. The suggestion was made that not every case brought by an Assistant Attorney General somewhere should be sufficient to close down an industry, even just pending a hearing. Some judges suggested that they simply would refuse to sign the injunction order at least until notice could be given to the alleged offender and an informal answer filed.

With respect to city and other ordinances, the question arose whether they are preempted by state law. It was generally agreed that at least for home rule cities there is no preemption.

Little discussion was held with respect to traditional nuisance principles, but the special section of the Criminal Code permitting a private individual to sue to enjoin a public nuisance was discussed. The most difficult problem there was suggested to be whether the Attorney General's proceeding before the Pollution Control Board or using some remedy other than the one provided in the Criminal Code is sufficient to bar a suit by an individual. It was generally suggested that there should be such a bar although the statute appears to the contrary.

Substantial discussion was had over how to frame a remedy in pollution cases, particularly where an injunction was sought. It was suggested that perhaps (a) the matter could be continued pending efforts to abate the pollution, (b) the injunction could be issued and suspended for a period in order to permit abatement measures to proceed, or (c) a reporting system could be established whereby the polluter would have to meet a prescribed schedule of abatement to avoid an injunction being entered.

Finally, *res judicata* was discussed in the context of suits settled with prejudice by the Attorney General or private parties. It was generally agreed that while suits fraudulently brought and settled would not be binding, suits brought by the Attorney General or brought as class actions would be a bar to further suits against the alleged pollution by other individuals.

II. Class actions.

Three factors must be present in order to have a proper class action:

1. The cases must be based on common facts.
2. There must be a common issue or issues of law presented.
3. The remedy sought must be common to all.

It was suggested that although these principles seem straightforward there may be cases in which the question whether they apply may be very close. For example, in one case involving an alleged defective automobile part, it was suggested that the remedy might not be common since some of the members of the class would want a replacement part while others might have a product-liability injury suit.

It was generally agreed that the plaintiff need not be able to specify by name all the members of the class, even after discovery. That is, it theoretically should be sufficient to be able to prove that there are a given number of people with a common problem meriting a common relief. The question of ascertainability would, by this view, come up only when the fund was to be distributed. Dissenters from this view, however, argued that class actions are subject to abuse by lawyers who file claims that they know will only generate attorney's fees and taking this view, it is not unreasonable to bar class actions where one cannot even specify who the plaintiffs might be.

Other questions which arose included whether Illinois should adopt Federal Rule 23 which prescribes a notice procedure allowing individuals in the class to decide not to be represented. Although there was disagreement as to whether the specific rule should be adopted, it was generally agreed that some form of notice procedure was highly desirable if only to bind members of that class and thus protect the defendant. But it was suggested that where the amount of recovery for each plaintiff was very small, notice might cost more than it was worth.

It was generally agreed that if several class actions purporting to be on behalf of the same class were filed, the cases should be consolidated. Likewise, a second plaintiff from the class might well be permitted to intervene in such a suit. The question arose of division of attorney's fees in such a case, and it was suggested that judges who have faced this situation simply permit the attorneys to divide the total fee as they see fit.

Finally, it was generally recognized that the court has a much greater duty of supervision in a class action than in the normal case. That is, in a class action there are many nominal plaintiffs who effectively are at the mercy of the representation they are given and particularly the settlement proposed for them. It was suggested that the court should be extremely attentive to the interests of class members in deciding whether or not to approve a proposed settlement.

Particular discussion centered on the basis for attorney's fees. Again, it was agreed that the court should be concerned with the rights of the class to maximum recovery from the fund. It was suggested by many that it is unrealistic and contributes to public misunderstanding of the profession to permit an automatic 1/3 fee from a huge recovery or settlement where the amount of time the lawyer had to spend was minimal. It was suggested that while the contingent nature of the fee is a valid factor to consider, it should be only one factor and time spent, difficulty of the issues, etc., should all play a part in the fee awarded.

Other judges argued, however, that there would have been no recovery at all except for the work of the lawyer, and thus that members of the class had no reason to complain of large fees paid to the attorney. It was suggested that in an ordinary personal injury case involving far less special social value, a fee of 1/3 of the recovery was usual. It was reasoned that a similar recovery in a class action suit was thus appropriate.

A final question concerned attorney's fees where there is no fund. A United States Supreme Court case, *Mills v. Electric Auto Light Company*, 396 U.S. 375 (1970), held that attorney's fees were appropriate under the particular circumstances presented there. Some plaintiffs reason that they are similarly entitled to have the defendant pay their attorney's fees even though no financial recovery is obtained. A very recent Illinois case, *Rosemont Building Supply, Inc. v. Illinois Highway Trust Authority*, holds that the State may not be obligated to pay the plaintiffs attorney's fees in a suit to hold a statute unconstitutional. While the Supreme Court does not deal with the ordinary civil suit situation, it does not dispute the plaintiff's contention that attorney's fees are allowable in such a case.

III. Temporary restraining orders v. preliminary injunctions.

Under the federal practice, a plaintiff is entitled to a temporary restraining order for a period not to exceed 10 days without giving notice to the defendant (Federal Rule 65(b)). Indeed, such orders are often used when giving notice to the defendant would permit him to change the status quo before the court could issue the order. On the other hand, a preliminary injunction under the federal practice may only be issued after notice and hearing (Federal Rule 65(a)).

Illinois has both a temporary restraining order and preliminary injunction procedure. The problem is that the statutes establishing each

make the requirements for obtaining them virtually identical. That is, under Illinois law even a preliminary injunction may be issued without notice to the defendant under certain circumstances (Ill. Rev. Stat., ch. 69, sec. 3). The question discussed at the conference was whether or not the conditions for granting the two remedies should continue to be the same.

It was generally agreed that the Illinois statute should be revised to treat the two remedies as they are treated under federal procedure. A recent case, *People ex rel Pollution Control Board v. Lloyd A. Fry Roofing Company*, 4 Ill.App.3d 675, 281 N.E.2d 757 (1972), suggests the legislature meant to copy the federal practice in the first place. It was suggested that there is now a practical difference in that the permanent injunction must be dissolved upon the filing of an answer contravening the allegations of the complaint; whereas a temporary restraining order continues in effect until the hearing. However, it was generally agreed that the Illinois statutes should be amended to be parallel to the federal procedure.

Some questions arose as to whether the bond procedure was different with respect to temporary injunctions and temporary restraining orders. It was generally agreed, however, that the court has authority to require a bond under either procedure.

Topic VI—VIDEO TECHNOLOGY AND THE COURTS

Lecture, Panel Discussion and Demonstration

Panelists:

Hon. Wendell E. Oliver

Hon. Daniel J. Roberts

William R. Jacobs, II, Esq.

William M. Madden, Esq.

Robert M. Roe

Edmund W. Sinnott, Esq.

A. Summary of Advance Reading Material

1. *Summary Report On Court Centered Videotape Panel*. National Bureau of Standards (Oct. 14, 1971). Pages 3-11 of the Advance Reading Material
2. *Experimental Videotaping of Courtroom Proceedings*. Unpublished interim report to the Illinois Supreme Court (Nov. 1968), prepared by William M. Madden, Administrative Office of the Illinois Courts. Pages 12-33 of the Advance Reading Material
3. DeVries, *The Use of Videotape In Depositions*, 11 For the Defense No. 10 (Dec. 1970). Pages 34-35 of the Advance Reading Material
4. Suggested stipulation proposed by the McLean County Bar Association, for use in videotaping physician's deposition. Page 36 of the Advance Reading Material
5. *People v. Ardella*, 46 Ill.2d 517, 276 N.E.2d 302 (1971)
6. *Hendrix* v. *Swenson*, 40 L.W. 2609 (8 Cir. 1972)
7. *Paramore* v. *Florida*, 229 So.2d 855 (Fla. 1969)

B. Selected Bibliography

Video Recording

Madden, *Illinois Pioneers Video Taping of Trials*, 55 A.B.A.J. 457 (May 1969).

Morrill, *Enter - The Video Tape Trial*, 3 John Marshall Journal of Practice and Procedure 237 (Spring Term 1970).

Krell, *Videotape: A New Horizon in Evidence*, 4 John Marshall Journal of Practice and Procedure 339 (1971).

Sullivan, *Court Record by Video-Tape*, 50 Chicago Bar Record 336 (April 1969).

