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MILITARY LAW REVIEW

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Articles **Page**

Comment

PROHIBITION ON MILITARY UNIONIZATION: A CONSTITUTIONAL APPRAISAL

Deanne C. Siemer*, A. Stephen Hut, Jr.,**
Gurden E. Drake***

On October 6, 1977 the Secretary of Defense issued a comprehensive directive prohibiting participation by military personnel in certain labor union organizations or in activities associated with such organizations.[1] The directive reaches speech in the prohibitions on recruiting, solicitation, and collective bargaining, and also speech-related conduct such as membership, picketing, posting handbills, and distributing leaflets. This article describes, in Part I, the general constitutional constraints relevant to any effort to regulate speech and speech-related activity by military personnel. It then analyzes, in Part 11, the case law specifically applicable to the principal prohibitions in the directive — prohibitions against: first,

*General Counsel, Department of Defense. A.B., **1962,** George Washington University; LL.B. **1968,** Harvard Law School. Member of the Bars of the District of Columbia, New York, Maryland, the Trust Territory of the Pacific Islands, the United States Supreme Court, the United States Courts of Appeals for the Second, Fourth and District of Columbia Circuits, and the United States District Court for the District of Columbia.

Attorney, Wilmer, Cutler & Pickering, Washington, D.C. A.B. **1968, University of Pennsylvania, J.D. **1972,** Harvard Law School. Member of the Bars of the District of Columbia, the United States Supreme Court, the United States Courts of Appeals for the Fifth and District of Columbia Circuits, and the United States District Court for the District of Columbia. The author was retained as a consultant by the Office of the General Counsel, Department of Defense, to assist in the preparation of the directive discussed in this article.

***Staff Attorney, Office of General Counsel, Department of Defense. **A.B., 1965,** LL.B., **1968,** University of Virginia. Member of the Bars of New York and the United States Court of Military Appeals.

The authors wish to acknowledge the important contribution of Warren L. Simpson, Jr., attorney, Rawle & Henderson, Philadelphia, Pa. A.B. **1969,** Dartmouth College; J.D. **1972,** Cornell University. Department of Defense Directive No. **1354.1** was prepared by the Office of the General Counsel with the advice and assistance of other legal offices within the Department of Defense.

[1] DEP'T OF DEFENSE DIRECTIVE No. **1354.1,** RELATIONSHIPS WITH ORGANIZATIONS WHICH SEEK TO REPRESENT MEMBERS OF THE ARMED FORCES IN NEGOTIATION OR COLLECTIVE BARGAINING (6 Oct. 1977), **42** Fed. Reg. **55,209 (1977)** (to be codified in **32** C.F.R. § **143)** [hereinafter cited as DOD DIRECTIVE **1354.11.** Implementing instructions issued by each Service put the directive into effect. These instructions generally track the directive and add explanatory language or examples. They also contain command and reporting responsibilities specific to each Service.

negotiation arid collective bargaining; second, strikes and other collective job-related actions; third, solicitation and advocacy activities; and fourth, membership in union organizations — in order to assess whether the prohibitions can constitutionally be imposed. The article concludes that the directive can be defended successfully against attack on constitutional grounds.

I. GENERAL CONSTITUTIONAL CONSTRAINTS

Efforts to prevent unionization activities in the military must be analyzed primarily under the first amendment which provides: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In addition to the expressly stated rights of speech, assembly and petition, the protection of the first amendment has been extended to the corollary "right of association" for the advancement of beliefs and ideas pertaining to political, economic, religious and cultural matters.[2] This corollary right is based on the recognition that the guarantees of free speech and the right to petition for a redress of grievances often may be hollow in the absence of strength gained through association with others. Restrictions on unionization activity in the military also must be consistent with the principle that similarly situated persons or groups should be treated similarly under the law, a principle explicitly applied to the states in the equal protection clause of the fourteenth amendment and implicitly applied to the federal government in the due process clause of the fifth amendment.[3] Each of these general constitutional constraints and the standards by which they are applied are described below.

A. CONSTRAINTS ON REGULATION OF MILITARY UNIONIZATION IMPOSED BY THE FIRST AMENDMENT

Analyzing the large body of law developed under the first amendment and applying that body of law to particular regulatory

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[2]The Supreme Court recognized the right of association under the first and fourteenth amecdments in **NAACP** v. Alabama, **357** U.S. **449, 460-61** (1958):

> It is beyond debate that freedom to engage in association for the advancement of heliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political. economic. religious or cultural matters. and state action which may have the effect **of** curtailing the freedom to associate is subject to the closest scrutiny.

[3]Buckley v. Valeo. **424** U.S.1, 93 (1976); Bolling v. Sharpe, **347** U.S. **497 (1954).**

provisions prohibiting unionization of the military involves three broad questions: *first,* whether the first amendment applies in the military context with more limited scope or force than in the civilian context; *second,* what substantive standards will be used to determine the constitutionality of the prohibition; and *third,* what further constitutional limitations are imposed by the first amendment overbreadth doctrine. These questions are examined below.

1. Application of the first amendment in the military context

The threshold question is whether the first amendment protects the freedoms of speech and association for those in the military.* Until quite recently, even some commentators who advocated an expansive view of the protection provided by the first amendment were inclined to include the military in those "alien sectors" of society that "fall outside the area in which. . . freedom of expression must be maintained."[5] In *Parker v. Levy*[6] however, the Supreme Court held that while "military society has been a society apart from civilian society,"[7] and while " 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty,' "[8] nevertheless "the members of the military are not excluded from the protection granted by the First Amendment."[9]

Although the Court extended the protections of the first amendment to military personnel, it also held that the unique character of the military mission justifies a narrower application of those protections than is afforded in a civilian context. In upholding Articles **133** and **134** of the Uniform Code of Military Justice[10] against arguments that they were unconstitutionally vague and overbroad, the Court cautioned pointedly that:

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), however, the Court suggested, without elaboration, that the protections afforded by the two amendments "are not always coextensive" since "overriding national interests [may] justify selective federal legislation which would be unacceptable for an individual State." Id. at 100.

[4] *See generally* Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart,* 51 NOTRE DAME LAWYER 396, 404-10 (1976).

[5] *E.g.*, Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 918 (1964).

[6] 417 U.S. 733 (1974).

[7] *Id.* at 744.

[8] *Id.* (quoting Burns v. Wilson. 364 U.S. 137, 140 (1953)).

[9] *Id.* at 758. See also Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), *aff'd mem.*, 429 F.2d 427 (4th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971).

[10] 10 U.S.C. §§ 933, 934 (1970).

> [T]he different character of the military community and of the military mission requires a different application of those [first amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline. may render permissible within the military that which would be constitutionally impermissible outside it.[11]

Indeed, even the dissenting Justices in *Porker v. Levy* conceded that "individual rights must necessarily be subordinated to the overriding military mission" and that "the military may constitutionally prohibit conduct that is quite permissible in civilian life." [12]

Two years later, the Court again considered the application of the first amendment in a military contest. In *Greer v. Spock* [13] civilian political candidates raised a first amendment challenge to military regulations limiting political campaigning and the distribution of literature on the Fort Dix Military Reservation.[14] The primary issue in *Greer* was whether civilians could have unfettered access to Fort Dix in order to exercise their first amendment rights because the military reservation, normally open to civilian visitors,[15] had become a "public forum." [16] As in *Parker v. Levy*, the Court resolved

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[11]417 U.S. at 758. *See also* Burns v. Wilson, 346 U.S. 137, 140 (1953); Orloff v. Willoughby, 345. U.S. 83 (1953). The *Parker* Court quoted approvingly from the decision of the United States Court of Military Appeals in United States v. Priest, 21 C.M.A. 564, 570. 45 C.M.R. 338, 344 (1972), a case that involved a court-martial conviction under Article 134 for publishing. during the Vietnam War era, an underground newsletter that contained articles termed both disloyal and intended to promote disloyalty and disaffection among the persons in the armed forces:

> Disrespectful and contemptuous speech. even advocacy of violent change. is tolerable in the civilian community. for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to incitingimmincnt lawless action and is likely to produce such action. In military life, however. other considerations must be weighed. The armed forcer depend on a command structure that at timer must commit men to combat. not only hazarding their liver but ultimately the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does. it is constitutionally unprotected.

417 U.S. at 759 (citations omitted).

[12]417 U.S. at 787 (Stewart, J. dissenting).

[13]424 U.S. 828 (1976).

[14]The regulations at issue imposed an absolute ban on speeches and demonstrations of a partisan political nature and further prohibited certain other types of expressive activity without the prior written approval of Fort Dis authorities. *Id.* at 831.

[15]The main entrances to Fort Dis were not normally guarded and civilian vehicular and pedestrian traffic was permitted. as a matter of course. on the roads and footpaths of the reservation. Moreover. civilian speakers were occasionally invited to the base to address military personnel. *Id.* at 830-31.

[16]As early as 1939 in Hague v. CIO. 307 U.S. 496, 515 (1939), the Court had observed that:

> Wherever the title of streets and parks may rest. they have immemorially been held in trust for the use of the public and. time out of mind. have been used for purposes of assembly.

the issue by relying, in part, on the special needs of the military mission. Writing for the majority, Justice Stewart observed:

> One of the very purposes for which the Constitution was ordained and established was to "provide for the common defence," and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable. In short, it is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.
>
> A necessary concomitant of the basic function of a military installation has been "the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command." The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.[17]

Since there was no claim that the Fort Dix authorities had abandoned their power to exclude civilians,[18] the Court held that the challenged regulations were constitutionally valid.

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communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been part of the privileges, immunities. rights and liberties of citizens.

The question raised by later cases was whether public streets running through military reservations were such public forums. In Flower v. United States, 407 U.S. 197 (1972) (per curiam), the Court reversed the conviction of a civilian arrested for distributing anti-war leaflets on a street within the city of San Antonio that was also within the limits of Fort Sam Houston, an active military base. After the decision in *Flower,* and before *Greer,* it appeared that it was no longer necessary to demonstrate that the area in which first amendment rights were sought to be exercised was one historically used for that purpose — the test used in *Hague.* Instead, under an "openness" test, it was sufficient to show that the area was generally open and available to the public and that the exercise of first amendment rights did not conflict with the intended public use of the area. *See, e.g., In re* Hoffman, 67 Cal.2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); Wolin v. Port of New York Auth., 268 F. Supp. 855 (S.D.N.Y. 1967), *affd,* 392 F.2d 83 (2d Cir.), *cert denied,* 393 U.S. 940 (1968). *See generally* Zillman & Imwinkelried, *The Legacy of* Greer v. Spock: *The Public Forum Doctrine and the Principle of the Military's Political Neutrality,* 65 GEO. L.J. 773 (1977); Note. *The Public Forum: Minimum Access, Equal Access, and the First Amendment, 28* STAN. L. REV. 117 (1975). The Court eschewed this approach in *Greer,* however, and instead looked to the traditional function of a military reservation.

[17] 424 U.S. at 837-38 (citations omitted).

[18] The Court in *Greer* used the "abandonment" principle as a way of distinguishing United States v. Flower, 407 U.S. 197 (1972), *see* note 16, *supra,* and pointed out:

> The decision in *Flower* was thus based upon the Court's understanding that New Braunfels Avenue was a public thoroughfare in San Antonio no different from all the other public thoroughfares in that city, and that the military had not only abandoned any right to exclude civil-

Broadly interpreted, *Greer* arguably supports the proposition that military authorities could ban all on-base unionization activities simply by exercising their traditional powers over military installations. There are, however, limits on the reach of *Greer* that are relevant to efforts to prevent military unionization. First, it is conceptually awkward to apply the public forum doctrine to the first amendment right of association. Association, in the form of mere membership in an organization, need not have any spatial dimension and would not, therefore, be subjected to a commander's control of activities on a military base. Second, and more fundamentally, earlier Supreme Court cases are at odds with the mechanical approach adopted by the majority in *Greer.* In *Pell v. Procunier*,[19] for example, the Court afforded certain first amendment rights to prison inmates; and in *Tinker v. Des Moines School District*,[20] the Court ruled that a school administration could not punish the wearing of black armbands in school to protest the Vietnam War. Thus, as noted by Mr. Justice Powell in his concurring opinion in *Greer:*

> [I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a "public forum.". . . Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and the degree of infringment on. . . First Amendment rights. . . . Some basic incompatibility must be discerned between the communication and the primary activity of an area.[21]

In sum, it appears that first, military personnel can invoke the protection of the first amendment with respect to expressive and associational conduct, but the protection afforded by the Constitution will turn on the kind of expression or association at issue and the effect on the military mission; and second, while the public forum doctrine (absent "abandonment") may permit banning from military installations of the kind of speechmaking and leafletting by outside civilians at issue in *Greer,* the doctrine may not preclude all kinds of expressive conduct and will not apply to the right of association.

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ian vehicular and pedestrian traffic from the avenue. but also any right tn exclude leafletters . . . .

That being so, the Court perceived the *Flower* case as one simply falling under the long established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks and parks . . . .

424 U.S. at 835.

[19]417 U.S. 817 (1974).

[20]393 U.S. 503, 505-06 (1969).

[21]424 at **843.** *See also id.* at 858-60 (Brennan, J.. dissenting).

2. *Substantive standards for application of the first amendment protection*

The extent to which first amendment protections are limited in the military context depends upon the substantive standards that the courts apply to determine when the government lawfully may prohibit or restrict expressive or associational conduct. Although the Supreme Court has never really formulated a general and cohesive mode of first amendment analysis, it has followed primarily two related approaches.[22] Under one approach the Court balances the importance of the government's interest in limiting speech or association against the individual's interest in the restricted speech or association. Under another approach, the Court looks in a more narrowly focused way to see whether there is a clear and present danger to a government interest and if such a danger is not present, the individual's interest takes precedence. The basis for these judgments — general principles for choosing between these two approaches and for applying each — are set out below.

a. Balancing individual and government interests

Under this analytical approach, the courts recognize that there will be frequent instances in which a statute or other government action will in some way burden expressive or associational conduct, and that "[n]either right . . . is absolute.'' [23] The question whether the law or government action is constitutional, therefore, will turn on two determinations: first, a weighing of the respective interests of the individual and the government; and second, a review of the government's alternatives to see if any other approach could achieve the same result through less restrictive means.