McCrystal, *Video Tape Trials*, XLIV The Ohio Bar 639 (May 24, 1971).

Sound Recording

Manual of Electronic Recording, prepared by the Administrative Director of Courts, Anchorage, Alaska (1964).

Handbook on Electrical Recording, prepared by National Shorthand Reporters Association (Rev. January 1965).

Boyko, *The Case Against Electronic Courtroom Reporting*, 57 A.B.A.J. 1008 (1971).

Reynolds, *Alaska's Ten Years of Electronic Reporting*, 56 A.B.A.J. 1080 (1970).

C. Reference Material Outline

VIDEOTAPE AND MOTION PICTURE USAGE

RELEVANT ILLINOIS CASES:

McGoorty v. Benhart, 305 Ill. App. 458, 27 N.E. 2d 289 (1940) (Use of silent motion picture segments for impeachment in personal injury case affirmed.)

Dept. of Public Works v. Oberlander, 92 Ill. App. 2d 174, 235 N.E. 2d 3 (1969) (Use of prepared motion picture to demonstrate land affirmed.)

People v. Ardella, 49 Ill. 2d 517, 276 N.E. 2d 302 (1971) (Use of videotape for conviction of drunk driving affirmed.)

Also See:

Eizerman v. Behm, 9 Ill. App. 2d 263, 132 N.E. 2d 788 (1956)

Belfield v. Coop, 8 Ill. 2d 293, 134 N.E. 2d 249 (1955)

ADMISSIBILITY OF FILMS IN GENERAL:

62 ALR 2d 686

TAKING TAPE RECORDINGS OR CONFESSIONS INTO THE JURY ROOM:

37 ALR 3d 238

People v. Caldwell, 39 Ill. 2d 346, 236 N.E. 2d 706 (1968)

People v. Dixon, 37 Ill. 2d 416, 226 N.E. 2d 608 (1967)

MOTION PICTURES AS EVIDENCE IN CRIMINAL CASES:

See: 62 ALR 2d 701

Boyne City, G & AR Co. v. Anderson, 146 Mich. 328, 109 N.W. 429 (1906) (First use of a phonograph record in the United States as evidence.)

Com. v. Roller, 100 Pa. Super. Ct. 125 (1930) (Admission of talking motion picture with criminal confession.)

Com. v. Clark, 123 Pa. Super. Ct. 277, 187 A. 237 (1936) (Attempted bribery of Attorney General recorded on phonograph record admitted in evidence and affirmed.)

People v. Hayes, 21 Cal. App. 2d 320, 71 P. 2d 321 (1937) (Sound motion picture confession of crime admitted and affirmed.)

State v. Perkins, 355 Mo. 851, 198 S.W. 2d 704 (1946) (Confession of rapist on phonograph record admitted with death penalty affirmed.)

People v. Bowley, 230 Cal. App. 2d 269, 382 P. 2d 591 (Admissibility of stag film for conviction of performer of oral copulation affirmed.)

VIDEOTAPE CASES:

Housewright v. State, 154 Tex. Crim. 101, 225 S.W. 2d 417 (1949) (DWI conviction affirmed.)

Carpenter v. State, 169 Tex. Crim. 282, 333 S.W. 2d 391 (1960) (DWI affirmed.)

Lanford v. People, 159 Colo. 36, 409 P. 2d 829 (1966) (DWI affirmed.)

City of Piqua v. Hinger, 15 Ohio St. 110, 238 N.E. 2d 766 (1968) (DWI affirmed.)

People v. Strickland, 276 N.C. 253, 173 S.E. 2d 129 (1970) (DWI affirmed.)

People v. Ardella, 49 Ill. 2d 517, 276 N.E. 2d 302 (1971) (DWI affirmed.)

State v. O'Brien, 255 La. 704, 232 S. 2d 484 (1970) (Videotape showing living quarters of defendant to prove occupancy of premises to sustain possession of narcotics conviction.)

Paramore v. State, 229 So. 2d 855 (1969) (Confession of murder on videotape affirmed with death penalty.)

Williams v. State, 461 S.W. 2d 614 (Tex. 1971) (Videotape bank robbery films affirmed.)

Mikus v. U.S., 433 F. 2d 719 (CA2-Conn. 1970) (Videotape bank robbery films conviction affirmed.)

REPORT

OF THE

1972 SEMINAR FOR NEW JUDGES

OF THE

ILLINOIS JUDICIAL CONFERENCE

Lake Shore Club of Chicago
850 Lake Shore Drive
December 14, 15 and 16, 1972

AGENDA

1972 NEW JUDGE SEMINAR

THURSDAY, DECEMBER 14, 1972

11:00 A.M. - 12:00 NOON

SEMINAR REGISTRATION
Second Floor Corridor

12:00 NOON

LUNCHEON
Hubbard Room - Second Floor
Remarks - Hon. Thomas E. Kluczynski,
Justice, Illinois Supreme Court

2:00 - 4:00 P.M.

LECTURES
Burnham Room - Second Floor
The Illinois Judicial System - Its Structure and Operation - Hon. Roy O. Gulley, Director, Administrative Office of the Illinois Courts
Observations - Mr. John M. Oswald, Assistant Director, Administrative Office of the Illinois Courts
Judges Reading List - Hon. James O. Monroe, Jr.
Third Judicial Circuit

4:00 - 6:00 P.M.

SEMINAR
Burnham Room - Second Floor
The Trial and Judge's Authority -
Hon. Alfred E. Woodward, Circuit Judge,
Eighteenth Judicial Circuit
Prof. Vincent F. Vitullo, DePaul University, College of Law

6:00 P.M.

SOCIAL HOUR
Hubbard Room - Second Floor

6:30 P.M.

DINNER
Hubbard Room - Second Floor
Address - *Law and Government* -
Hon. Charles H. Davis, Justice,
Illinois Supreme Court

FRIDAY, DECEMBER 15, 1972

7:00 - 9:00 A.M.

BREAKFAST
Mediterranean Room - Third Floor

9:00 - 12:30 P.M.

LECTURE
Burnham Room - Second Floor
Criminal Law (Search & Seizure) -
Prof. Charles H. Bowman and
Prof. Wayne R. LaFave, University of
Illinois, College of Law

12:30 P.M.

LUNCHEON
Hubbard Room - Second Floor

2:00 - 5:30 P.M.

LECTURE
Burnham Room - Second Floor
Selected Topics of Evidence -
Prof. Prentice H. Marshall, University
of Illinois, College of Law

5:30 P.M.

SOCIAL HOUR
Hubbard Room - Second Floor

6:00 P.M.

DINNER
Hubbard Room - Second Floor
A showing of "Under Arrest", a short
educational film

SATURDAY, DECEMBER 16, 1972

7:00 - 9:00 A.M.

BREAKFAST
Mediterranean Room - Third Floor

9:00 - 12:00 NOON

SEMINAR
Burnham Room - Second Floor
Criminal Law - Motions, Pleas of Guilty and Sentencing under the new Code of Corrections - Hon. Richard Mills
Circuit Judge, Eighth Judicial Circuit;
Chairman, Committee on Criminal Law for
Illinois Judges

12:00 NOON

LUNCHEON
Mediterranean Room (if desired)

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

ILLINOIS JUDICIAL CONFERENCE EXECUTIVE COMMITTEE

Rodney A. Scott
Chairman

Daniel J. McNamara
Vice-Chairman

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

Thomas E. Kluczynski
Liaison Officer

NEW JUDGE SEMINAR PLANNING COMMITTEE

Charles H. Davis
Chairman

John C. Fitzgerald
Richard Stengel

Rodney A. Scott
Liaison Officer

ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

Roy O. Gulley
Director

REPORT OF PROCEEDINGS

The Illinois Judicial Conference conducted its third seminar for new judges on December 14, 15 and 16, 1972 at the Lake Shore Club of Chicago. Supreme Court Justice Thomas E. Kluczynski, liaison officer to the Executive Committee, convened the seminar.

The newly appointed judges were addressed by Supreme Court Justice Charles H. Davis, chairman of the New Judge Seminar Planning Committee; by the Honorable James O. Monroe, Jr.; by the Administrative Director, Roy O. Gulley; and by Mr. Carl H. Rolewick and Mr. John M. Oswald, deputy director and assistant director, respectively, of the Administrative Office of the Illinois Courts.

In addition to the addresses at the luncheons and dinners, the seminar consisted of lectures and discussions on the following topics:

I. The Trial and the Judge's Authority

II. Criminal Law - Search and Seizure

III. Selected Topics of Evidence

IV. Criminal Law - Motions, Pleas of Guilty and Sentencing under the new Unified Code of Corrections

The advance reading material for the topics was the same or similar to the materials which were used at previous annual seminars for the judges of the Supreme, Appellate and circuit courts. The discussion format followed was also similar to the previous seminars. However, each new judge did receive a copy of Hunter's *Trial Handbook for Illinois Lawyers* (4th ed.).

None of the lectures, reading material or summaries of discussions is reproduced here since these items can be found in the previously published Judicial Conference reports. The one exception is Judge James O. Monroe's selected reading list, which follows.

A Selected Reading List for Illinois Judges

prepared by the
Hon. James O. Monroe, Jr., 3rd Circuit

Table of Contents

APPENDICES

A Selected Reading List for Illinois Judges

Preface

As the candid would readily concede, most judges need continuing direction, wide perspective and stimulus. Consequently, any efforts to this end are in order. To have such an effort suggested or sponsored by the Supreme Court of Illinois gives it the dignity it deserves and the recognition which is so overdue.

The 1968 Seminar for New Judges includes advance reading materials and a selected reading list. It is our fond hope that this list will furnish materials, ideas, solutions and inspiration to its readers and thereby enable them better to understand the problems of our society and of our bench.

Any reading list is open to critique. It must be selective. (A 1968 bibliography on *The American Judge* contains 317 pages, some 30 items to a page, some 9,000 items—so many that one must pick and choose.) To be selective, it must be personal. Being personal, it will be subjective. A list prepared by different judges, lawyers or law schools would vary appreciably from this, and a later list would perhaps be much better than the first. In making the selection, there is no beginning or end. In appraising the product, one man's meat may be another man's poison.

The list at hand was suggested by a small committee of Illinois judges directed by the Supreme Court to plan the 1968 program of orientation and to compile advance reading materials for new Illinois judges. At their first meeting, the committee judges promptly, independently and unanimously developed several thoughts: 1) Since the need for judge orientation is so great and the time for formal course sessions is so short, the reading materials ought to cover far more topics than the course. 2) The readings might be more important than the course. 3) The list should be prepared not just for new judges but for all judges; a judge's reach should always exceed his grasp.

This led to an attempt to provide two things: 1) A set of basic items which every judge should have at hand—"bread-and-butter, nitty-gritty daily details", things which some judges know by rote, some keep in an elaborate bench book, some follow with a check list, and some ignore; 2) items of depth and substance not providing ready-made detail but intended to aid the judge in working out his own solutions to problems.

The two-column form for the list is not intended to divide possible reading into daily detail items and depth items, because all judges need some of both. Rather, the "basic" column includes items that all judges *can and must* read, and the "supplementary" column has materials which judges *could and should* read. They are placed side by side in hope that those who read the basic materials will be impelled through interest to read the supplementary suggestions.

Sources consulted included standard reading lists available in law libraries and law schools, the committee members' own selections of items they found most useful for themselves, programs and publications of the National College of State Trial Judges, orientation programs for new judges in other states and in federal courts, and previous seminars for Illinois judges and magistrates. From these sources a "trial run" list was prepared. Many changes, substitutions, and especially deletions were made, to produce the present list.

How will judges acquire these readings? 1) A few items should be on every judge's desk or bench—purchased by the State or county and owned by or assigned permanently to that judge: such as a set of the Illinois Revised Statutes, the State Trial Judge's Book, some trial guide, and a handbook on evidence. 2) The statute, case law and treatise material for Illinois should be in every county library or in a large-county library available to all judges and lawyers of the circuit—likewise purchased by the county, from statutory library fees, and available for evening, holiday, weekend or daily use. 3) Some items from previous Illinois seminars and a few other items are available to judges on request from the Administrative Office of the Illinois Courts, usually in xerox form. 4) Other items may be borrowed by interested judges from the Chicago Civic Center law library, or from law

school libraries at Northwestern, Chicago, Illinois; St. Louis or Washington universities, or from the American Bar Center, or they may be secured directly from publishers or legal bookshops.

Why have a reading list for judges? Perhaps those who need it least will give it most attention; and those who need it most might not read the materials even if they were handed to them. Like the errant among the preacher's flock, those in need of the message are not even there to receive it. Fortunately, the vast majority of judges—busy, overworked, beset, conscientious, aware of their needs—would probably welcome a reading list. Local discussions, with or without lawyer participation, could enhance the value of reading materials through the refinement of dialogue. The result—which rests with the judges themselves—could be salutary.

Charles H. Davis, Chairman
John C. Fitzgerald
James O. Monroe, Jr.

Chicago
November, 1968

Where a book raises your spirit, and inspires you with noble and courageous feelings, seek for no other rule to judge the event by; it is good, and made by a good workman.

—Jean de la Bruyère

Preface to the 1972 Revision

When three judges were asking in 1968 to prepare a reading list for new Illinois judges, and given some time to do it, that was challenge enough. Now after all that has happened, leaving the revision to one man with little time is almost frightening. This, then, is to recognize limitations, forego ambition, and avoid pretentiousness, and to explain what has been done and why.

To review the old list after four years is an humbling exercise, recalling the original frustrations and pointing up original inadequacies. But the eager reception of new judges seeking help and the few kind words from respected colleagues and superiors make the effort to revise, update and improve the first list seem worthwhile.

This list is not presented as a best list, only as a culled and subjective selection. If "one man's meat is another man's poison," this list started out as three men's meat, and most of the choices have been proven by respectable publication, honored by usage or chosen by others in the business of choosing.

For this list, in lieu of organized help from any staff, bar, bench or academic sources, these devices were used:

1. To cull and supplement the general list, new recommendations were secured from a number of colleagues and law deans.

2. To check on the topics and materials for them, course lists and text lists were secured from leading law schools in Illinois, plus nearby schools and a few other leading schools (Harvard, Yale and Stanford).

3. To check on current developments, a modicum effort was made to scan recent United States and Illinois Supreme Court cases and three annual surveys, plus the contrasting general views of the American Bar Association Journal and Trial.

4. To localize and limit the effort, Illinois practice books were consulted, and recent issues of the Illinois Bar Journal and Illinois Law Forum.

5. Articles have been preferred over single cases, books over articles. Such choices shorten the list but broaden the help and provide an over-all view. There is a tendency in trial courts for lawyers and judges to mislead themselves and one another with single instances: even if an item is the over-advertised "case in point," it should be checked with others and placed in perspective.

6. Whole fields have been avoided, as this list is chiefly for Illinois trial judges.

7. Some items are appended - including another entire list which provides an alternative.

The topics selected are meant to be those most likely to be needed. On this list as revised, many topics are new.

The items selected for each topic are meant to be those most likely to be helpful to an Illinois trial judge. This type of selection has lead in many instances to treatises, texts, or books of cases and materials. The choices made are comprehensive, authoritative and longish but well-organized and manageable in one or two volumes, either very recent or standards supplemented or still in point, readily available and inexpensive. On this list as revised, most items are new.

Many topics of current controversy and importance—capital punishment, euthanasia, sexual behavior, abortion, drugs, draft law, and so on—are omitted as more intriguing than likely to be useful in the average judge's work. Some fascinating periodicals—a race relations reporter, a black law journal, a journal of law reform, to name a few—are likewise important and engaging but not of general use.

(The two-column format of the original edition was abandoned in the revision to save space. A number of items in the original edition were dropped as passe'. Items available only from the Administrative Office of the Illinois Courts are marked "A.O.I.C.")

A word about selection, and a reading suggestion for all judges. Regarding substance, Francis Bacon suggested that "some books are to be tasted, others to be swallowed, and some few to be chewed and digested." Regarding form and techniques, the rapid reading experts advise skimming and scanning. Regarding the mountains of material available, much must simply be looked at and avoided. Given the limitations of time, every judge must choose whether he will try slavishly to read all the advance sheets of even his own jurisdiction, or instead seek the general guides of texts, case books and law reviews and rely in cases before him on the offerings of counsel plus his own pointed research on that particular matter. Dean Bok's advice quoted on the cover is in point.