(1) *Weighing of competing interests.* Given the fundamental nature of first amendment interests, it is well established that "governmental 'action which may have the effect of curtailing [these interests] is subject to the closest scrutiny,' -- and can be justified only if it serves some "compelling" government interest.[24] The determi-

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[22] A third approach is sometimes called the "definitional" or "absolutist" approach. Its principal advocates were Justices Black and Douglas; but it has not commanded a majority of the Court. Under the absolutist view, the sole inquiries are whether the expressive conduct in question amounts to "speech" within the terms of the first amendment, and whether the law in question "abridges" that speech. If so, then the law is unconstitutional.

[23] United States Civil Serv. Comm'n. v. Nat'l Assn. of Letter Carriers, **413** U.S. **548, 567** (1973).

[24] Buckley v. Valeo, **424** U.S. 1, **25** (1976).

nation whether a government interest is sufficiently compelling to justify the burden imposed on expression or association necessarily turns on particular facts in each case. Thus in SAACP *v. Alabama*,[25] decided in 1938, the state argued that the NAACP membership lists were needed to facilitate a determination whether certain state statutes applied to the organization; but the Court found that the organization really did not contest the application and had offered to comply with the statute in all respects. Since the state had demonstrated no persuasive need for the lists, its interest in commanding the production was insufficiently compelling. In a 1976 case, *Buckley v. Valeo*,[26] on the other hand, the Court held that restrictions on the amount of contributions to federal election campaigns were justified in light of the strong and "fundamental" government interests identified—the prevention of actual corruption or the appearance of corruption as a result of large campaign contributions—since the " 'free functioning of our national institutions' is involved." [27]

The government interest in military order is surely substantial. The security of the nation depends on maintaining an effective combat force. To this end, a high degree of command control and individual commitment to mission accomplishment is required. Members of the armed forces, unlike any other profession, must be prepared to fight and, if necessary, to die in order to preserve the security of the nation. Effective operation of the armed forces depends on proper functioning of the chain of command. There must be control, discipline, and unhesitating obedience to lawful orders. As the decisions in *Parker* and *Greer* demonstrate, the Supreme Court views these interests as compelling; and both cases suggest that few restrictions that directly promote those interests will be invalidated.

(2) *Assessment of least restrictive alternative.*[28] Not only must the government interest asserted to justify restraints on speech or association be compelling, but the regulatory formulation

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[25] 357 U.S. 449 (1958).

[26] 424 U.S. 1 (1976).

[27] *Id.* at 66. *See* United States Civil Serv. Comm'n v. Nat'l Assn. of Letter Carriers, 413 U.S. 548, 567 (1973). There, the Court sustained a prohibition on partisan political activity by federal employees against first amendment challenge; it concluded that the government's interest in "fair and effective government" was sufficiently compelling to justify the prohibition. *Id.* at 565. *See also* Elrod v. Burns, 421 U.S. 347, 362-63 (1976).

[28] While this least restrictive alternative requirement is applicable where the Court engages in a balancing test, it probably does not apply to the clear and present danger test described at text accompanying notes 37–56, *infra*.

also must be the means that least restricts first amendment activity.[29] The Court must be able to find that no other readily available alternative would serve the government interest in a way that is less restrictive of first amendment freedoms.[30] While the least restrictive alternative doctrine has been expressed in a variety of ways, the formulation in *Shelton v. Tucker* [31] seems most often used. There, the Court reviewed an Arkansas statute that required teachers to file, as a condition of employment in state schools, an annual affidavit listing every organization to which they had belonged over the preceding five years. Appellant, a member of the NAACP, refused to file the affidavit and was not rehired. Finding the Arkansas statute unconstitutional under the first amendment, the Court held that

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[32]

The Court believed that as a less restrictive alternative the state could require disclosure only of associational affiliations that bore on job performance.[33]

The courts have looked to existing regulations,[34] other state prac-

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[29] Least restrictive alternative analysis should not be confused with the question whether a statute offends the first amendment because it is overbroad. In overbreadth analysis, a statute is invalid if, at the same time it restrains conduct that can be constitutionally restricted, it also addresses and thus threatens to deter conduct that is unrelated to the government's need and constitutionally cannot be restricted. *See* text accompanying notes **67–64,** ***infra.*** Under the least restrictive alternative approach, the presence of a less restrictive means renders each specific application of the statute unconstitutional.

[30] In the military contest, the point is often made that servicemen have alternative means of expressing and obtaining redress of grievances through command channels, the Inspector General system and Article 138 of the Uniform Code of Military Justice. The courts are concerned only with alternatives available to the Government, however, and not with alternative means available to those who would exercise the first amendment rights. ***See*** Linmark Assocs., Inc. v. Township of Willingboro, **431** U.S.85 (1977).

[31] **364** U.S.**479 (1960).**

[32] *Id.* at **488** (citations omitted).

[33] ***See*** *also* Louisiana v. NAACP, **366** U.S. **293 (1961).**

[34] Lamont v. Postmaster Gen., 381 U.S. **301 (1965),** for example, concerned section 305(a) of the Postal Service and Federal Employees Salary Act of **1962,** which required the Postmaster General to retain, and deliver only on the addressee's request, unsealed foreign mailings of communist political propaganda. The purpose of the statute was asserted to be protection of recipients from offensive mail. The Court held that the provision was unconstitutional because existing postal regulations requiring the post office to honor requests to stop delivery of offensive

tices,[35] and common sense [36] to identify less restrictive alternatives in the civilian contest. In the military contest the courts might be persuaded not to look to civilian practices as alternatives, but the least restrictive alternative requirement still limits the manner in which the compelling interests recognized in *Greer* and *Parker* can be pursued.

b. The clear and present danger test and its variations

In a narrow class of cases, the Supreme Court has declined to undertake *ad hoc* balancing to determine whether government action is consistent with the first amendment, but has applied instead a standard that purports to be more clear-cut, predictable, and protective of expression and association. As first articulated by Mr. Justice Holmes in 1919 in *Schenck v. **United** States:* "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[37] Where this clear-and-present-danger test applies, even an action that furthers a "compelling" government interest in the least restrictive way will be invalidated unless the espression or association affected poses a clear and immediate threat to that interest. It remains to consider, first, the class of cases in which the Supreme Court has applied the clear and present danger test, and, second, precisely how the Court has formulated that test.

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mail provided an alternative means of achieving the purpose with less restriction of first amendment rights.

[35] In Kusper v. Pontikes. **414** U.S. 51 **(1973)**, appellant challenged an Illinois election law that prohibited a person from voting in the primary election of a political party if he or she voted in the primary of any other party within the preceding twenty-three months. The purpose of the statute was to prevent raiding, a practice where voters in sympathy with one party vote in another's primary in order to distort that primary result. The Court stated that this purpose could be achieved by more narrow means, as was done in New York, where voters are required to enroll in the party of their choice at least thirty days before the general election. It therefore held the Illinois law to be unconstitutional.

[36] In Procunier v. Martinez, **416** U.S. 396 **(1974)**, the Court struck down prison mail censorship regulations, under which inmate mail was censored or confiscated when it expressed inflammatory political, racial. religious, or other views or beliefs; pertained to criminal activity; or was lewd, obscene or defamatory. Although the Court recognized that the government interests involved — the preservation of prison order and discipline, the maintenance of security against escape or unauthorized entry, and the rehabilitation of prisoners — were legitimate, indeed perhaps compelling, it held as it did because less restrictive controls — the refusal to send or deliver encoded letters or letters concerning escape plans or other criminal activity, for example—would suffice to protect these interests.

[37] **249** U.S. **47, 52 (1919).**

(1) *Application of the danger test.* The *Schenck* case and other cases in which the Supreme Court has applied the clear and present danger test have certain characteristics in common that serve to identify the kind of case to which the test will likely be applied. First, in each case in which the test has been applied the statute or regulation in question — whether as written [38] or as applied [39] — punished "pure speech" [40] (or advocacy) on the basis of its content, that is, the ideas expressed, [41] or punished mere association unaccompanied by any unlawful act.[42] Second, in each case the content of the speech or association alone was made a crime. Accordingly, the test has not been applied where a person is simply burdened in a noncriminal way on the basis of the content of speech or of associational membership, even where the civil burdens and penalties are quite substantial.[43]

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[38] *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (proscribing advocacy of government overthrow by force or violence); Whitney v. California, 274 U.S. 357 (1927) (same); Gitlow v. New York, 268 U.S. 652 (1925) (same); Yates v. United States, 354 U.S. 298 (1957) (proscribing advocacy of government overthrow); Dennis v. United States, 341 U.S. 494 (1951) (same); Thomas v. Collins, 323 U.S. 516 (1945) (proscribing union solicitation).

[39] *E.g.*, Cohen v. California, 403 U.S. 15 (1971) (breach of peace conviction); Feiner v. New York, 340 U.S. 315 (1951) (statute prohibited speech which "stirs the public to anger, invites disputes, brings about conditions of unrest, or creates a disturbance"); Cantwell v. Connecticut, 310 U.S. 296 (1940) (same); Terminiello v. Chicago, 337 U.S. 1 (1949) (disorderly conduct statute); Abrams v. United States, 250 U.S. 616 (1919) (proscribing attempts to cause insubordination); Schenck v. United States, 249 U.S. 47, 52 (1919) (same).

[40] This element may explain why the test was not applied in United States v. O'Brien, 391 U.S. 367 (1968), which upheld a conviction for draft card burning.

[41] This "content" element plausibly explains why the clear and present danger test plays no role in cases where government regulation is upheld as a reasonable restriction on time, place and manner of expression. *E.g.*, Adderly v. Florida, 385 U.S. 39 (1966) (demonstration on the steps of jailhouse); Cox v. Louisiana, 379 U.S. 559 (1965) (picketing and parading); Kovacs v. Cooper, 336 U.S. 77 (1949) (use of loudspeakers).

[42] *E.g.*, Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); *cf.* Elfbrandt v. Russell, 384 U.S. 11 (1966).

[43] This element explains why the clear and present danger test has not been applied in a number of Supreme Court decisions. Thus, in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), the Court upheld section 9(h) of the Taft-Hartley Act, 29 U.S.C. § 159(h), which provided that any labor union whose officers failed to file annually an oath disclaiming memberhip in the Communist Party and belief in violent overthrow of the Government was barred from access to the Labor Board. Although this had an obviously adverse impact on freedom of association, Communist Party membership was not a crime, only the basis for a civil burden. The Court used an *ad hoc* balancing approach to sustain the statutory penalty, concluding that the Government's right to prevent political strikes and disruption in commerce was more substantial than the limited associational interest of the small number of persons affected by the statute.

Balancing has, for this reason, also been used to invalidate the dismissal of a

(2) *Formulation of the test.* The clear and present danger test has evolved through a number of quite different formulations. Shortly after *Schenck,* in *Gitlow v. New York,*[44] the Court upheld a criminal conviction under a state law making it a crime to advocate the necessity or propriety of overthrowing the government by force or violence. The defendant's conviction was affirmed in the absence of evidence showing the effect of the prohibited speech and, more significantly, in the absence of even a contention that defendant's action created a "present" threat to the security of the state. The majority rejected the Holmes test, explaining that

> when the legislative body has determined generally, in the constitutional exercise of its discretion. that utterances of **a** certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely. in and of itself. to bring about the substantive evil, is not open to consideration.[45]

Under this view a legislature's determination that speech of a particular kind is seriously inimical to the general welfare and involves inherent danger of substantive evil is virtually conclusive on the

Subsequently, in *Dennis v. United States,*[47] the plurality opinion for the Court adopted the formulation of the clear and present danger test that had been set forth by Judge Learned Hand in the Court of Appeals and that removed the element of temporal immediacy between the speech affected and the evil sought to be prevented. The Court described the test as "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free

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teacher for the exercise of first amendment rights. Pickering v. Board of Education, 391 U.S.563 (1968); to sustain Communist Party registration requirements, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); to uphold an inquiry by a state bar into Communist associations prior to admission of lawyers, Konigsberg v. State Bar, **366** U.S. **36** (1961);to sustain congressional and state inquiries into associations and activities of individuals deemed to be subversive. Barenblatt v. United States, 360 U.S. 109 (1959); to invalidate state attempts to compel production of organization membership lists, NAACP v. Alabama. 357 U.S. 449 (1958); and to sustain regulations limiting first amendment rights of prison inmates, Jones v. North Carolina Prisoners' Union. Inc., 97 S. Ct. 2532 (1977).

[44] 268 U.S. 652 (1925).

[45] *Id.* at 670.

[46] This formulation controlled the decision by the Supreme Court in Whitney v. California, 274 U.S 357, 371–72 (19271, which upheld a criminal conviction under a comparable California statute. *Whitney* was subsequently overruled in Brandenburg v. Ohio. 395 U.S. 444. 449 (1969)(per curiam).

[47] 341 U.S. 494 (1951).

speech as is necessary to avoid the danger." [48] The Court emphasized that the phrase 'clear and present danger' "cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed . . . ." [49]

It is questionable, however, whether this aspect of the *Dennis* case remains good law, for in *Brandenburg* v. *Ohio* [50] the Court appears to have restored the element of immediacy and incitement to clear and present danger analysis. In that case the Court held that: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to inciting or producing imminent lawless acfion and is likely to* . . . produce such action." [51] It is apparent, given *Brandenburg,* that at least in civilian contexts speech cannot be criminalized unless it is likely to incite or produce imminent lawlessness.[52]

Whether so rigorous a test is appropriate in the military context is a quite difficult question. As one commentator points out:

> [I]t is as unsatisfactory to apply an immediacy requirement to calls for disobedience of military orders as it is to apply such a requirement to calls for overthrow of the government [as in Dennis] . . . The military has a legitimate interest in conditioning servicemen to immediately obey lawful orders by inculcating a positive attitude of obedience to orders . . . . Speech that does not motivate a serviceman to commit an immediate act of disobedience may nevertheless tend to undermine the . . . disciplined attitude, impairing a weighty government interest well before the threat of the ultimate, substantive evil becomes imminent.[53]

Indeed, the *Dennis* formulation of the clear and present danger test, which eschews the element of imminent incitement, was adopted by the Court of Military Appeals in 1972 in *United States v. Priest*,[54] and the Supreme Court noted its approval of *Priest* in its 1974 decision in *Parker* v. *Levy*.[55] The Court in *Priest* adopted this formulation: "[T]he . . . inquiry, therefore, is whether the gravity

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[48] *Id.* at 510.
[49] *Id.* at 509.
[50] 395 U.S. 444 (1969) (per curiam).
[51] *Id.* at 447 (emphasis added).
[52] *See also* Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).
[53] Imwinkelried & Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community,* 54 TEX L. REV. 42, 80–81 (1975)(citation omitted). *See also* Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice,* 81 HARV. L. REV. 1697, 1747 (1968).
[54] 21 **C.M.A.** 564, 572, 45 C.M.R. 338, 344–45 (1972).
[55] 417 U.S. 733, 758–59 (1974).

of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction." [56]

It appears likely that the deference the Court has accorded to military needs will result in a different standard for military and civilian cases, both with respect to what constitutes a "clear danger" and what constitutes an "immediate danger." Even a relaxed "danger" standard, however, will be more rigorous in the military context than the "interest balancing" standard.

3. The requirements of the overbreadth doctrine

No matter which of the two standards — interest balancing or clear and present danger — is applied, an administrative regulation with respect to unionization activities may founder on the constitutional requirement that the proscription not be overbroad. Prohibitions of particular activities may be required in order to meet the government's need, but if, due to defective drafting or conceptual difficulties, they also sweep in other activities unrelated to the government's need, then they probably will be held Overbroad. The doctrine is explained in *United States* v. *Robel* [57] where the Court held overbroad a statute that burdened Communist Party membership:

> [C]larity and preciseness of the provision in question [may] make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting [that a court should not undertake] . . . . It is precisely . . . [when a] statute sweeps indiscriminately across all types of association . . . without regard to the quality and degree of membership, that it runs afoul of the First Amendment.[58]

In the overbreadth cases, the courts often permit a person affected by a government action to litigate the impact on the first amendment freedoms of others. Even if the government action, as applied to the challenger, is not unconstitutional, the court confers standing for this purpose because first amendment rights are given special protection.[59] The mere existence of an overbroad government

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[56] 21 C.M.A. at 572, 45 C.M.R. at 344-45. See *also* United States v. Gray, 20 C.M.A. 63, 66, 42 C.M.R. 255, 258 (1970) ("similar [disrespectful or contemptuous] speech by a subordinate toward a superior in the military can directly undermine the power of command").

[57] 389 U.S. 258 (1967).

[58] *Id.* at 262.

[59] *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Aptheker v. Secretary of State, 378 U.S. 500 (1964); NAACP v. Button, 371 U.S. 415 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

action can have a "chilling effect'' on the exercise of first amendment rights since law-abiding citizens generally will not engage in conduct that is prohibited even though, by hypothesis, they could not constitutionally be punished for having done so. To eliminate this "chilling effect" the Supreme Court frequently has permitted plaintiffs to raise the first amendment rights of third parties.

Two standards appear to have developed. Where "pure speech" is regulated, little or no overbreadth is permitted. In *Gooding v. Wilson*,[60] for example, where the state purported to prohibit the use of abusive language, the Court required that lines be "carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." [61] Where, on the other hand, either expressive conduct or the first amendment rights of assembly or association are regulated, more leeway is permitted, and the restriction will not be struck down unless the overbreadth is "substantial." In *Broadrick* v. *Oklahoma* [62] a state employee challenged a state merit system that regulated both speech and association. The Court sustained the statute against the challenge on overbreadth grounds pointing out that the overbreadth must be substantial to be fatal and that any consideration of the substantiality of the overbreadth must take into account the plainly constitutional applications of the statute.

In *Parker v. Levy*,[63] the Supreme Court applied the overbreadth doctrine to statutes affecting the exercise of first amendment rights by military personnel. Captain Levy advised a number of soldiers, orally and in writing, that they should refuse to fight in Vietnam. He was convicted of violations of Articles 133 and **134** of the Uniform Code of Military Justice neither of which is directed exclusively at pure speech. The Court found that, given the breadth of the disciplinary power conferred on the military, there were numerous constitutional applications of the two articles including the application to Levy's own case. The Court conceded that there was "some possibility" that the articles included in their sweep some constitutionally protected speech, but rejected the overbreadth claim because the overbreadth was too insubstantial to warrant invalidation.[64] Even with the indulgence for overbreadth in the

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[60] **405** U.S. **518 (1972).**
[61] *Id.* at **522.**
[62] **413** U.S. **601 (1973).**
[63] **417** U.S. **733 (1974).**
[64] *Id.* at **761.** *Parker* also involved a claim that the Articles were void for vagueness under the due process clause of the fifth amendment. An unduly vague stat-

military context, however, the overbreadth doctrine as applied to limitations on the speech and conduct of military personnel and of civilian personnel in military contests requires careful and precise drafting.

B. CONSTRAINTS ON REGULATION OF MILITARY UNIONIZATION IMPOSED BY EQUAL PROTECTION REQUIREMENTS

Even where the government may prohibit certain expression or association consistent with the first amendment, such a prohibition must meet the separate constitutional requirement of equal protection. The equal protection requirement is set out in the fourteenth amendment: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The fourteenth amendment applies only to the states, but the equal protection principle is made applicable to the federal government through the requirement of the fifth amendment that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." [65] The equal protection requirement is relevant in the unionization contest because membership in and solicitation by many charitable, recreational, fraternal and other organizations is permitted at the same time that membership in and solicitation by certain union organizations is prohibited. This analysis considers both the substantive standards of equal protection review and the application of those standards to classifications that affect expression and association.

1. Substantive standards

The Supreme Court has applied several tests in considering equal protection challenges to classifications by the government. The usual and traditional test presumes legislation that draws distinctions among persons to be constitutional and requires only that there be a "reasonable" or "rational" basis for the classification. In

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ute is unconstitutional for two reasons — because it fails to provide persons with adequate notice as to what conduct is unlawful, and because it fails to provide clear guidelines for law enforcement and so can foster arbitrary and irrational law enforcement. *E.g.*, Smith v. Goguen, 415 U.S. 566 (1974). In the first amendment area, moreover, vague statutes engender the same sort of "chilling effect" because their application is uncertain, as do overbroad statutes. Indeed, in the first amendment area, all vague statutes are overbroad. *See* Note. *The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844, 871* n.104 (1970).

[65] Buckley v. Valeo, 424 U.S. 1 (1976); Bolling v. Sharpe. 347 U.S. 497 (1954).

Dandridge v. *Williams*,[66] for example, the Court reviewed a challenge under the equal protection clause to a Maryland regulation that placed a ceiling on state welfare benefits to families that were also receiving federal welfare benefits. The Court upheld the classification, finding that the "legitimate" interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor provided a rational basis for the classification. The Court further explained its rational basis test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classificiation has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." [67]

In certain cases, however, the Court applies a far stricter test. When a classification that is "suspect"—based on race,[68] nationality,[69] or alienage,[70]—is involved, the Court exercises a close or "strict scrutiny," and the classification can be justified only if based on a "compelling state interest.'' In addition to the "suspect classification" category, the Court has applied a test stricter than the traditional '(rational basis" formulation in cases where "fundamental" rights or interests—most often rights relating to voting and interstate travel [71]—are at issue. In *Shapiro v. Thompson*,[72] for example, the Court focused on the classification for eligibility of welfare recipients in two states and the District of Columbia based on the period of state residency. The Court found that these provi-

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[66] 397 U.S. 471 (1970).

[67] *Id.* at 485. ***See*** *also* McGowan v. Maryland, 366 U.S. 420 (1961) (rejecting an equal protection challenge to the Maryland Sunday closing law):

> [Tlhe Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed *to* have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts can reasonably be conceived to justify it.

366 U.S. at 425–26.

[68] *E.Q.*, Loving v. Virginia, 388 U.S. 1 (1967).

[69] *E.Q.*, Korematsu v. United States, 323 U.S. 214 (1944).

[70] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

[71] Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax); Reynolds v. Sims, 377 U.S. 533 (1964) (malapportioned state legislature).

[72] 394 U.S. 618 (1969).

sions involved the constitutionally derived right of interstate movement and held that the provisions violated the equal protection clause:

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period clearly violates the Equal Protection Clause.[73]

There is some suggestion in Supreme Court decisions since *Shapiro v. Thompson* that a middle standard may be evolving between the traditional rational relationship test and the more active review applied where a "suspect classification" or a "fundamental right" is involved. In several cases decided in the 1971 Term, the Court appeared to apply an intensified "rational relationship" test, with focus on the means selected by the state to advance its legitimate objective, although the Court did not purport to apply a new standard. In ***Reed*** *v. Reed*,[74] the Court stated that a "classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " [75] The Court further stated that while the objective may be legitimate, the crucial question is whether the statute advances that objective in a manner consistent with the command of the equal protection clause.[76] In *Bullock* v. *Carter*, [77] the Court stated that a system of filing fees for primary election candidates, because of its impact on the franchise, could not be judged by the traditional standards but "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." [78]

Shortly thereafter, however, the Court reverted to its older formulations. In *Dunn v. Blumstein*,[79] involving voter durational resi-

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[73] *Id.* at **638** (emphasis in original).
[74] **404** U.S. 71 (1971)
[75] *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. **412. 415 (1920)**).
[76] ***See*** *also* James v. Strange, **407** U.S. 128(1972); Lindsey v. Normet, **405** U.S. 56 **(1972).**
[77] **405 U.S.134 (19'72).**
[78] *Id.* at **144.**
[79] 405 U.S. **330** (1972).

dence requirements, the Court subjected the Tennessee provision to the "closest scrutiny" and applied an unmodified "compelling state interest'' standard to the fundamental right to vote. In *Memorial Hospital v. Maricopa County*,[80] the Court held unconstitutional, as a denial of equal protection, a county durational residence requirement for providing free medical care to indigents. The Court stated the question as whether the state has shown its requirement to be "legitimately defensible" in that it furthers a "compelling state interest." It is not clear from the more recent Supreme Court decisions whether the Court in fact is developing a middle level approach involving a rational relationship test but with more bite than before.

2. *Classifications that affect expression or association*

Regardless of which standard applies, however, government action that affects interests in expression or association and that differentiates among persons or groups on the basis of those interests must, at the very least, be tied closely to—and have more than a "rational relationship" to—some important government interest. As the cases discussed below demonstrate, only occasionally will such action survive judicial scrutiny.

In *Police Department* v. *Mosley*,[81] the Supreme Court addressed a Chicago ordinance that prohibited, as disorderly conduct, picketing or demonstrating on a public way within 150 feet of any primary or secondary school during and for one-half hour before and after classes. The ordinance excepted from its prohibition the peaceful picketing of any school involved in a labor dispute. Mosley had picketed the school, in a peaceful manner, protesting alleged racially discriminatory practices of the school and had been convicted of disorderly conduct. The Court held the ordinance to be an unconstitutional denial of equal protection because it made an impermissible distinction between labor picketing and other peaceful picketing. The city, in permitting one kind of picketing but not another, was restricting the activity not because all picketing was disruptive but because of the message being conveyed. The Court pointed out:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

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[80] 415 U.S. 250 (1974).
[81] 408 U.S. 92 (1972).

> And it may not select which issues are worth discussing or debating in public facilities.. . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[82]

The Court was willing to permit restrictions on picketing so long as those restrictions went to the "time, place and manner" of picketing and were necessary to further a significant government interest, such as where conflicting demands on the same place compel the state to make choices among potential users and uses. Moreover, the Court indicated that the state may have a legitimate interest in prohibiting some picketing to protect public order although it provided no additional guidance as to what standard it might apply in reviewing the acceptability of "selective exclusions or distinctions among pickets." [83]

The same result has been reached when classifications are applied to meetings or the distribution of leaflets. In *United States v. Crowthem*,[84] the defendant was convicted of violating government regulations relating to disturbances and leafletting in connection with a "Mass for Peace" and various other demonstrations on the concourse of the Pentagon. Pentagon regulations prohibited the distribution of leaflets without prior approval and prohibited certain disorderly conduct such as loud or unusual noises and obstruction of entrances and foyers that would disturb public employees in the performance of their duties; but the concourse had been used previously for religious, recreational and awards assemblies authorized by Pentagon officials. The court pointed out that

> [B]eyond question, the government may forbid all ceremonial use of the concourse or any other part of the Pentagon. But it may not pick and choose for the purpose of selecting expressions of viewpoint pleasing to it and suppressing those that are not favored. [85]

The court concluded that the record strongly suggested invidious discrimination and selective application of a regulation because the government permitted public meetings in support of government policy and at the same time forbade public meetings opposed to that policy.[86]

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[82] *Id.* at 96.
[83] *Id.* at 98.
[84] 456 F.2d 1074 (4th Cir. 1972).
[85] *Id.* at 1078.
[86] In Greer v. Spock, 424 U.S. 828 (1976). the Court pointed out there was no claim that the military authorities discriminated in any way among candidates for

Last Term, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[87] the Supreme Court upheld, against an equal protection challenge, regulations that restricted the activities of prison inmates in their capacity as union members and that distinguished between the union and other organizations permitted to operate within the prison. Union members were prohibited from meeting as a group, although meetings of inmate members of the Junior Chamber of Commerce, Alcoholics Anonymous and Boy Scouts were permitted, and prisoners could not receive bulk mail from unions, although that privilege was accorded other organizations. Given the special conditions in a prison, the Court declined to disturb the judgment of prison officials. Drawing upon the equal protection analysis in *Greer v. Spock*,[88] the Court held that because a prison was not a public forum, "appellants need only demonstrate a rational basis for their distinctions between organizational groups."[89] Moreover,

> [i]t is precisely in matters such as this, the decision as to which of many groups should he allowed to operate within the prison walls, where, confronted with claims based on the Equal Protection Clause, *the courts should allow the prison administrators full latitude of discretion, unless if can be firmly stated that the two groups are* so *similar that discretion has been abused.* That is surely not the case here.[90]

If the latitude of discretion permitted prison officials in *Jones* applies in similar respects to military officials (as the reference to *Greer*—a military case—in the Jones opinion suggests), the equal protection problems involved in government action with respect to unionization of the military can be resolved by careful drafting.