The assistance of those who helped in this revision is acknowledged with thanks. Special thanks are due Mrs. Annabel Bagley, court reporter, for typing, and Mr. David Ground, bailiff, for compilation and general assistance.

Finally, while it is recognized that no reading list alone can make a reader a good man, a good lawyer or a good judge, it is also worth hoping that any reading list - even this one - might help.

James O. Monroe, Jr.
Circuit Judge

Edwardsville
November, 1972

A Note on County Law Libraries

In Illinois, county law library facilities are possibly the best means of providing judges with available reading materials. The enabling act appears in ch. 81, sec. 81, Ill. Rev. Stat. 1971. These suggestions are offered:

Get as many of the basic works (not strictly current topics or the personal literature) included in this list as your budget permits.

Make arrangements with the Cook County Law Library (Chicago Civic Center) and your nearest university law library for loan service. Personnel of these libraries are most accommodating, and a well-put emergency phone call may even bring you a needed book or a xeroxed article special delivery tomorrow morning. Honor these privileges by prompt safe return of borrowed items. The American Bar Center and the Illinois Bar Center may furnish similar service.

Set up rules for the protection, arrangement and daily housekeeping of your books and for the quiet, orderly, undisturbed use of your library rooms. Get at least one competent instructable bailiff or clerk, possibly a law student, under at least one judge who knows law books, to supervise your facilities. Provide strict accounting for funds, acquisitions and replacements. Drastically control removals of items, even to courtrooms and chambers. Put your rules in writing and publish them; then enforce them, with someone on hand at all working hours and backed by the authority of the chief judge or presiding resident judge.

For lawyers and judges only, and under a strict honor system, make your library available at nights and on week-ends.

Don't fragmentize your library by placing basic research sets like the Corpus Juris series, the ALR series, federal and regional reports, law reviews and sourcebooks in non-central facilities.

Don't duplicate such works in non-central facilities: they are so expensive that the money used on second sets could be better spent for additional source materials—such as the many treatises, casebooks and texts for the topics in this list. Area trial facilities may need the immediacies essential to sound spot-checking on immediate trial decisions—the statutes, state supreme and appellate court reports, pattern instructions, and McCormick or Cleary on evidence. But area court facilities are not research libraries. Lawyers and judges doing their homework after hours would be better served by having in one place the additional sources suggested for a centralized research library. The short driving time to this library is well-spent thinking about the problem and more than restored by having the quiet, unbothered work conditions of a central library, especially at night or on week-ends.

Once you have a decent law library, keep it up to date.

A Selected Reading List for Illinois Judges

General

1. *Daily Reference*

Illinois Revised Statutes, latest ed., Burdette-Smith, Chicago.

Smith-Hurd Illinois Annotated Statutes, Burdette-Smith, Chicago.

Illinois Blue Book, Sec. of State, Springfield, latest ed.

World Almanac, St. Louis Post-Dispatch, St. Louis, latest ed.

Webster's Third New International Dictionary, or Webster's Seventh New Collegiate Dictionary, Merriam, Springfield, Mass.

Illinois Digest, West, St. Paul, Minn., or

Illinois Digest, Callaghan, Chicago.

Illinois Law and Practice, Burdette-Smith, Chicago.

Illinois Supreme Court, reports and advance sheets.

Illinois Appellate Court, reports and advance sheets.

United States Supreme Court, reports and advance sheets.

The Holy Bible (your favorite edition).

Shakespeare, Complete Works (any authentic edition).

2. *Periodicals*

Trial Judges Journal, Natl. Conf. of State Trial Judges, Am. Bar Center, Chicago.

Illinois Law Forum, Univ. of Ill., Champaign.

Illinois State Bar Journal, Ill. State Bar Assn., Ill. Bar Center, Springfield.

American Bar Association Journal, Am. Bar Center, Chicago.

Trial, Journal of the American Trial Lawyers Assn., Cambridge, Mass.

Journal of American Judicature Society, Am. Bar Center, Chicago.

Supreme Court Review, Univ. of Chicago Press, Chicago.

University of Chicago Law Review, Univ. of Chicago, Chicago.

Northwestern University Law Review, Northwestern Univ., Chicago.

Chicago Bar Record, Chicago Bar Assn., Chicago.

Chicago-Kent Law Review, Chicago-Kent Law School, Chicago.

DePaul Law Review, DePaul Univ., Chicago.

John Marshall Journal of Practice and Procedure, John Marshall Law School, Chicago.

Harvard Law Review, Harvard Univ., Cambridge, Mass.

Yale Law Journal, Yale Univ., New Haven, Conn.

Law journal of your own law school.

3. *Judges, Judging and Judgment*

State Trial Judge's Book, Natl. Conf. of State Trial Judges & Joint Comm. for the Effective Administration of Justice, West, St. Paul, Minn., 1965.

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James, Howard, Crisis in the Courts, McKay, New York, 1968.

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Manual on Recordkeeping, Ill. Sup. Ct. Order, 1968, publ. A.O.I.C., 1972.

Vanderbilt, Arthur, The Challenge of Law Reform, Princeton Univ. Press, Princeton, N. J., 1955.

5. *The Illinois Courts*

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6. *Running a Trial Court*

"Conference Call Technique Shortens Arguments", 4 Trial Judges J., no. 1, Jan., 1965.

"Court Room Etiquette; Trial Practice Defects to Avoid", Ill. Judges Sem., 1967, A.O.I.C.

"Disruption in Our Courts: Why?" Trial, vol. 7, no. 1, Jan.-Feb., 1971.

Fair Trial and Free Press, Am. Bar Assn. Advisory Comm. on Fair Trial & Free Press, Paul C. Reardon, Ch., Am. Bar Assn., New York, 1968.

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Richter, George B., "Advance Trial Briefs", 3 Trial Judges J., no. 3, July, 1964.

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"Trial Court's Power (to Assess Costs for Attorney Misconduct Causing Mistrial)", 3 Trial Judges J., no. 2, April, 1964.

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The Prosecution Function and the Defense Function
Providing Defense Services
Pretrial Release
Discovery and Procedure Before Trial
Fair Trial and Free Press
Speedy Trial
The Function of the Trial Judge, including the Judge's Role in Dealing with Trial Disruptions
Joinder and Severance
Pleas of Guilty
Probation
Sentencing Alternatives and Procedures
Criminal Appeals
Appellate Review of Sentences
Post-Conviction Remedies

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21. *No-Fault Insurance*

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Casey, Edward F., "Auto Reparations in Illinois - the 'Illinois Plan': (The Painless Claim)"; and Vaccarello, Vincent B., "Improved Auto Reparations - an Answer to 'Total No-Fault'," 59 Ill. B. J. 800, 801, 1971.

Hofeld, Albert F., "Toward Understanding, Analyzing and Improving 'No Fault' in Illinois," 59 Ill. B. J. 972, 1971.

O'Connell, Jeffrey, The Injury Industry and the Remedy of No-Fault Insurance, Commerce Clearing House, Chicago, 1971; Univ. of Ill. Press paperback.

O'Connell, Jeffrey, and Wilson, Wallace, "Public Opinion on No-Fault Auto Insurance: A Survey of the Surveys," 1970 Ill. L. F. 307, 1970.

22. *Poverty Law*

Dodyk, Paul M., Sovern, Michael I., Berger, Curtis J., Young, William F. Jr., and Paulsen, Monrad G., Law and Poverty, West, St. Paul, Minn., 1969.

Ferman, Louis A., Kornbluh, Joyce L., and Haber, Alan, Poverty in America, Univ. of Michigan Press, Ann Arbor, Mich., 1965, rev. ed., 1968.

Levy, Robert J., Lewis, Thomas P., and Martin, Peter W., Social Welfare and the Individual, Foundation Press, Minneola, N.Y., 1971.

23. *Taxation*

Kragen, Adrian, and McNulty, John K., Federal Income Taxation, West, St. Paul, Minn., 1970.

New Illinois Income Tax Law with Explanation, Commerce Clearing House, New York, 1969.

24. *Torts*

Dickerson, Reed, "Products Liability—How Good Does a Product Have to Be?", 42 Ind. Law J. 301, 1967.

Harper, Fowler V., and James, Fleming, Jr., The Law of Torts, Little-Brown, Boston, 3 vols., 1956, supp. to vol. 2, 1968.

Kionka, Edward J., "The King Is Dead, Long Live the King: State Sovereign Immunity in Illinois," 59 Ill. B. J. 660, 1971.

Laird v. Nelms,____U.S.____, 32 L.Ed. 2d 499 (1972), strict liability for sonic boom damage denied.

Prosser, William L., The Law of Torts, West, St. Paul, Minn., 4th ed., 1971.

Prosser, William L., "The Fall of the Citadel (Strict Liability to the Consumer)", 50 Minn. L. Rev. 791, 1966.

Sklar, Ronald J., "Products Liability", 54 Ill. Bar J. 355, 1965.

25. *Women and the Law*

Lewis, Barbara, "Women and the Law", in 1970-71 Ann. Surv. of Am. Law, New York Univ., New York, p. 343.

Sisterhood is Powerful, Robin Morgan ed., Random House, New York, 1970.

Smith, Dorothy, Justice is a Woman, Dorrance, Philadelphia, 1966.

APPENDIX A:
Harvard Reading List

See pages 58 through 65 of "Harvard Law School Handbook."

APPENDIX B:
Topics

This list includes all topics covered in the last two annual surveys of American law, the original Illinois Judges list, and the American Association of Law Schools list.

	Specific Subjects Legal Educ. Biblio. Am. Surv. 1970-71	Full Articles Am. Surv. 1969-70	Full Articles Am. Surv. 1970-71	Illinois Judges List 1968	AALS List
Accounting and Law	X				X
Administrative Law	X	X	X		X
Admiralty	X	X			X
Aeronautics					X
Agency	X				
Air and Space Law	X				
Antitrust			X		
Atomic Energy					X
Bankruptcy; Creditors' Rights	X				
Behavioral and Social Sciences and Law	X				
Biography					X
Business Association	X				
Business Enterprises					X
Business Law	X				
Capital Gains and Losses		X			
Commercial Arbitration		X			
Commercial Cases				X	
Commercial Law	X		X		X
Commercial Transactions	X				
Comparative Law	X				X
Conflict of Laws	X	X	X		X
Constitutional Law	X	X	X	X	X
Consumer Protection		X	X		
Contracts	X	X			X
Copyright; Patents, Trusts	X	X	X		
Corporate Investors			X		

	Specific Subjects Legal Educ. Biblio. Am. Surv. 1970-71	Full Articles Am. Surv. 1969-70	Full Articles Am. Surv. 1970-71	Illinois Judges List 1968	AALS List
Corporations		X	X		
Courts (The Illinois)				X	
Creditor' Rights; Bankruptcy	X	X	X		
Criminal Law		X	X	X	
Criminal Procedure		X	X		
Criminal Law and Procedure	X				X
Criminology	X				
Dictionaries					X
Discovery in Illinois				X	
Divorce				X	
Domestic Relations	X				
Environment	X				
Equity	X				
Estate Planning; Wills, Trusts	X				
Evidence	X			X	X
Family Law	X	X	X		X
Federal Jurisdiction and Practice	X	X	X		
Food, Drug, Cosmetics					X
Illinois Civil Practice				X	
Intellectual and Industrial Property					X
International Law	X				X
International Relations	X				
Insurance					X
Judges, Judging and Judgment				X	
Judicial Administration	X	X	X	X	X
Jurisprudence	X				X
Jury				X	
Juveniles and the Court				X	
Labor Law	X	X	X		X
Landlord and Tenant		X			
Land Use Control		X			

	Specific Subjects Legal Educ. Biblio. Am. Surv. 1970-71	Full Articles Am. Surv. 1969-70	Full Articles Am. Surv. 1970-71	Illinois Judges List 1968	AALS List
Law and Judges in the Current Am. Scene				X	
Legal Bibliography	X				
Legal Drafting	X				
Legal Education	X				
Legal Ethics	X				
Legal History	X				X
Legal Profession		X			X
Legal Research	X				
Legal Writing	X				
Legislation	X				
Local Government					X
Medicine and Law	X				
Medical Jurisprudence					X
Mental Health				X	
Military Law	X				X
Mining Law					X
Minors in Civil Litigation				X	
Municipal Corporations	X				
Natural Resources	X				
Oil and Gas					X
Patent; Copyright, Trademark	X	X	X		
Philosophy of Law and Related Areas	X				
Probate				X	
Procedure	X				
Products Liability				X	
Property	X				X
Personal		X			
Real			X		
Regulated Industries					X
Restitution	X				
Roman Law	X				
Running a Trial Court				X	
Selective Service Law		X	X		

	Specific Subjects Legal Educ. Biblio. Am. Surv. 1970-71	Full Articles Am. Surv. 1969-70	Full Articles Am. Surv. 1970-71	Illinois Judges List 1968	AALS List
Social Welfare and Insurance					X
Supreme Court and the Antitrust Laws	X				
Taxation	X				X
Torts	X	X	X		X
Trademark; Copyright, Patent	X				
Trade Regulations	X				X
Trial Practice	X				
Trusts; Estates	X	X	X		
Urban Law	X				
Wills; Estate Planning, Trusts	X				
Women and the Law			X		

APPENDIX C:

The 1970 Term of the U. S. Supreme Court - Kurland Curtailed

This is a mere listing of most of the cases covered by Professor Philip B. Kurland in "1970 Term: Notes on the Emergence of the Burger Court," final chapter in The Supreme Court Review, Kurland, ed., Univ. of Chicago Press, Chicago, 1971, pp. 265-322. This review, published annually, puts each term's cases in perspective, with critical analysis, in expertly organized chapters and topical sections. It is comparable, not unfavorably, with the similar annual treatment of the Harvard Law Review. Unless one is to tackle the job unguided, some such treatment is essential to keeping abreast of what is happening in our highest court, indeed in our juridical life.

The capsules following each case here are simply teasers to provoke reading - with apologies to Professor Kurland for necessary but regrettable brevity. Kurland's full essays are highly authoritative, brilliant, penetrating, opinionated, stimulating - and recommended.

The 1972 volume, covering the 1971 Term ended in June, will be out in January, 1973.

Civil Rights.

Griggs v. Duke Power Co., 401 U.S. 424 (1971), employment of Negroes.

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), employment of women.

Griffin v. Breckenridge, 403 U.S. 88 (1971), private action to enforce.

Palmer v. Thompson, 403 U.S. 217 (1971), public facilities.

The Electoral Process.

Oregon v. Mitchell, 400 U.S. 112 (1970), U.S. control of voting - literacy, age, residence.

Perkins v. Matthews, 400 U.S. 379 (1971), U.S. control of voting districts.

Gordon v. Lance, 403 U.S. 1 (1971), majority or 60% re bond issues.

Whitcomb v. Charis, 403 U.S. 124 (1971), apportionment.

Abate v. Mundt, 403 U.S. 182 (1971), apportionment, 12% variance.

Ely v. Klahr, 403 U.S. 108 (1971), time to reapportion.

Connor v. Johnson, 402 U.S. 690 (1971), single-member districts.

Jenness v. Fortson, 403 U.S. 431 (1971), nomination, new parties.

First Amendment.

1. *Press.*

New York Times v. U.S., 403 U.S. 713 (1971), Pentagon papers.

Time v. Pape, 401 U.S. 279 (1971), libel, falseness as malice.

Monitor-Patriot Co. v. Roy, 401 U.S. 265 (1971), libel, public official, crime.

Ocala Star-Banner v. Dameron, 401 U.S. 295 (1971), libel, candidate.

Rosenbloom v. Metromedia, 403 U.S. 29 (1971), libel, private person.

2. *Obscenity.*

Blount v. Rizzi, 400 U.S. 410 (1971), judicial review required.

U.S. v. 37 Photographs, 402 U.S. 363 (1971), circulation.

U.S. v. Reidel, 401 U.S. 351 (1971), mails, even to willing adults.

Cohen v. California, 403 U.S. 15 (1971), four-letter words in public.

Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971), prior restraint.

3. *Freedom of Association.*

Coates v. Cincinnati, 402 U.S. 611 (1971), 3-person "assembly."

4. *Loyalty oaths, bar admission, practice of law.*

Connell v. Higginbotham, 403 U.S. 297 (1971), constitution or beliefs.

Baird v. State Bar of Arizona, 401 U.S. 1 (1971), applicant's past memberships.