In sum, any government response to unionization activities must survive challenges under both first amendment and equal protec-

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public office based on the candidate's supposed political views because no political candidate had ever been permitted to campaign on the base. The Court commented in a footnote on permissible classifications of speakers:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

424 U.S. at **838** n.lO.

[87] 97 S.Ct. **2532** (1977).

[88] **424** U.S. **828, 838** n.10 (quoted in note 86, *supra*).

[89] 97 S.Ct. **2532. 2543.**

[90] *Id.* at **2543–44** (emphasis added).

tion principles, and in each of these areas there are different substantive standards and modes of analysis. Each of these standards provides an independent basis on which government action could be held unconstitutional.

11. ASSESSMENT OF THE DEPARTMENT OF DEFENSE DIRECTIVE

The Secretary of Defense has exercised his regulatory authority to prohibit a broad range of activities traditionally associated with labor union organization efforts. Three of the principal prohibitions — those with respect to collective bargaining, concerted activities and membership — apply only to military personnel and apply to actions taken by military personnel both on-base and off-base. The fourth principal prohibition — that with respect to solicitation and advocacy activities — applies to both civilian and military personnel, but applies only to actions taken on military installations. This Part analyzes the Directive with respect to each of these four prohibitions in terms of the general constitutional principles discussed in Part I, and the case law more specifically relevant to the subject matter of each prohibition.

A. *COLLECTIVE BARGAINING*

A prohibition on collective bargaining, as that term is used in the civilian context, does not abridge the freedoms of speech, assembly and association guaranteed by the first amendment. A constitutional concern is raised only with respect to equal protection guarantees. Because collective bargaining is a very specialized type of activity, it probably presents relatively few opportunities for treating differently those who are, in fact, similarly situated.

1. Cnse law relevant fo prohibition on collective bargaining

Neither public nor private sector employees have a constitutional right to bargain collectively.[91] Although Congress has enacted legislation granting such rights to employees in the private sector,[92] it has not enacted legislation providing or denying the right to bargain collectively to federal employees or military personnel. And while pur-

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[91] *See generally* Note, *Labor-Management Relations and Public Employees Engaged in Protective Functions: Policemen and Firemen as Sui Generis*, 5 GA. L. REV. 540, 545 (1971).

[92] National Labor Relations Act, § 7, 29 U.S.C. § 157 (1970).

suant to the authority delegated to the President, [93] federal employees have been granted by Executive Order [94] the right to bargain collectively, this right does not extend to military personnel.
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At the state level, the trend among the legislatures is to enact comprehensive public employee relations statutes that cover broad groups of government employees and that grant organization and collective bargaining rights. Some states, however, have excluded from such statutory schemes certain classes of employees such as policemen and firemen.[95] At least one state has taken a different approach and has provided simply that any agreement or contract entered into by any government agency and a labor organization representing public employees is illegal and of no effect.[96] A number of cases have considered the state prohibitions on collective bargaining by police officers and firemen, and in all cases the prohibition has been upheld.

In *Atkins v. City of Charlotte*,[97] the court held that a North Carolina statute that declared illegal all contracts between units of government and labor unions, trade unions or labor organizations [98] was not unconstitutional as applied to city firemen. The court found that the statute simply expressed the public policy of North Carolina regarding collective bargaining contracts and held that "The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution." [99]

In *Newport News Firefighters Association v. City of Newport News*,[100] the plaintiffs challenged the city's refusal to bargain collectively on the issues of wages, hours and other conditions of

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[93] 5 U.S.C. § 7301 (1976).
[94] Exec. Order No. 11491, 3 C.F.R. § 861 (1966–1970 compilation), 34 Fed. Reg. 17605 (1969), *reprinted in* 5 U.S.C. § 7301, at 576 (1976).
[95] *E.g.*, Mo. ANN. STAT. § 105.510 (Supp. 1977) (Vernon) (excluding policemen, deputy sheriffs, state highway patrolmen, National Guardsmen, and teachers).
[96] N.C. GEN. STAT. §§ 95–98 (1975).
[97] 296 F. Supp. 1068 (W.D.N.C. 1969).
[98] N.C. GEN. STAT. § 95–98 (1975) provides:

> Any agreement, or contract between the governing authority of any city, town, county. or other municipality, or between any agency, unit or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina. and any labor union, trade union. or labor organization. as bargaining agent for any public employees of such city. town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State. illegal, unlawful. void and of no effect.

[99] 296 F. Supp. at 1077.
[100] 339 F. Supp. 13 (E.D. Va. 1972) (three-judge court).

employment. The court held that the basic rights contained in the first and fourteenth amendments cannot be extended to include a right to require the city to enter into collective bargaining with an association of its employees, and the question whether the city must enter into a collective bargaining agreement is one for the legislature.

Although the federal government permits some of its employees (including some civilian Department of Defense employees) to engage in collective bargaining, the distinction between these civilian employees and members of the armed forces raises no substantial equal protection concern. Because the classification is not a suspect one and does not involve expressive conduct or any other fundamental interest, the government would have to show only a rational basis for the distinction. In *Vorbeck v. McNeal*,[101] for example, the court held that a Missouri statute excepting police officers and certain other. employees from statutory collective bargaining provisions did not deny equal protection of the law because police officers occupy such a unique place in society that a rational basis exists for a classification that singles them out for disparate treatment. The unique role of the military has been expressly recognized by the Supreme Court,[102] and would also sustain, in the face of an equal protection challenge, a classification that singles out members of the armed services for special restrictions on unionization activities.

2. Provisions of the Department of Defense Directive relevant to collective bargaining

The Department of Defense Directive provides: "No commander or supervisor may engage in negotiation or collective bargaining." [103] The term "negotiation or collective bargaining" is defined broadly to include:

> A process whereby a commander or supervisor acting on behalf of the United States engages in discussions with a member or members of the Armed Forces (purporting to represent other such members). or with an individual, group, organization, or association purporting to

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[101] 407 F. Supp. 733 (E.D. Mo. 1976). For other cases which hold that there is no constitutional right to bargain collectively, see Lontine v. Van Cleave, 483 F.2d 966 (10th Cir. 1973); University of New Hampshire Chapter of the American Ass'n. of Univ. Professors v. Haselton, 397 F. Supp. 107 (D.N.H. 1975); Confederation of Police v. City of Chicago, 382 F. Supp. 624 (N.D. Ill. 1974). The principles enunciated by these cases are well-established, and there is no precedent to the contrary.

[102] ***See*** test accompanying notes 6–17, *supra*.

[103] DoD Directive 1354.1, ¶ E(1).

represent such members, for the purpose of resolving bilaterally terms or conditions of military service.[104]

This formulation limits only the activities of those who would act on behalf of the United States, not the activities of those on the other side of the bargaining table. As such it is no more than a reasonable restriction imposed by an employer on the way its employees (here, the supervisory employees who would represent the government in negotiations) perform their duties, and it affects no expression or association by those employees that is protected by the first amendment, Because the Directive affects no first amendment conduct, there is no need to demonstrate either a compelling government interest for the restraint or that affected expression or association poses a clear and present danger.

The Directive makes clear that the term "negotiation or collective bargaining" cannot be read to affect normal military grievance procedures. Paragraph F(1) provides: "This Directive does not prevent, among other things: [a]ny member of the Armed Forces from presenting complaints or grievances over terms or conditions of military service through established military channels." [105] This narrows further the prohibition on collective bargaining and focuses the prohibition on those matters outside established military channels where the potential adverse effects on military discipline are to be found.

The collective bargaining provision has one equal protection aspect. Paragraph F, on permissible activity, also provides that the Directive does not prevent "[c]ommanders or supervisors from giving due consideration to the views of any member of the Armed Forces presented . . . as a result of participation on command-sponsored or authorized advisory councils, committees or organizations for the purpose of improving conditions or communications at the military installation involved." [106] This provision might be interpreted to permit commanders to exempt, in effect, certain organizations from the reach of the directive by declaring the organization to be command-sponsored or authorized. A close look at the language of the Directive reveals, however, that no exemption is created. Commanders and supervisors may not negotiate or bargain collectively with any organization, regardless of whether it is command-sponsored. This language is by way of clarification as to what con-

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[104] *Id.*, Encl. 1, ¶ *G.*
[105] *Id.*, ¶ F(1).
[106] *Id.*, ¶ F(2).

duct does *not* fall under the term "negotiation or collective bargaining" as that term is defined in the Directive. The language applies only to commanders and supervisors and regulates only the way in which the government's supervisory employees carry out their responsibilities. To the extent that this provision classifies organizations as to whether they are command-sponsored, there appears to be no basis on which such a classification would be subjected to the "strict scrutiny standard." [107] The presumption of constitutionality that accompanies an application of the "rational relationship" standard [108] together with the demonstrated utility of command-sponsored organizations for the purpose of improving conditions on base should be sufficient to ensure the constitutionality of this provision.

B. STRIKES AND OTHER CONCERTED ACTIVITY

A prohibition on strikes and other concerted activity does not abridge the freedoms of speech, assembly or association guaranteed by the first amendment because such concerted activity by itself is not protected by the first amendment. Equal protection principles implicit in the fifth amendment are not violated by a prohibition on concerted activity for particular purposes so long as no particular persons or organizations are singled out for disparate treatment,

1. Case law relevant to prohibition on concerted activity

There is substantial legislative and judicial precedent supporting the proposition that the freedoms of speech, assembly and association do not include the right to strike or to engage in other concerted activity to obtain better terms and conditions of employment.

A federal statute prohibits strikes against the federal government by civilian personnel in the following terms:

> An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he . . .
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> (3) participates in a strike, or asserts the right to strike. against the Government of the United States or the government of the District of Columbia. [109]

In a series of decisions, [110] three-judge district courts in the District

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[107] ***See*** text accompanying notes 68–73. *supra*.
[108] ***See*** text accompanying notes **66–67.** *supra*.
[109] 5 U.S.C. § 7311 (3) (1976).
[110] Nat'l Ass'n of Letter Carriers v. Blount, 305 F. Supp. **546** (D.D.C. 1969).

of Columbia have held all of this statute unconstitutional except that part of subsection **(3)** which proscribes participation in a strike against the Government of the United States or the government of the District of Columbia. In a subsequent decision, *United Federation of Postal Workers v. Blount*,[111] the court focused specifically on the constitutionality of this portion of subsection *(3)*. Plaintiffs claimed that the right to strike is a fundamental right protected by the Constitution, that subsection **(3)** constitutes an infringement of the first amendment rights of association and speech, and that subsection *(3)* is vague and overbroad. The district court interpreted this subsection as prohibiting only an actual refusal by particular employees to provide service.[112] The court found that there is no constitutional right so to act, and that

> it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons.[113]

At least 38 states have enacted statutes prohibiting strikes and other concerted activities by some or all of their public employees.[114] New York, for example, enacted the so-called Taylor Law[115] in 1957 which provides: "No public employee or employee organization shall engage in a strike and no public employee or employee organization shall cause, instigate, encourage or condone a

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appeal dismissed, 400 U.S. 801 (1970) (holding unconstitutional, ***inter alia***, subsection (4), which prohibited being a member of an organization that asserts the right to strike); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969) (holding unconstitutional subsections (1) and (2) of 5 U.S.C. § 7311, which prohibited advocating the overthrow of the government, or being a member of an organization that does so).

[111] 325 F. Supp. 879 (D.D.C.), *aff'd mem.*, 404 U.S. 802 (1971).

[112] *Id.* at 884.

[113] *Id.* at 883. In numerous cases, actions by the government for injunctive relief against striking employees and their unions for violations of § 7311 have been allowed. *E.g.*, United States v. Robinson, 449 F.2d 925 (9th Cir. 1971); United States v. Professional Air Traffic Controllers Org., 438 F.2d 79 (2d Cir. 1970), ***cert. denied,*** 402 U.S. 915 (1971).

[114] ***See*** U.S. DEP'T OF LABOR, SUMMARY OF PUBLIC SECTOR LABOR RELATIONS POLICIES, STATUTES, ATTORNEY GENERAL OPINIONS AND SELECTED COURT DECISIONS (1976).

[115] N.Y. CIVIL SERVICE LAW §§ 200–213 (McKinney 1977).

strike." [116] Courts in New York [117] and in numerous other states [118] have expressly rejected constitutional challenges to legislation prohibiting and punishing strikes by public employees. The Taylor Law was considered in *City of New York v. DeLury* [119] which involved a nine-day strike by sanitation workers in New York City. The defendant DeLury, president of the union, and the members of the union refused to comply with a temporary restraining order and a preliminary injunction that directed them not to engage or participate in any strike, concerted stoppage of work or concerted slowdown. Notwithstanding the consequent health and fire hazards, the defendants remained away from their jobs and the court found DeLury and the union guilty of criminal contempt for willfully disobeying the restraining order. On appeal, the defendants contended that the Taylor Law was unconstitutional, but the court held that neither the fourteenth amendment to the United States Constitution nor the bill of rights of the New York Constitution grants to any individual an absolute right to strike.[120]

2. Provisions of the Department of Defense Directive relevant to concerted activity

The Department of Defense Directive provides:

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[116] *Id.* § 210(1).