In re Stolar, 401 U.S. 23 (1971).

Law Students Research Council v. Wadmond, 401 U.S. 154 (1971), cf. United Transport Union v. Michigan Bar, 401 U.S. 576 (1971), group practice?

5. *Federal Control of State Prosecution as Harassment (Dombrowski).*

Younger v. Harris, 401 U.S. 37 (1971), California syndicalism law.

Samuels v. Mackell, 401 U.S. 66 (1971), New York anarchy law.

Boyle v. Landry, 401 U.S. 77 (1971), Illinois intimidation law.

Perez v. Ledesma, 401 U.S. 82 (1971).

6. *The Religion Clauses.*

Gillette v. U.S., 401 U.S. 437 (1971), conscientious objection.

Lemon v. Kurtzman, 403 U.S. 602 (1971), parochial aid, teaching services.

Robinson v. DiCeuso, id. 672, direct payment to teachers.

Tilton v. Richardson, ibid, construction grants.

Criminal Procedure.

1. *Search and Seizure.*

Williams v. U.S., 401 U.S. 646 (1971), area, retroactivity.

U.S. v. Harris, 403 U.S. 573 (1971).

Coolidge v. New Hampshire, 403 U.S. 443 (1971), voluntary surrender.

Bivens v. Six Unknown Narcotic Agents, 403 U.S. 388 (1971), civil action.

U.S. v. White, 401 U.S. 745 (1971), electronic surveillance.

2. *Coerced Statements (or Plea).*

Harris v. New York, 401 U.S. 222 (1971), impeachment, cf. Miranda.

North Carolina v. Alford, 400 U.S. 25 (1970), plea bargaining.

3. *Right to Counsel.*

Kitchens v. Smith, 401 U.S. 847 (1971), Gideon retroactive.

4. *Jury Trial.*

Groppi v. Wisconsin, 400 U.S. 505 (1971), impartial jury, venue.

McKeiver v. Pennsylvania, 403 U.S. 528 (1971), in juvenile court.

5. *Right of Confrontation.*

Nelson v. O'Neill, 402 U.S. 622 (1971), codefendant's statement.

Dutton v. Evans, 400 U.S. 74 (1970), coactor's statement.

6. *Juvenile Courts.* See 4 supra.

7. *Double Jeopardy.*

U.S. v. Jorn, 400 U.S. 470 (1971), mistrial not caused or asked by defendant.

Simpson v. Florida, 403 U.S. 384 (1971), collateral estoppel.

8. *Self Crimination.*

California v. Byers, 402 U.S. 424 (1971), hit-and-run information.

Mackey v. U.S., 401 U.S. 667 (1971), retroactivity of Marchetti; Gross.

U.S. v. U.S. Coin & Currency, 401 U.S. 715 (1971), same topic, different result.

U.S. v. Freed, 401 U.S. 601 (1971), firearms registration.

9. *Sentencing.*

McGautha v. California, 402 U.S. 183 (1971), death penalty instructions.

Tate v. Short, 401 U.S. 395 (1971), jail instead of fine, cf. Williams v. Illinois, 399 U.S. 235 (1970).

10. *Contempt.*

Mayberry v. U.S., 400 U.S. 455 (1971), same or different judge.

Johnson v. Mississippi, 403 U.S. 212 (1971), recusing.

Due Process.

Bell v. Burson, 402 U.S. 535 (1971), driver's license suspension.

Wisconsin v. Constantineau, 400 U.S. 433 (1971), blacklisting drinkers.

Boddie v. Connecticut, 401 U.S. 371 (1971), indigent divorce plaintiffs.

Richardson v. Perales, 402 U.S. 389 (1971), state welfare procedure.

Palmer v. Euclid, 402 U.S. 544 (1971), "suspicious persons" ordinance.

U.S. v. Vuitch, 402 U.S. 62 (1971), D.C. abortion law.

Commerce Clause.

Perez v. U.S., 402 U.S. 146 (1971), federal "loan shark" law.

Equal Protection.

U.S. v. Maryland Savings-Share Inc. Corp., 400 U.S. 4 (1970), classification.

Citizenship.

Rogers v. Bellei, 401 U.S. 815 (1971), loss of *jus sanguinis.*

Welfare.

Wyman v. James, 400 U.S. 309 (1971), conditions for welfare aid.

Labine v. Vincent, 401 U.S. 532 (1971), disinheritance of bastards.

James v. Valtierra, 402 U.S. 137 (1971), low-rent housing referenda.

Graham v. Richardson, 403 U.S. 365 (1971), welfare, aliens, residence.

Other topics in Kurland's essay deal with items less juridically dramatic. Other essays in the volume cover at length: 1) self-incrimination and the hit-and-run decisions, 2) the defeat of selective conscientious objection, 3) legislative motive in civil rights cases, 4) parochial aid and the First Amendment, 5) rights of and wrongs against Indians (a historical and sociological item rather oddly included), and 6) the chief justice and law reform - 1921 to 1971.

APPENDIX D:
Authoritative Reports on the Current Scene

President's Commission on Law Enforcement and Administration of Justice, Rept., "The Challenge of Crime in a Free Society" Task Force Reports:

1. Assessment of Crime
2. The Courts
3. Corrections
4. Drunkenness
5. Juvenile Delinquency and Youth Crime
6. Organized Crime
7. The Police
8. Science and Technology

U.S. Gov. Printing Office

Mattich, Hans W. and Sweet, Ronald P. *Illinois Jails-Challenge and Opportunity for the 1970's.* Illinois: University of Chicago Center for Studies in Criminal Justice, December 27, 1969.

BOOKS:

Campbell, James S.; Sahid, Joseph R.; and Stang, David P. *Law and Order Reconsidered.* A Staff Report to the National Commission of the Causes and Prevention of Violence. New York: Bantam Books, November 1970.

Sheehan, Neil; Smith, Hedrick; Kenworthy, E.W.; and Butterfield, Fox. *The Pentagon Papers.* Bantam Books, July 1971.

The Politics of Protest. Skolnick, Jerome H., Director Task Force on Violent Aspects of Protest and Confrontation of the National Commission on the Causes and Prevention of Violence. New York: Ballentine Books, April 1970.

Contempt (Transcript of the Contempt Citations, Sentences, and Responses of the Chicago Conspiracy 10). Chicago: The Swallow Press Inc., 1970.

The Report of the Commission on Obscenity and Pornography. New York: Bantam Books, September 30, 1970.

Justice, 1961 United States Commission on Civil Rights Report 5. Washington D. C.: Government Printing Office.

Rights in Conflict, The Official Report to the National Commission on the Causes and Prevention of Violence. New York: Signet Books, 1968.

Carey, James T.; Goldfarb, Joel; and Rowe, Michael J. *The Handling of Juveniles from Offense to Disposition,* Volumes I & II. Washington D. C.: Government Printing Office.

Law and Poverty, Natl. Conf. Rept., U.S. Atty. Genl. & Office of Economic Opportunity, Washington, D.C., 1965.

"Meeting the Insurance Crisis of Our Cities," President's Natl. Advisory Panel on Insurance in Riot-Affected Areas, Rept., U.S. Govt. Printing Off., Washington, D.C., 1968.

APPENDIX E:
A Short Guide to Recent Developments

Annual Survey of American Law, New York University School of Law, Oceana Publications, Dobbs Ferry, New York, current volumes.

Illinois Law Forum, current issues.

Illinois Bar Journal, current issues.

Supreme Court Review, University of Chicago, current volumes.

Harvard Law Review, issue containing annual review of United States Supreme Court cases.

United States Supreme Court opinions, current volumes and advance sheets.

Illinois Supreme Court opinions, current volumes and advance sheets.

United States Code Annotated, current and supplements.

Illinois Revised Statutes, current and supplements.

APPENDIX F:
Illinois Practice Books

Illinois Estate Administration.

Business Practice Under The UCC In Illinois.

Illinois Civil Practice Before Trial.

Illinois Civil Trial Practice.

Illinois Civil Practice After Trial.

Creditors' Rights In Illinois.

Drafting Wills And Trust Agreements In Illinois.

Illinois Family Law I: Handling Matrimonial Cases.

Life Insurance In Estate And Business Planning.