[117] Matter of DiMaggio v. Brown, 19 N.Y.2d 283, 279 N.Y.S.2d 161 (1967):Pruzan v. Board of Education, 25 Misc. 2d 945, 209 N.Y.S.2d 966 (1960), *aff'd mem.*, 215 N.Y.S.2d 718 (1961), *aff'd mem.*, 9 N.Y.2d 911, 217 N.Y.S.2d 86 (1961). ***See*** *also* City of New York v. Social Services Employees Union, 48 Misc. 2d 820, 266 N.Y.S.2d 277 (1965).

[118] *E.g.*, City of Detroit v. Div. 26 of Amalgamated Ass'n, 332 hlich. 237, 51 N.W.2d 228, *appeal dismissed*, 344 U.S. 805 (1952) (MICH. STAT. ANN. § 17.455(2)); City of Cleveland v. Div. 268 of Amalgamated Ass'n. 41 Ohio Op. 236. 90 N.E.2d 711 (1949) (OHIO REV. CODE ANN. § 4117.02); *See also* Virgin Island Port Auth. v. S.I.U. de Puerto Rico, Caribe & Latinoanierica. 494 F.2d 452 (3d Cir. 1974)(V.I. CODE **ANN.** tit. 24. § 64(b) (1970)).

[119] 23 N.Y.2d 175, 296 N.Y.S.2d 901, *appeal denied*, 23 N.Y.2d 766. 296 N.Y.S.2d 958 (1968), *appeal dismissed*, 394 U.S 455 (1969).

[120] *Id.* at 181–82, 295 N.Y.S.2d at 905–906. In a brief discussion of a second contention by the defendants that the prohibition against strikes by public employees (or their representatives) violates the equal protection clause of either the federal or the state constitution, the court stated: "There are a number of factual differences between employment in the public and private sectors which furnish reasonable justification for disparate treatment vis-a-vis the right to strike." *Id.* at 186, 295 N.Y.S.2d at 909. The most important difference, the court observed. was that. unlike in the private sector, the market place has no restraining effect upon collective bargaining negotiations in the public sector, and the sole constraint on such negotiations is found in the budget allocations made by the legislature.

No member of the Armed Forces may:

a. Engage in any strike, slowdown, work stoppage, or other collective job-related action related to terms or conditions of military service; or

b. Picket for the purpose of causing or coercing other members of the Armed Forces to engage in any strike, slowdown, work stoppage, or other collective job-related action related to terms or conditions of military service.[121]

Paragraph (a) refers specifically to the well-known forms of concerted activity — strikes, slowdowns and work stoppages. These activities plainly are not within the ambit of first amendment protection. Paragraph (a) also refers to "other collective job-related action" in order to reach the wide variety of possible actions that might be used to circumvent this provision if it were limited to strikes, slowdowns and work stoppages. The sweep of the term "other collective job-related action" could be quite broad and might encompass constitutionally protected activities. The term has, however, been defined narrowly as: "Any activity by two or more persons that is intended to and does obstruct or interfere with the performance of a military duty assignment".[122] The dual test of "intended to and does obstruct. . . performance" would appear to meet possible vagueness problems and to limit the prohibition to activities that, like strikes, slowdowns and work stoppages, are not constitutionally protected.

Paragraph (b) prohibits picketing by military members, both on-base and off-base, to the extent that such picketing is intended to coerce other members of the armed forces to engage in the collective job-related actions prohibited by paragraph (a). Unlike strikes, picketing is quite clearly expressive conduct within the ambit of the first amendment.[123] Nevertheless, the prohibition appears to be constitutional under either an interest balancing approach or the clear and present danger test, as those tests are applied in the military context. Under the interest balancing approach, the ultimate government interests are maintaining effective command control and military discipline, interests that were recognized as compelling in *Parker v. Levy* and *Greer v. Spock*.[124] The individual interest in

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[121] DoD Directive 1354.1, ¶ E(2).
[122] *Id.*, Incl. 1, ¶ B.
[123] *See* Thornhill v. Alabama, 310 U.S. 88 (1940).
[124] *See* text accompanying notes 11–18, 27–28, *supra*. The immediate government interest is, of course, the prevention of strikes and similar collective activity; but the weight that interest carries in the balance necessarily depends on the unique needs of the military.

expressive conduct that is intended to coerce violations of a lawful regulation (such as paragraph (a)) does not appear adequate to tip the balance against the paragraph (b) prohibition. Nor is there a less restrictive means to accomplish the desired end. Paragraph (b) is drawn narrowly to reach only that conduct intended to coerce or cause violations of subparagraph (a). Moreover, a prohibition against strikes like that contained in paragraph (a) will reach only those who engage in such conduct volitionally. Paragraph (b) reaches those "work stoppages" that are coerced and thus, in some sense, involuntary.

Application of the clear and present danger test is only slightly more problematic. Unlike the second of the two regulations upheld in *Greer v. Spock*,[125] paragraph (b) does not, by its terms, require a determination in each case that the prohibited conduct constitutes a clear danger to military loyalty, discipline, or morale. Nevertheless, because the provision proscribes only picketing intended to be coercive, and because picketing activity creates substantial opportunity for actual coercion,[126] paragraph (b) will be primarily, if not solely, applicable to situations posing a clear and present danger to military discipline and order.

Finally, paragraph (b) should not run afoul of either the overbreadth doctrine or the requirements of equal protection. As noted previously, the provision is drawn narrowly to address only picketing intended to coerce violations of a lawful regulation and that prohibition applies to all persons over whom the military has control.

C. SOLICITATION

The concept of "solicitation" in the unionization context has two distinct meanings. In its usual labor law sense, "solicitation" refers to organization — that is. asking or bidding persons to become members of a union.[127] In this sense, a prohibition on solicitation with respect to union membership may be aimed at a wide range of activities — including speeches, meetings, information centers, leaflets, advertisements, correspondence, conversation and other

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[125] **424** U.S. at **840;** ***see*** test accompanying notes 18–18. *supra*.

[126] As noted by Mr. Justice Powell in *Greer v. Spock*. "face-to-face persuasion by someone who urges. . . [a] refusal to obey **a** . . . command. has an immediacy and impact" not found in other forms of expression. **424** U.S. at 849 (Powell. J., concurring).

[127] *See* NLRB v. United Steelworkers. ***357*** U.S. 357 (1958); Republic Aviation Corp. v. NLRB, **324** U.S. 793 (1945).

means of persuading or encouraging servicemen to become union members — which may take place on or off military installations. More broadly, "solicitation" also frequently is made a crime. It is an inchoate crime — like conspiracy or attempt — in which the actor requests or encourages another to engage in unlawful conduct. In either context a prohibition on solicitation raises first amendment and equal protection concerns.

1. Case law relevant to prohibition on solicitation or advocacy

There are no current federal statutes that bar solicitation of membership in a union or other group, and there are only a few judicial precedents that address the question whether a prohibition on membership solicitation by members or representatives of a union is constitutional.[128]

Perhaps the leading case is *Thomas v. Collins*.[129] There, a Texas statute required that "[a]ll labor union organizers operating in the State of Texas shall be required to file . . . before soliciting any members for his organization, a written request . . . or shall apply in person for an organizer's card. . . ."[130] The petitioner, president of a union, gave a speech in Texas without the required card in which he issued a general invitation to members of the audience to join the union local (and specifically solicited one named individual) in violation of a restraining order that had issued *ex parte*. The Supreme Court held the statute under which he had been held in contempt to be unconstitutional:

> The assembly was entirely peaceable, and had no other than a wholly lawful purpose. The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger. . . . Moreover, the State has shown no justification for placing restrictions on the use of the word "solicit." . . . When legislation or its application can confine labor leaders . . . to innocuous and abstract discus-

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[128] The statutes challenged in the police and firemen union membership cases either did not prohibit solicitation or the prohibition was not challenged. Sections 95–97 of the North Carolina General Statutes, which was held unconstitutional in Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969), as an abridgment of the freedom of association, contained language which would appear to constitute a prohibition against solicitation by employees: "Nor shall such an employee organize or aid, assist or promote the organization of any such trade union, labor union, or labor organization, or affiliate with such organization in any capacity whatsoever." The court in *Atkins*. however, did not specifically address this point.

[129] 323 U.S. 516 (1945).

[130] *Id.* at 519 n.1.

> sion of the virtues of trade unions . . . freedom of speech for them will be at an end.[131]

Nor was this an instance where an individual had unclertaken to collect funds or secure subscriptions. In such a case, where conduct in addition to pure speech was implicated, the Court suggested that the state might regulate more freely through its prior registration scheme. [132]

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, [133] prison regulations prohibited inmate-to-inmate "solicitation" to join a prisoners union, A three-judge district court held that it was irrational to prohibit membership solicitation when membership alone was lawful, but the Supreme Court disagreed. The Court intimated that mere membership could not be prohibited; [134] but, without citing *Thomas v. Collins*, it upheld the solicitation prohibition by reading that proscription very narrowly to prohibit only "an invitation to collectively engage in a legitimately prohibited activity," [135] and not merely "the simple expression of individual view as to the advantages or disadvantages of a Union." [136] The "legitimately prohibited activity" in question included union meetings, and, since the case involved a noncriminal proscription on conduct, the Court applied the interest balancing test and concluded that the activity could be prohibited. [137] The Court found that "speech rights are barely implicated" because "appellants have merely affected one of several ways in which inmates may voice their complaints"; and the minimal speech interests involved had to yield to reasonable considerations of penal management.[138] Taken together, *Thomas v. Collins* and *Jones* suggest that there is a serious constitutional impediment to a sweeping ban on *all* "solicitation," but make clear that invitations to engage in unlawful conduct—as in the sense of the inchoate crime—may constitutionally be proscribed.[139] Moreover,

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[131] *Id.* at 536–37.
[132] *Id.* at 540–41.
[133] 97 S.Ct. 2532 (1977).
[134] *Id.* at 2539–40. *See* text accompanying notes 87–90, *supra*.
[135] *Id.* at 2545 (Stevens, J., concurring).
[136] *Id.* at 2541.
[137] **See** test accompanying notes *23–27, supra*.
[138] 97 S.Ct. at 2540–41.
[139] There have been a number of relatively recent state court decisions involving convictions under state statutes rendering it unlawful to solicit others to commit criminal offenses. *E.g.*, Greenblatt v. Munro. 161 Cal.2d 596, 326 P.2d 929 (1958); People v. Hairston. 46 Ill.2d 348. 263 N.E.2d 840 (1970); People v. Hayden, 26 Ill.

Jones confirms that reasonable limits may be enacted on the time, place and manner in which solicitation takes place.

In the military contest. *Cafeteria and Restaurant Workers Union v. McElroy* [140] establishes "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command." While *Cafeteria Workers* does not in terms permit a prohibition on the use of military personnel as organizers, *Greer V. Spock* [141] seems to permit a prohibition on speechmaking, leafletting and other kinds of solicitation traditionally associated with the public forum—at least when those activities are undertaken on a military installation.

2. Provisions of the Department of Defense Directive relevant to solicitation or advocacy

The Department of Defense Directive provides:

> a. No person may conduct or attempt to conduct a demonstration. meeting, march, speechmaking, protest, picketing. leafletting or other similar activity on any part of a military installation for the purpose of forming, recruiting members for or soliciting money or services for an organization (or organizations) that:
>
> (1) Engages or is substantially likely to engage in any activity prohibited by this Directive; or
>
> (2) Proposes or holds itself out as proposing to engage in negotiation or collective bargaining on behalf of members of the Armed Forces; or
>
> (3) Proposes or holds itself out as proposing to represent members of the Armed Forces to the military chain of command with respect to terms or conditions of military service when such representation would interfere with the military chain of command; or
>
> (4) Solicits or aids and abets a violation of this Directive by a member of the Armed Forces.
>
> b. No person may engage in any activity on any part of a military installation, including but not limited to individual contacts or the posting for public display of any poster, handbill or other writing, if that activity or the material displayed constitutes or includes an invitation to collectively engage in an act prohibited by this Directive.[142]

The Directive is drawn to adhere closely to the constitutional limits set forth in the case law, Paragraph (a) contains limitations on

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App.2d 337, 168 N.E.2d 458 (1960); James v. State, 248 Miss. 777, 160 So.2d 695 (1964); Gervin v. State, 212 Tenn. 653, 371 S.W.2d 449 (1963); State v. Cieoca, 125 Vt. 64, 209 A.2d 507 (1965).

[140] 367 U.S. 886, 893 (1961).

[141] 424 U.S. 828 (1976).

[142] DoD Directive 1354.1, ¶ E(3).

public forum activities and is governed by the considerations set out in *Greer v. Spock*.[143] Paragraph (b) contains limitations on activities of the sort not associated with a public forum, and it looks to the standard in *Jones*.[144] Both appear to satisfy constitutional requirements.

Paragraph (a) applies to both military and civilian personnel and forbids solicitation on military bases.[145] It has no application off-base; therefore, both military and civilian personnel have an outlet for the esercise of their first amendment rights with respect to union organization.[146] Paragraph (a) prohibits solicitation or advocacy activities only when there is a purpose to form a labor union-type organization; to recruit members for such an organization; or to solicit money or services for such an organization. It does not prohibit abstract advocacy of labor unions in the military. It also has no effect on the right of military members to petition Congress.[147]

Even as applied to labor unions or similar organizations, the prohibition is carefully limited. It applies only when such organizations engage or are substantially likely to engage in prohibited or fraudulent activity. These limitations are set out in subparagraphs (1) through **(4)** of paragraph (a). Subparagraphs (a)(1) and (a)(4) deal with prohibited activity. They provide that solicitation may be barred with respect to organizations that engage or are substantially likely to engage in prohibited activity or that solicit or aid and abet a violation of the Directive by a member of the Armed Forces. These prohibitions on soliciting and aiding and abetting are further

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[143] 424 U.S. 828 (1976).

[144] 97 S.Ct. 2532 (1977).

[145] The coverage of this prohibition is governed by the definition of "military installation" which "includes installations, facilities, ships, aircraft, and other property controlled by the Department of Defense." DoD Directive 1354.1. Incl. 1, ¶ F.

[146] Such an outlet has been considered by the Court to be important. In *Greer v. Spock* it was noted:

> Political communications reach military personnel on bases in every form except when delivered in person by the candidate or his supporters and agents. The prohibition does not apply to television, radio. newspapers, mapazincs. and direct mail. Nor could there be any prohibition on handing out leaflets and holding campaign rallies outside the limits of the base. Soldiers may attend off-base rallies as long as they do so out of uniform. The candidates, therefore. have alternative means of communicating with those who live and work on the Fort; and servicemen are not isolated from the information they need to esercise their responsibilities **ad** citizens and voters.

424 U.S. at 847 (Powell, J., concurring).

[147] This exclusion is made explicit in para. F(3) which provides that the directive does not prevent "[a]ny member of the Armed Forces from petitioning Congress or communicating with any member of Congress. individually or collectively."

limited by the definitions of the terms "solicit" and "aid and abet." [148] The Directive bars only conduct by individuals; it does not attempt to create separate prohibitions with respect to organizations. The provisions of subparagraph (a)(1)reach the professional unicn organizer who is directed and paid by the union and also union officers or other representatives. The provisions of subparagraph (a)(4) reach other persons, not acting as union agents but acting in response to its requests, suggestions or incitement. This provision is limited to military personnel. The Directive does not apply to union activities with respect to civilian employees on military bases.

Subparagraphs (a)(2) and (a)(3) deal with fraudulent activity. Because no commander or supervisor can engage in collective bargaining with any union organization, any union that proposes or holds itself out as proposing to engage in collective bargaining is deceiving its intended audience. There is no limitation, however, on an organization proposing or holding itself out as proposing to petition Congress to enact a statute that would permit collective bargaining. Advocating a change in the law is constitutionally protected activity and the Directive does not interfere with that activity. Nor is there a limitation on an organization proposing or holding itself out as proposing to engage in collective bargaining *when and if* the law permits it. So long as the organization makes clear to its intended audience that it may *not,* under the current law and current Department of Defense regulations, engage in collective bargaining, there is no fraud involved, and thus no prohibition on such statements by the terms of paragraphs (a)(2) and (a)(3). Since ***Greer*** *v. Spock* permits a prohibition applicable to military installations on broad classes of public forum activities that have no reference to prohibited or fraudulent activities, the restrictions of paragraph (a), drawn more narrowly to apply only to such illegal or fraudulent activities, should be constitutional.

Paragraph (b) deals with a different class of activities. These do not necessarily require a public forum and may be carried out by individual contacts or in very small groups. Here the prohibition is drawn very narrowly. It is taken directly from the prohibition held

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[148] The directive defines the term "solicit" to mean "[t]o use words or any other means to request, urge, advise, counsel, tempt, or command another to commit any act prohibited by this Directive." DoD Directive 1354.1, Incl. 1 ¶ H. The Directive defines the term "aid and abet" to mean "[t]o be present during the commission of any act prohibited by this Directive and to assist, command, counsel, or otherwise encourage the commission of such act." *Id.*, Incl. 1 ¶ **A.**

constitutional in *Jones* and applies only to invitations to engage collectively in an act prohibited by the Directive. There are three important prerequisites to the operation of this prohibition. First, the speech or speech-related conduct involved must be an "invitation" to engage in prohibited activity. **A** broad range of advocacy is thus excluded. Second, the invitation must be to engage "collectively" in prohibited activity. Invitations to engage individually in unrelated illegal acts are not prohibited even though they may be job-related or may affect military duty assignments. Third, only activity prohibited by this Directive will serve as a predicate for invoking this prohibition. The prohibition is thus focused narrowly on the precise objective — prevention of collective activity — that presents a danger to military discipline and combat effectiveness.

The distinctions drawn between labor unions and other organizations appear consistent with equal protection principles. In *Jones*, the Supreme Court upheld this precise distinction; and in *Greer v. Spock*, quite similar distinctions among organizations were sanctioned in the military contest.

D. MEMBERSHIP

Perhaps the most effective roadblock to unionization of the armed forces would be an across-the-board prohibition on union membership. The likelihood of incurring a substantial fine or imprisonment for mere membership could deter enthusiasm for collective activities and would make organizing very difficult. Such a prohibition, however, faces substantial first amendment hurdles, whether it is measured against some form of clear and present danger test or whether an interest balancing approach is used.[149] Because there are so many organizations to which military personnel are permitted or encouraged to belong, a ban on membership in union organizations also raises equal protection concerns.

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[149] For example, a 1969 directive of the Army Adjutant General noted that "it is unlikely that mere membership in a servicemen's union can constitutionally be prohibited." ACAM-P (M), DCSPER-SARD, 27 May 1969. *See* Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing,* 18 WAYNE L. REV. 665, 671 (1972). Although the Supreme Court has stated (without deciding) that the clear and present danger test applies to a criminal prohibition on mere membership, *see* Scales v. United States, 367 U.S. 203, 230 n. 21 (1961), we are aware of one case that has undertaken to balance interests. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

1. Case law relevant to prohibition on membership

There are a number of cases, both federal and state, that involve attempts to bar union membership. For a variety of reasons, every court to consider a challenge to such a prohibition on mere membership in the last ten years has found it unconstitutional. These federal and state efforts are considered below.

The federal statute prohibiting membership in union organizations provides in part:

> An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he
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> **(4)** is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.[150]

In *National Association of Letter Carriers v. Blount*,[151] a three-judge district court concluded that subsection (4), in its entirety, was unconstitutional under the first amendment. Relying principally on *United States v. Robel*,[152] the court concluded that the statute was not susceptible to a narrowing construction, and therefore was fatally overbroad.

The *Robel* case is important in the context of military activities because it makes clear that prohibitions on mere membership will not fare well even under circumstances where the national security is at stake. *Robel* involved section 5(a)(1)(D) of the Subversive Activities Control Act of 1950[153] which provided that when a Communist organization is under a final order to register, it shall be unlawful for any member of the organization to engage in employment in any defense facility. Robel, a Communist, was employed by a shipyard that was declared to be a defense facility in August 1962. When he continued in the employ of the shipyard beyond that date, he was indicted. While the Court recognized that congressional concern over the danger of sabotage and espionage in national defense industries was substantial — indeed compelling — it held the statute unconstitutional because it was both overbroad and not the least restrictive alternative. By its terms, the Act punished individuals

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[150] 5 U.S.C§ 7311 (4)(1976).
[151] 305 F. Supp. **546** (D.D.C. 1969), *appeal dismissed,* 400 U.S.801 (1970).
[152] 389 U.S. 258 (1967).
[153] **50** U.S.C§ 784(a)(1)(D) (1970).

without regard to whether they were active or passive members of an organization, and for that reason was overbroad. Moreover, the statute was not the least restrictive alternative because the government could accomplish its purpose of protecting defense facilities from sabotage and espionage by limiting access to classified information, by keeping from sensitive positions in defense industry those who would use their positions to disrupt the nation's productive facilities, and by prescribing criminal penalties for those who engage in espionage and sabotage.

In *Police Officers' Guild V. Washington*,[154] the members of a police union challenged a District of Columbia statute that prohibited police officers from joining or affiliating with any organization that "holds, claims or uses" the right to strike.[155] The police union involved was opposed to strikes by police officers and stated specifically in its constitution and bylaws that strikes were prohibited. The police officers' union, however, had affiliated with the AFL-CIO, some of whose other affiliates held, claimed and used the right to strike. The court explained that the unique and special nature of a policeman's obligation to serve the public justified government control and prohibition of some activities in which a policeman otherwise would be free to engage, but it added that government regulation of such activity may not be achieved by means that infringe unnecessarily upon first amendment rights.[156] The court found no government interest so compelling as to justify such a broad intrusion upon the police officers' first amendment rights of speech and assembly, and, therefore, held the statute unconstitutional.

In *Atkins v. City of Charlotte*,[157] city firemen challenged a North Carolina statute that prohibited government employees from belonging to any labor organization which is or may become affiliated with a national labor union.[158] The city defended on the ground that

> fire departments are quasi-military in structure, and that such a structure is necessary because individual firemen must be ready to respond instantly and without question to orders of a superior. and that such military discipline may well mean the difference between saving human life and property. and failure.[159]

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[154] 369 F. Supp. 543 (D.D.C. 1973) (three-judge court).
[155] D.C. CODE § 4–125 (1973).
[156] 369 F. Supp. at 551.
[157] 296 F. Supp. 1068 (W.D.N.C. 1969).
[158] N.C. GEN. STAT. §§ 95–97 (1975).
[159] 296 F. Supp. at 1076.

The court nevertheless held the statute "voicl on its face as an abridgement of freedom of association protected by the First and Fourteenth Amendments. . . ." [160] The only danger to a valid state interest suggested by the defendants, the court noted, was the fear that fire protection for the City of Charlotte might be disrupted by violence or strike. The statute was overbroad because it "strikes down indiscriminately the right of association in a labor union — even one whose policy is opposecl to strikes." [161] No less significantly, the statute did not represent the least restrictive alternative, because it appeared that the state interest could be protected simply by enactment of legislation prohibiting strikes.

Melton V. City *of Atlanta*[162] involved a Georgia statute prohibiting policemen from joining or belonging to any labor union.[163] Plaintiffs did not contend that the statute did not serve a legitimate state interest, but rather argued that the statute in question attempted to accomplish a legitimate end (securing complete impartiality on the part of police officers, particularly in labor strike situations) in an unconstitutional manner (unnecessarily broad infringement upon the plaintiffs' first amendment rights) and was, therefore, unconstitutional on its face. The court weighed the plaintiffs' interests in the first amendment right of association and the defendant's interest in securing an impartial police force and concluded that "[w]hile the statutes here undoubtedly tend toward securing the desired impartiality, their practical effect in that direction would not appear so efficacious or certain as to offset or outweigh the obvious impairment of plaintiffs' First Amendment rights." [164]

In *Vorbeck v. McNeal*,[165] plaintiff challenged a Missouri statute permitting union activities by public employees except "police, deputy sheriffs, Missouri state highway patrolmen, Missouri National Guard, teachers of all Missouri schools, colleges and universities," and also challenged a police board rule prohibiting police officers from participating in the organization of or becoming a member of any association, union, or any organization of department members other than certain approved organizations.[166] The court held the prohibition on membership to be unconstitutional on its face as ex-

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[160] Id. at 1075.
[161] Id. at 1076.
[162] 324 F. Supp. 315 (N.D. Ga. 1971) (three-judge court).
[163] GA. CODE ANN. §§ 54–909 (1976).
[164] 324 F. Supp. at 320.
[165] 407 F. Supp. 733 (E.D. Mo. 1976).
[166] Mo. ANN. STAT. § 105.510 (Supp. 1976) (Vernon).

ceeding the permissible bounds of the first and fourteenth amendments because it infringed significantly upon the plaintiffs' right of freedom of association. Because there was no showing that the organizations were detrimental to the paramilitary nature of police departments, the court found no compelling reason for denying plaintiffs membership in organizations solely because of their status as policemen.[167]

It may be possible to distinguish the police and firemen cases from the military contest by focusing on the government interests involved and the degree of harm that might be suffered if they are not protected. In the police officer and firemen cases the courts recognized a legitimate state interest in protecting lives and property and insuring the impartial enforcement of the law, but concluded that such interests could be protected by legislation prohibiting strikes by police officers or firemen. The danger to the public safety and welfare from an illegal strike by police officers or firemen would, no doubt, be significant, but not so substantial as an illegal strike by the armed services. If police officers or firemen go on strike, only the local community is threatened, whereas if the armed services or a large or critical portion thereof were to go on strike, the survival of the nation might be endangered, as well as the survival of the nations that depend upon the military power of the United States for protection. If a court were to appraise constitutional validity by an interest balancing aproach, it might conclude that the government interest in maintaining an effective military combat force capable of protecting the nation at all times is sufficiently compelling to justify a broader intrusion upon the first amendment rights of military members than would be permitted in the case of police officers or firemen.

Under the clear danger approach, however, the basis for constitutional validity might be difficult to establish. There are two possible ways to state the "substantive evil" as to membership that the government has the power to prevent: first, union membership itself creates a state of mind that is incompatible with military needs and therefore is a danger; and second, the union organization engages in unlawful action or unlawful advocacy that raises a clear and present danger, and association with such an organization therefore can be punished.

In practice it may be that the greatest danger to the military is the disruptive attitude that could be engendered by widespread

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[167] **407** F. Supp. at 738.

unionization of the armed forces. Military training and discipline are directed, in large part, toward establishing a state of mind conducive to immediate, unquestioning obedience to lawful orders. If an organization promoted a questioning and dissident state of mind, it would pose a threat to military order. Similarly, an organization that promoted loyalty and devotion to leaders or principles that detracted from the chain of command and the loyalty needed to support an effective military operation might also be a danger to the military. Of course, these adverse effects are necessarily hypothetical; [168] and devotion to a union is not the only sort of allegiance that may detract from single-minded devotion to military duty. Moreover, to punish mere membership under these circumstances, without regard to any unlawful purpose or act pursued by the organization, is to punish a dissident state of mind. In the absence of action that is in some way socially harmful, the government cannot constitutionally make union sympathy a crime; and a prohibition on membership in an organization that lawfully seeks to encourage unionization is virtually indistinguishable from a prohibition on mere sympathy. If there is a single constitutional truism, it is that the government may not make crimes of thoughts; "beliefs are inviolate," [169] because "[f]reedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind." [170]

If union solicitation, collective bargaining, or strikes and concerted work stoppages can be prohibited constitutionally, or if the advocacy of this activity can be made unlawful, then a basis might be provided for a prohibition of membership in organizations that engage in such unlawful efforts or unlawful advocacy. The theoretical basis for this prohibition is that, like concepts of conspiracy and complicity in the criminal law, a knowing, willful and active association with an organization that engages in unlawful conduct can be

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[168] Moreover, this theoretical basis also irrebuttably presumes that union membership will adversely affect all those who join. Whether the facts will support so all-embracing a presumption is an open question. *Cf.* Cleveland Bd. of Education v. Lafleur, **414** U.S. **632** (1974) (invalidating school board mandatory maternity leave rules on ground that irrebuttable presumption of physical incompetence violates due process).