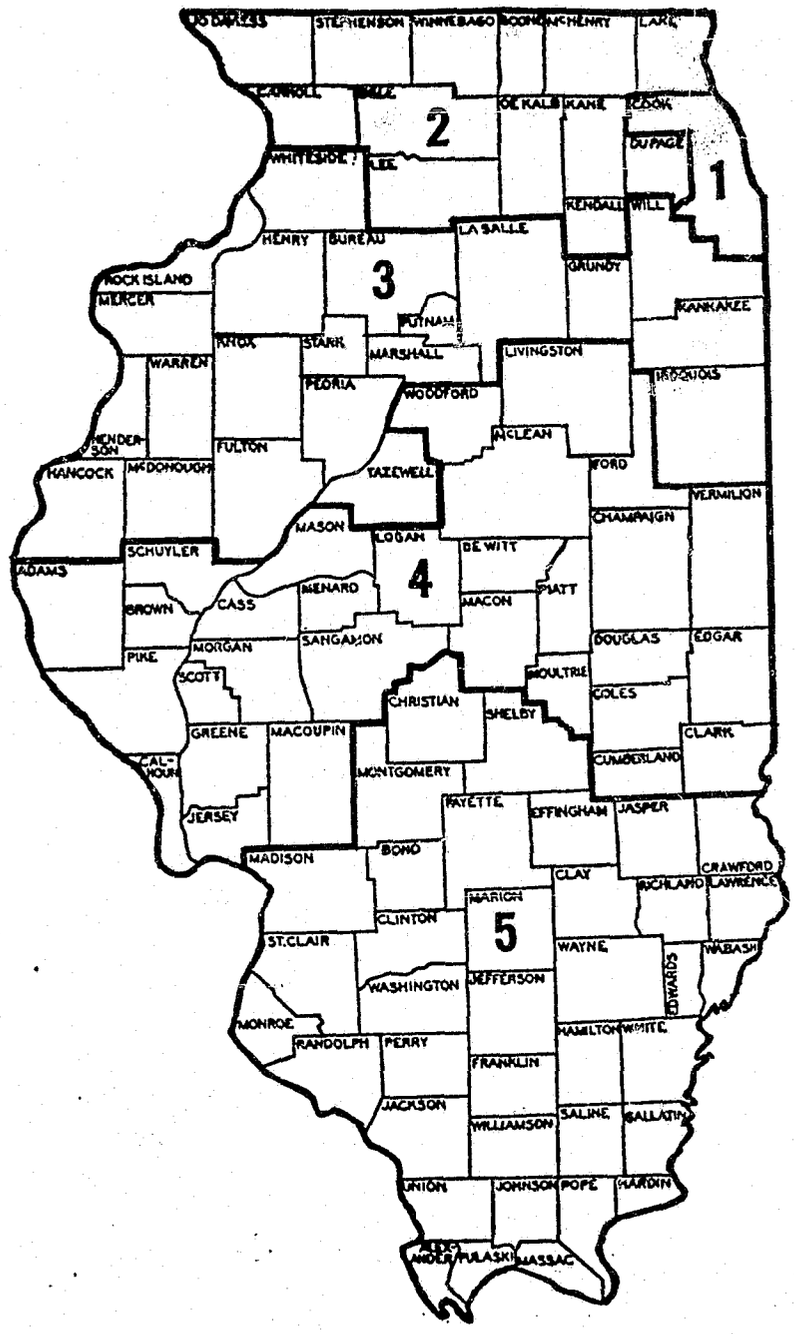
Organizing And Advising Illinois Businesses.

Illinois Real Property I: Contracts and Conveyancing.

Illinois Real Property II: Handling Advanced Real Estate Transactions.

These are available from the Illinois Institute For Continuing Legal Education, Illinois Bar Center, Springfield, Ill.

ILLINOIS JUDICIAL DISTRICTS



SUPREME AND APPELLATE COURTS

[A6448]

SUPREME COURT OF ILLINOIS

FIRST DISTRICT

Walter V. Schaefer
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
(June 30, 1972)

FIRST DISTRICT

First Division

Joseph Burke
Mayer Goldberg
John J. Lyons

Second Division

George N. Leighton
Ulysses S. Schwartz (retired-serving by assignment)
John J. Stamos

Third Division

John T. Dempsey
Thomas A. McGloon
Daniel J. McNamara

Fourth Division

Thaddeus V. Adesko
Henry L. Burman
Henry W. Dieringer

Fifth Division

Joseph J. Drucker
Robert E. English
Francis S. Lorenz

SECOND DISTRICT

Mel Abrahamson
William L. Guild
Thomas J. Moran
Glenn K. Seidenfeld (assigned
from the 19th Judicial Circuit)

THIRD DISTRICT

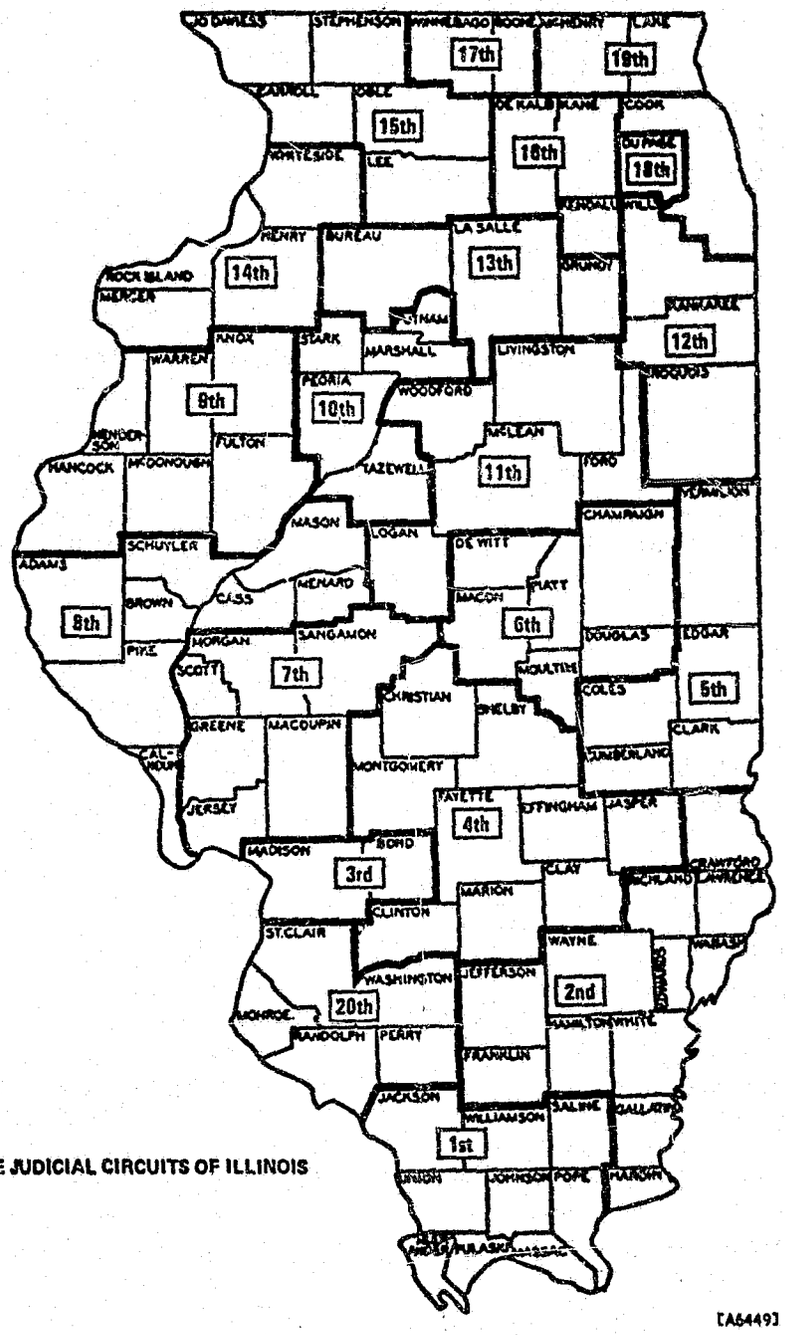
Jay J. Alloy
Walter Dixon
Albert Scott (assigned
from the 9th Judicial Circuit)
Allan L. Stouder

FOURTH DISTRICT

James C. Craven
Leland Simkins (assigned
from the 11th Judicial Circuit)
Samuel O. Smith
Harold Trapp

FIFTH DISTRICT

Caswell J. Crebs
Edward C. Eberspacher
Charles E. Jones (assigned
from the 2nd Judicial Circuit)
George J. Moran



THE JUDICIAL CIRCUITS OF ILLINOIS

[A6449]

JUDGES OF THE CIRCUIT COURTS OF THE STATE
(June 30, 1972)

COOK COUNTY

Circuit Judges

John S. Boyle, Chief Judge

Earl Arkiss
Marvin E. Aspen
James M. Bailey
Charles R. Barrett
Thomas W. Barrett
Norman C. Barry
William M. Barth
Raymond K. Berg
L. Sheldon Brown
Abraham W. Brussell
Nicholas J. Bua
Felix M. Buoscio
Joseph J. Butler
David A. Canel
Archibald J. Carey, Jr.
David Cerda
Nathan M. Cohen
Robert J. Collins
Harry G. Comerford
Daniel A. Covelli
James D. Crosson
Wilbert F. Crowley
Walter P. Dahl
William V. Daly
Russell R. DeBow
Francis T. Delaney
George E. Dolezal
Thomas C. Donovan
Robert J. Downing
Raymond P. Drymalski
Arthur L. Dunne
Robert J. Dunne
Edward J. Egan
Norman N. Eiger
Irving W. Eiserman
Herbert A. Ellis
Paul F. Elward
Samuel B. Epstein
Saul A. Epton
Hyman Feldman
James H. Felt
George Fiedler
John C. Fitzgerald
Richard J. Fitzgerald
Thomas H. Fitzgerald
Philip A. Fleischman
Herbert R. Friedlund
Louis B. Garippo
James A. Geocaris
James A. Geroulis
Louis J. Giliberto
Albert E. Hallett
Richard A. Harewood
Edward F. Healy
John F. Hechinger
Jacques F. Heilingoetter
Joseph B. Hermes
Harry G. Hershenson
George A. Higgins
Reginald J. Holzer
Charles P. Horan
Robert L. Hunter
Harry A. Iseberg
Mel R. Jiganti
Glenn T. Johnson
Mark E. Jones
Sidney A. Jones, Jr.
William B. Kane
Nathan J. Kaplan
Anthony J. Kogut
Norman A. Korfist
Walter J. Kowalski
Franklin I. Kral
Alvin J. Kvistad
Irving Landesman
David Lefkovits

Frank B. Machala
Robert L. Massey
Nicholas J. Matkovic
Robert E. McAuliffe
Francis T. McCurrie
Helen F. McGillicuddy
John P. McGury
Robert A. Meier,III
James J. Mejda
Francis T. Moran
F. Emmett Morrissey
James E. Murphy
James C. Murray
Gordon B. Nash
Benjamin Nelson
Irving R. Norman
Donald J. O'Brien
Wayne W. Olson
Margaret B. O'Malley
Herbert C. Paschen
William F. Patterson
John E. Pavlik
Edward E. Plusdrak
Maurice D. Pompey
Albert S. Porter
Joseph A. Power
Daniel A. Roberts
Philip Romiti
Thomas Rosenberg
Daniel J. Ryan
Edith S. Sampson
Raymond S. Sarnow
George J. Schaller
Ben Schwartz
Anton A. Smigiel
Joseph A. Solan
Pasquale A. Sorrentino
Harry S. Stark
Sigmund J. Stefanowicz
Earl E. Strayhorn
James E. Strunck
Chester J. Strzalka
Harold W. Sullivan
Robert J. Sulski
Fred G. Suria, Jr.
Vincent W. Tondryk
Raymond E. Trafelet
Eugene L. Wachowski
Harold G. Ward
Alfonse F. Wells
Kenneth R. Wendt
Louis A. Wexler
William Sylvester White
Frank J. Wilson
Kenneth E. Wilson
Minor K. Wilson
Joseph M. Wosik
Arthur V. Zelezinski

Associate Judges

Charles A. Alfano
Peter Bakakos
Frank W. Barbaro
Lionel J. Berc
Francis M. Blake
Nicholas J. Bohling
Anthony J. Bosco
John M. Breen, Jr.
Martin F. Brodkin
Robert C. Buckley
Thomas R. Casey, Jr.
Thomas P. Cawley
Paul G. Ceaser
Irwin Cohen
Cornelius J. Collins
James A. Condon
Francis X. Connell
Richard K. Cooper
Ronald James Crane
John J. Crowley
Robert J. Dempsey
Russell J. Dolce
John T. Duffy
George B. Duggan
Charles J. Durham
Ben Edelstein
Nathan B. Engelstein
Carl F. Faust

William F. Fitzpatrick
John M. Flaherty
John Gannon
Lawrence Genesen
Paul F. Gerrity
Joseph R. Gill
Francis W. Glowacki
Meyer G. Goldstein
Myron I. Gomberg
Ben Gorenstein
James L. Griffin
Jacob S. Guthman
Arthur N. Hamilton
Edwin C. Hatfield
John J. Hogan
Louis J. Hyde
Thomas J. Janczy
Rudolph L. Janega
Lester Jankowski
Robert F. Jerrick, Sr.
Eddie C. Johnson
Richard H. Jorzak
Benjamin J. Kanter
Wallace I. Kargman
Helen J. Kelleher
John J. Kelly, Jr.
Irving Kipnis
Marilyn R. Komosa
Edwin Kretske
Albert H. LaPlante
Maurice W. Lee
Richard F. LeFevour
Reuben J. Liffshin
John J. Limperis
David Linn
Frank S. Loverde
Martin J. Luken
James Maher, Jr.
Harry H. Malkin
Erwin L. Martay
John H. McCollom
John J. McDonnell
William J. McGah, Jr.
Dwight McKay
Anthony J. Mentone
Joseph W. Miodusk
Anthony S. Montelione
Joseph C. Mooney
John Joseph Moran
John M. Murphy
John William Navin
Earl J. Neal
James L. Oakey, Jr.
Paul A. O'Malley
John A. Ouska
Burton H. Palmer
Marvin J. Peters
William E. Peterson
Frank R. Petrone
James P. Piragine
Bernard A. Polikoff
Simon S. Porter
Francis X. Poynton
Seymour S. Price
John F. Reynolds
Emanuel A. Rissman
Allen F. Rosin
Joseph A. Salerno
Richard L. Samuels
George M. Schatz
Joseph Schneider
Harry A. Schrier
Joseph R. Schwaba
Anthony J. Scotillo
Samuel Shamberg
David J. Shields
Harold A. Siegan
Frank M. Siracusa
Jerome C. Slad
Raymond C. Sodini
Joseph A. Solan
Milton H. Solomon
Robert C. Springsguth
Adam N. Stillo
James N. Sullivan
Robert A. Sweeney
John F. Thornton
Alvin A. Turner
Thomas M. Walsh
James M. Walton
Jack Arnold Welfeld
Daniel John White
Willie Mae Whiting
James A. Zafirato
George J. Zimmerman

FIRST CIRCUIT

Circuit Judges

John H. Clayton, Chief Judge

Robert H. Chase
Stewart Cluster
Peyton H. Kunce
William A. Lewis
Harry L. McCabe
Jack C. Morris
George Oros
Robert B. Porter
Everett Prosser
Paul D. Reese
Richard E. Richman
Dorothy W. Spomer
R. Gerald Trampe

Associate Judges

Michael P. O'Shea
Robert W. Schwartz

SECOND CIRCUIT

Circuit Judges

William G. Eovaldi, Chief Judge

Philip B. Benefiel
John D. Daily
Don Al Foster
Charles Woodrow Frailey
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Charles L. Quindry

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Foss D. Meyer
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Arthur L. Greenwood
Merlin Gerald Hiscott
William E. Johnson
A. Andreas Matoesian
Harry R. Mondhink
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Doane Kent Trone

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Raymond O. Horn
George R. Kelly
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Gail E. McWard
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Gale A. Mathers
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Albert Scott (assigned to Appellate Court)
Keith F. Scott

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G. Durbin Ranney
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SEVENTEENTH CIRCUIT

Circuit Judges

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Harry D. Strouse
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Carl H. Becker
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William P. Fleming
James Wendell Gray
Alvin H. Maeys, Jr.
Francix E. Maxwell
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