[169] American Communications Ass'n. v. Douds, **339** U.S. **382, 393 (1950).** ***See*** *also* Jones v. North Carolina Prisoners' Labor Union, Inc., **97** S. Ct. **2532, 2540 (1977)** ("thought control, by means of prohibiting beliefs. would not be only undesirable but impossible").

[170] Jones v. Opelika, **316** U.S **584, 618 (1942)** (Murphy, J., dissenting), *adopted as* ***the*** *Opinion of the Court on* ***rehearing,*** **319** U.S. **103 (1943).**

punished. [171] There are four requirements against which a prohibition on membership would be measured. First, because the prohibition is based on a constitutionally permissible bar to specified actions, it must be established that the organization has engaged culpably in unlawful acts. This is not a difficult drafting problem, but it introduces what may be a difficult enforcement problem. While strikes and much on-base solicitation almost certainly can be made unlawful,[172] if these activities are made unlawful, it is doubtful that an organization will engage in them.

Second, the purpose to engage in prohibited conduct must be ascribable to the organization. The organization would have to pursue this conduct, since membership probably could not be prohibited in an organization that had the capability to engage in prohibited activity (for example, strikes or work stoppages) but disavowed those activities. Whether sufficient "illegality" could be imputed to an organization that neither specifically adopted nor disavowed prohibited acts would turn on the kind of inferences that could be drawn from such circumstantial evidence as the expressed sentiments of the organization leaders in public addresses, written correspondence, and the like.[173]

Third, the circumstances of membership probably would have to permit a reasonable inference that the individual was an active member of the organization, and knew of its prohibited purposes. These requirements derive from case law that construed the "membership" clause of the Smith Act, which presently provides:

> Whoever organizes or helps or attempts to organize any society. group, or assembly of persons who teach, advocate. or encourage the overthrow or destruction of any such government. by force or violence; or *becomes or* is *a member of or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof*—
>
> Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof. for the five years next following his conviction [174]

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[171] *See* Scales v. United States, 367 U.S. **203.** 227 (1961).

[172] *See* test accompanying notes 109–20, *supra*.

[173] ***See*** Scales v. United States, 367 U.S. **203,** 226 n.18 (1961):

> The problems in attributing criminal behavior to an abstract entity rather than to specified individuals. though perhaps difficult theoretically. as a practical matter resolve themselves into problems of proof. Whether it has been successfully shown that a particular group engagea in forbidden advocacy must depend on the nature of the organization. the occasion on which such [conduct] took place. the frequency of such occasions. and the position within the group of the persons engaged in the [conduct]. . . .

[174] 18 U.S.C. § 2385 (1970) (emphasis added).

The leading Supreme Court decision with respect to the constitutionality of this membership bar is *Scales* v. *United States.*[175] The Court upheld the statute, as applied, against first and fifth amendment attack but only by giving the provision an extremely narrow interpretation. Thus, the Court found that the Act did not prohibit membership, per se, in the Communist Party or any other organization:

> In our jurisprudence, guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt. . . . Membership, without more, in an organization engaged in illegal advocacy . . . has not heretofore been recognized by this Court to be such a relationship.[176]

Moreover, to establish a sufficient relationship. membership must be active, not nominal or passive. Indeed, the Court subsequently approved the trial court's charge, which had defined active membership to mean a devotion of all or a substantial part of one's time and efforts to the organization.

Fourth, and perhaps most important for first amendment purposes, there must be "specific intent" to accomplish the prohibited aims of the organization. Although the Court in *Scales* said it could "discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of [the First] Amendment," the Court also emphasized that, inasmuch as a single organization can engage in both lawful and unlawful conduct, "the clause does not make criminal *all* association with an organization which has been shown to engage in illegal [acts]. . . . There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' "[177] And, as the Court emphasized in *Noto* v. *United States,*[178] a companion case to *Scales,* specific intent, to be culpable, must be "present [unlawful intent], and not an intent [to act unlawfully] in the future. . . .[179]

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[175] **367 U.S.203 (1961).**
[176] *Id.* at **224–25** (citation omitted).
[177] *Id.* at **229** (citation omitted).
[178] **367** U.S. **291, 298 (1961).**
[179] In a subsequent Supreme Court decision, Law Students Research Council v. Wadmond, 401 U.S. 154 (1971), appellants challenged, primarily under the first amendment, the system of screening applicants for admission to the New York

2. Provisions of the Department of Defense Directive relevant to membership

The Department of Defense Directive provides:

> No member of the Armed Forces may become or remain an active member of any organization when:
>
> a. A determination has been made that the organization presents a clear danger to discipline. loyalty, or obedience to lawful orders because the organization or any person on behalf of the organization
>
> (1) engages in any act prohibited by this Directive: or
>
> **(2)** violates or conspires to violate. or solicits or aids and abets a violation of articles 82, 85, 86, 87, 89, 90, 91. 92, 94, 108.109. 115, 116, 117 or 128 of the Uniform Code of Military Justice, or of 18 U.S.C. 1382; and
>
> b. Such member of the Armed Forces knows that the organization. or any person on behalf of the organization. engages in the conduct upon which the determination [made under paragraph (a)] is based and such member of the Armed Forces intends to promote such conduct.[180]

This membership bar is designed to incorporate the requirements of the body of case law discussed above. There are limitations both with respect to the nature of the organization in which membership can be barred and with respect to the quality of membership that can be reached.

Paragraph (a) requires that the organization must present a clear danger to military discipline before any membership bar can be invoked. Thus, the Directive, utilizes a variant of the clear and present danger standard as the test of validity—the more difficult of the two tests [181]—although it does not follow the most rigorous formulation of that standard. There is no requirement that the danger be a present danger as well as a clear danger. This is in reliance on

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Bar, which included a loyalty oath and a questionnaire into affiliation with organizations advocating overthrow of the government by force, violence or any unlawful means. The Court upheld the state requirement, but in so doing cited the *Scales* decision in the following terms:

> Our cares establish that inquiry into associations of the kind referred tu is permissible under the limitations carefully observed here. We have held that knowing membership in an organization advocating the overthrow of the Government by force or violence. on the part of one sharing the specific intent to further the organization's illegal goals. may be made criminally punishable.

401 U.S. at 165. ***See*** *also* Elfbrantlt v. Russell. 384 U.S. 11, 17 (1966) ("Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat.")

[180] DoD Directive 1354.1¶ E(4).

[181] ***See*** discussion at text accompanying notes 37–56, *supra*.

case law indicating that the courts would apply a relaxed danger standard to the military where the consequences of any danger are so obviously great.[182] Paragraph (a) also requires that the danger arise out of one of two sets of circumstances — either the organization engages in an act prohibited by the directive or the organization violates or secures a violation of enumerated sections of the Uniform Code of Military Justice.[183] This limits substantially the sweep of the prohibition.

The Directive restricts those who may make the determinations necessary to invoke a membership bar to the heads of Department of Defense components.[184] In the case of the Military Departments, this responsibility is vested in the Secretaries of the Army, Navy and Air Force.[185] The Directive also provides specific guiclance as to how these cleterminations are to be macle. First, the determinations must be made on a case-by-case basis in response to particular circumstances.[186] Second, there must be sufficient evidence to support a conclusion that the person or organization is substantially likely to engage in a prohibited act in the future.[187] Single instances of engaging in acts prohibited by the Directive or of soliciting conduct

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[182] *See* text accompanying notes 53–56, *supra*.

[183] The relevant provisions of the UCMJ prohibit a wide variety of conduct:

Article

82 — Solicitation to desert, mutiny, misbehavior before enemy or sedition where the offense is actually committed.
85 — Desertion.
86 — Absence without leave.
87 — Missing movement.
89 — Disrespect toward superior commissioned officer.
90 — Assaulting or willfully disobeying superior commissioned officer.
91 — Insubordinate conduct toward warrant officer, non commissioned officer or petty officer.
92 — Failure to obey a lawful order or regulation; dereliction of duties.
94 — Mutiny or sedition.
108 — Loss, damage, destruction or wrongful disposition of military property of the United States.
109 — Waste, spoilage or destruction of property other than military property of the United States.
115 — Malingering.
116 — Riot or breach of peace.
117 — Provoking speeches or gestures.
128 — Assault (to any other person).

The other statutory provision included in the directive. 18 U.S.C. § 1382, prohibits entering military property for purposes prohibited by law or regulation or reentering after being removed or ordered not to re-enter.

[184] DoD Directive 1354.1, ¶ G(2).

[185] *Id.*

[186] *Id.*

[187] *Id.*, Incl. 2, ¶ A(1).

found to be a violation of the Uniform Code of Military Justice will not provide a sufficient foundation for a membership bar. Third, the evidence by which acts of individuals can be imputed to organizations is required to be substantial.[188] Paragraph (b) places important limitations on the quality of membership that can be prohibited under the Directive. First, the membership must be active.[189] There is no proscription on what has been described in the case law as mere membership without more, by which the courts appear to mean membership without activities that further the organization's goals. Second, the membership must be with knowledge of the prohibited purposes of the organization.[190] That knowledge, however, may be inferred from circumstantial evidence, such as the conspicuous posting on the base where the military member is located of clear notices that a determination has been macle with respect to a particular organization and that membership is therefore prohibited.[191] Third. this active, knowing membership must be with the intent to promote the prohibited activities of the organization or of individuals within the organization. [192]

This approach appears to meet each of the requirements in *Scales* and *Noto* without sacrificing protection necessary against gradual accumulation by union organizations of increasing numbers of mem-

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[188] DoD Directive 1354.1. Incl. 2, ¶ A(1)(a) provides:

> In determining whether commission of a prohibited act by individual members can be imputed to the organization. examples of factors which should be considered include: the frequency of such act: the position in the organization of person.; committing such act; whether the commission of such act was known by the leadership of the organization; whether the commission of such act was condemned or disavowed by the leadership of such organization.

[189] Paragraph E(4) provides: "No member of the Armed Forces may become or remain an *active* member in [a regulated] organization . . . ." (emphasis added)

[190] Paragraph E(4)(b) requires that "[s]uch member of the Armed Forces *knozcs* that the organization, or any person on behalf of the organization, engages in the conduct on which the determination [of clear danger] is based. . . ." (Emphasis added).

[191] Paragraph A(1)(b) of Inclosure *2* provides:

> Once it is determined by the Head of a DoD Component that an organization engages in any prohibited act. and is likely to do so in the future, the Head of the DoD Component may instruct affected installations to post conspicuously notices which clearly state that:
>
> (1) Such organization poses a clear danger to discipline. loyalty, or obedience to lawful orders. and
>
> (2) Knowing. active membership in any such organization by a member of the Armed Forces with intent to promote such prohibited conduct is not permitted.

Paragraph A(3) of Inclosure *2* then provides:

> In deciding that a member of the Armed Forces knows about the prohibited conduct engaged in by the organization. such knowledge may be inferred if the clear notice specified above has been ported conspicuously.

[192] Paragraph E(4)(b) of the directive requires that "[s]uch member of the Armed Forces. . . *intends to promote* such conduct." (Emphasis added).

bers. It also appears to meet the standards with respect to overbreadth and least restrictive alternative set out in *Robel* by requiring case-by-case determinations based on the actions of the organizations and their members. This formulation should successfully withstand constitutional attack on first amendment grounds.

The regulation does not appear to raise any equal protection problems because it distinguishes between organizations only on the basis of the single ground for a membership prohibition that has been found acceptable under the first and fifth amendments—engaging in prohibited conduct. Such a basis for distinction among organizations is plainly rational and would pass muster under the more relaxed standard of equal protection review that would be applicable.

III. CONCLUSION

Prohibitions on two aspects of unionization activity — collective bargaining and concerted activity — raise relatively few and readily manageable constitutional problems. The provisions of the Department of Defense Directive prohibiting these activities do not infringe on activity protected by the first amendment. Prohibitions on two other, and more central, aspects of unionization activity — solicitation or advocacy and membership — raise more difficult constitutional problems and require consideration of a large body of not always consistent case law. The provisions of the Directive prohibiting these activities are narrowly drawn, well defined, and include guidelines for application that should suffice under first and fifth amendment standards.

APPENDIX

DEPARTMENT OF DEFENSE DIRECTIVE

No. 1354.1, October 6, 1977

SUBJECT: Relationships With Organizations Which Seek to Represent Members of the Armed Forces In Negotiation or Collective Bargaining

REFERENCES: (a) Uniform Code of Military Justice
(b) Title **18,** United States Code, Section **1382**
(c) DoD Directive **5200.27,** "Acquisition of Information Concerning Persons and Organizations not Affiliated With the Department of Defense," December 8, **1975**
(d) Executive Order **11491,** October **29, 1969**

A. *PURPOSE*

This Directive establishes policies and procedures with respect to organizations whose objective is to organize or represent members of the Armed Forces for purposes of negotiating or bargaining about terms or conditions of military service. The Directive does not modify or diminish the existing authority of commanders to control access to, or maintain good order and discipline, on military installations; nor does it modify or diminish the obligations of commanders and supervisors pursuant to Executive Order **11491** with respect to organizations representing DoD civilian employees.

B. *APPLICABILITY AND SCOPE*

The provisions of this Directive apply to:

1. The Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies.

2. All military and civilian personnel of the Department of Defense.

3. Individuals and groups entering, using, or seeking to enter or use military installations.

C. *DEFINITIONS*

Terms, as used in this Directive, are defined in enclosure **1.**

D. *POLICY*

The mission of the Department of Defense is to safeguard the security of the United States. Discipline, obedience to lawful orders, and loyalty on the part of members of the Armed Forces are essential to the combat readiness required to accomplish this mission. The interposition of collective or concerted action by any organization in the command relationships established by law and regulation for the government of the Armed Forces would:

1. Erode the discipline of the Armed Forces;

2. Interfere with the power of the Congress to make rules for the government and regulation of the land, air and naval forces, and interfere with the appropriate delegation of power to the Department of Defense to provide for the national defense;

3. Impair the authority of the President as Commander in Chief of the Armed Forces and that of officers appointed by him to command the Armed Forces; and

4. Impair the reliability, operational readiness, and combat effectiveness of the Armed Forces so as to threaten the security of the United States.

E. *PROHIBITED ACTIVITY*

1. *Negotiation or Collective Bargaining.* No commander or supervisor may engage in negotiation or collective bargaining.

2. *Strikes and Other Concerted Activity.* No member of the Armed Forces may:

a. Engage in any strike, slowdown, work stoppage, or other collective job-related action related to terms or conditions of military service; or

b. Picket for the purpose of causing or coercing other members of the Armed Forces to engage in any strike, slowdown, work stoppage, or other collective job-related action related to terms or conditions of military service.

3. *Recruitment Efforts on Military Installations.*

a. No person may conduct or attempt to conduct a demonstration, meeting, march, speechmaking, protest, picketing, leafleting, or other similar activity on any part of a military installation for the purpose of forming, recruiting members for or soliciting money or services for an organization (or organizations) that:

(1) Engages or is substantially likely to engage in any activity prohibited by this Directive; or

(2) Proposes or holds itself out as proposing to engage in negotiations or collective bargaining on behalf of members of the Armed Forces; or

(3) Proposes or holds itself out as proposing to represent members of the Armed Forces to the military chain of command with respect to terms or conditions of military service when such representation would interfere with the military chain of command; or

(4) Solicits or aids and abets a violation of this Directive by a member of the Armed Forces.

b. No person may engage in any activity on any part of a military installation, including but not limited to individual contacts or the posting for public display of any poster, handbill or other writing, if that activity or the material displayed constitutes or includes an invitation to collectively engage in an act prohibited by this Directive.

4. *Membership.* No member of the Armed Forces may become or remain an active member of any organization when:

a. A determination has been made that the organization presents a clear danger to discipline, loyalty, or obedience to lawful orders because the organization, or any person on behalf of the organization:

(1) Engages in any act prohibited by this Directive; or

(2) Violates or conspires to violate, or solicits or aids and abets a violation of articles 82, **85,** 86, **87,** 89, 90, 91, 92, 94, 108, 109, 115, 116, 117 or 128 of the Uniform Code of Military Justice (reference (a)), or of 18 U.S.C. § 1382 (reference (b)); and

b. Such member of the Armed Forces knows that the organization, or any person on behalf of the organization, engages in the conduct upon which the determination in E.4.a is based and such member of the Armed Forces intends to promote such conduct.

5. General Prohibitions.

a. No member of the Armed Forces may solicit the commission of or conspire with or aid and abet any person or organization in the commission of any act prohibited by this Directive.

b. No member of the Armed Forces may attempt to engage in any act prohibited by this Directive.

F. *PERMISSIBLE ACTIVITY*

This Directive does not prevent, among other things:

1. Any member of the Armed Forces from presenting complaints or grievances over terms or conditions of military service through established military channels.

2. Commanders or supervisors from giving due consideration to the views of any member of the Armed Forces presented individually or as a result of participation on command-sponsored or authorized advisory councils, committees or organizations for the purpose of improving conditions or communications at the military installation involved.

3. Any member of the Armed Forces from petitioning Congress or communicating with any member of Congress, individually or collectively.

4. Any member of the Armed Forces from being represented by qualified counsel, whether or not retained by an organization on his or her behalf, in any judicial or administrative proceeding with respect to which there is a right to counsel of choice.

5. Any member of the Armed Forces from joining or being a member of any organization which engages in representational activities with respect to terms or conditions of off-duty employment.

6. Any civilian employed at a military installation from joining or being a member of an organization that engages in representational activities with respect to terms or conditions of employment.

G. ADMINISTRATIVE PROVISIONS

1. *Responsibility.* Responsibility for assuring compliance with this Directive is vested in the Heads of the DoD Components. Guidelines for this purpose are contained in inclosure **2.**

2. *Application.* The Heads of the DoD Components (in the case of the Military Departments, the Secretaries of the Military Departments in consultation with their respective Chiefs of Staff) will determine on a case-by-case basis, whether paragraph E.3.b., or paragraph E.4., or both, of this Directive are to be invoked in particular circumstances and will make the specific determinations required.

3. *Reports.* The Heads of the DoD Components will report directly and expeditiously to the Secretary of Defense significant actions to be taken pursuant to this Directive. The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the administrative point of contact in the Office of the Secretary of Defense for all matters relating to this Directive.

H. *EFFECTIVE DATE AND IMPLEMENTATION*

This Directive is effective immediately. Forward two copies of implementing regulations to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) within **30** days.

HAROLD BROWN

Enclosures — 2
1. Definitions
2. Guidelines

DEFINITIONS

A. *Aid and Abet.* To be present during the commission of any act prohibited by this Directive and to assist, command, counsel, or otherwise encourage the commission of such act.

B. *Collective Job-Related Action.* Any activity by two or more persons that is intended to and does obstruct or interfere with the performance of a military duty assignment.

C. Conspire. To join or agree with one or more persons to commit any act prohibited by this Directive.

D. *DoD Components.* The Military Departments and the Defense agencies.

E. *Member of the Armed Forces.* A person who is **(1)** serving on active duty or inactive duty training, or **(2)** a member of a Reserve component while serving in his or her military capacity, but not those members or former members who are receiving retired or retainer pay.

F. *Military Installations.* For the purpose of this Directive, the term "military installation'' includes installations, facilities, ships, aircraft and other property controlled by the Department of Defense.

G. Negotiation or Collective Bargaining. A process whereby a commander or supervisor acting on behalf of the United States engages in discussions with a member or members of the Armed Forces (purporting to represent other such members), or with an individual, group, organization, or association purporting to represent such members, for the purpose of resolving bilaterally terms or conditions of military service.

H. *Solicit.* To use words or any other means to request, urge, advise, counsel, tempt, or command another to commit any act prohibited by this Directive.

I. *Supervisor.* Any member of the Armed Forces or Department of Defense civilian employee responsible for directing subordinate members of the Armed Forces in the performance of their duties.

J. *Terms or conditions of military service* means terms or conditions of military compensation or duty including but not limited to wages, rates of pay, duty hours, assignments, grievances, or disputes.

GUIDELINES

A. The prohibitions in this Directive will require that certain factual determinations be made by the Heads of the DoD Components (in the case of the Military Departments by the Secretaries of the Military Departments in consultation with their respective Chiefs of Staff) on the basis of particular facts that exist at particular installations. The guidelines for making these determinations are as follows:

1. In making the determination that a person or an organization poses a clear danger to the discipline, loyalty or obedience of lawful orders because such person or organization engages in, solicits, or aids and abets any act prohibited in this Directive (or in the statutory provisions identified in paragraph E.4., basic Directive), the history and operations of the organization (including the constitution and bylaws, if any) or person in question may be evaluated along with evidence with respect to the conduct constituting a prohibited act. In addition, there must be sufficient evidence to support a conclusion that the person or organization is substantially likely to engage in a prohibited act.

a. In determining whether commission of a prohibited act by individual members can be imputed to the organization, examples of factors which should be considered include: the frequency of such act; the position in the organization of persons committing such act; whether the commission of such act was known by the leadership of the organization; whether the commission of such act was condemned or disavowed by the leadership of the organization.

b. Once it is determined by the Head of the DoD Component that an organization engages in any prohibited act, and is likely to do so in the future, the Head of the DoD Component may instruct affected installations to post conspicuously notices which clearly state that:

(1) Such organization poses a clear danger to discipline, loyalty, or obediance to lawful orders, and

(2) Knowing, active membership in any such organization by a member of the Armed Forces with the intent to promote such prohibited conduct is not permitted.

2. In making the decision that **a** member of the Armed Forces is an "active" member of the organization in question, membership must be more than merely nominal or passive. Normally, a person can be considered an active member if he engages in certain kinds of conduct for the organization. This conduct includes solicitation or collection of dues, membership recruitment, distribution of literature, service as an officer of the organization, or frequent attendance at meetings or activities of the organization.

3. In deciding that a member of the Armed Forces knows about the prohibited conduct engaged in by the organization, such knowledge may be inferred if the clear notice specified above has been posted conspicuously.

B. Any information about persons and organizations not affiliated with the Department of Defense needed to make the determinations required by this Directive shall be gathered in strict compliance with the provisions of DoD Directive **5200.27** (reference (c)), and in any event, shall not be acquired by counterintelligence or security investigative personnel. The organization itself will be considered a primary source of information.

LEGAL IMPLICATIONS OF REMOTE SENSING OF EARTH RESOURCES BY SATELLITE *

Captain Gary L. Hopkins **

I. INTRODUCTION

> A new era of earth exploration began yesterday with the successful lofting of an unmanned earth-orbiting satellite that will continuously scan the surface of the earth, radioing back many kinds of information on global environment and natural resources.'
>
> *New York Times*

The "unmanned earth-orbiting satellite" described in the Times article was the National Aeronautics and Space Administration's (NASA) Earth Resources Technology Satellite (ERTS). This satellite was subsequently replaced by a second satellite, called Landsat-2,[2] launched by NASA on January 22, 1975.[3]

These satellites are a major step in the development of a systematic, planned means of managing, conserving, and effectively using the earth's resources. They and their associated research programs ". . . will open up, in the next few years, new perspectives of mankind's knowledge about its natural environmental conditions both on the continents and under the surface of the ocean." [4]

The need for management of such resources should be apparent to

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**JAGC, U.S. Army, Senior Instructor, Procurement Law Division, The Judge Advocate General's School. B.A., 1967, and J.D., 1970, University of Oklahoma; LL.M., 1975, George Washington University. Member of the Bars of Oklahoma, the United States Court of Military Appeals, and the United States Supreme Court.

[1]Rensberger, *An Earth-Exploring Satellite is Orbited,* New York Times, July 24, 1972, at 1, col. 2

[2]ERTS-A and ERTS-B have been redesignated Landsat 1 & 2.

[3]New York Times, Jan. 23. 1974. at 17, col. 5.

[4]Dauses, *National Sovereignty and Remote Sensing of Earth Resources by Satellites,* in PROCEEDINGS OF THE SIXTEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 121 (1974) [hereinafter cited as Dauses, SIXTEENTH COLLOQUIUM].

anyone observing life today. Food shortages producing famine and hunger are being experienced in many parts of the world. Population pressures continue to increase. Energy and mineral shortages threaten the very existence of certain industrial nations. Pollution remains unabated. Demands on the earth's finite resources have proliferated. How can man hope to survive and grow without an orderly use of earth resources that eliminates such problems?

Solutions for these problems will be many faceted, but an important aspect of any ultimate solution will be the means by which adequate information can be obtained to implement a rational system of resources use. Such a system necessarily requires ". . . research and evaluation of natural resources, rational use of flora and fauna, and operational information on natural phenomena. . . . [T]he broader the base for decision making, [sic] the more rational the planning. . . ." [5] Thus, ERTS is a welcome and timely addition to mankind's inventory of scientific knowledge.

However, determining the most effective method of employment of earth resources satellite systems is not without its difficulties. Early problems centered in scientific and technological areas. Recently, more thought and discussion have been given to legal considerations raised by earth resources satellites (ERS). For instance, do such systems violate the sovereignty of other nations? Does a launching state need to obtain permission from another country before it can extract data related to that country? Who should control ERS data and in what manner should the data be disseminated? What role, if any, should the United Nations play in the developing ERS programs? Is a new treaty needed on earth sensing by satellite? These are n is essential, and if all the possibilities opened up are to be used in a rjust a few of the legal questions raised by earth sensing satellites that must be resolved if all mankind is to benefit from the new technology. It is only from within a sound international legal framework that such space activities can be harnessed for worldwide use. In his book, *The Law of Outer Space*, [6] Manfred Lachs expressed this need for the rule of law in space activities thusly:

> If all the activities connected with outer space are to be conducted for the benefit of all and to the detriment of none, international cooperation is essential, and if all the possibilities opened up are to be used in a responsible manner, the conduct of states in regard to outer space must be submitted to the rule of law. [7]

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[5] U.N. Doc. A/AC.105/C.5/SR.233, at 61 (1975).
[6] M. LACH, THE LAW OF OUTER SPACE (1972).
[7] *Id.*, at 6.

This article will discuss and analyze the "rule of law" as it now applies to earth resources satellites and to remote sensing. It will attempt to determine if new laws need to be developed, and it will deal with some of the varied legal problems that have arisen in connection with such satellite systems.

II. HISTORY, TECHNOLOGY, AND OBJECTIVES OF REMOTE SENSING SATELLITES

A. *HISTORY*

The concept of surveying and studying earth's resources by way of satellites is a relatively new phenomenon. For the most part, the history of earth resources satellites (ERS) is a history of the United States program because, until very recently, it was the "only game in town."

During the early days of the United States space program, particularly the Mercury and Gemini missions, scientists in this country began to develop an interest in remote sensing by satellite. Typical of the incidents that began to arouse this scientific curiosity was the one described in the New York Times of February 4, 1972. "The few times that remote sensing, with the human eye, piqued the . . . imagination took place in the early nineteen sixties when several Mercury astronauts reported seeing from an orbital altitude of 100 miles, railroad tracks, highways and smoke coming from chimneys." [8] The growing scientific interest and curiosity was finally satisfied on July 23, 1972, when the United States became the first nation to launch an unmanned satellite, known as ERTS-1 (subsequently renamed Landsat-1),[9] to replace the eyes of the Mercury astronauts for "seeing" earth resources.[10]

Landsat-1 was the culmination of the Earth Resources Technology Satellite (ERTS) Program that had been established in 1969. President Nixon, addressing the United Nations General Assembly on September 18 of that year outlined the United States policy for that program:

> We are just beginning to comprehend the benefits that space technology can yield here on earth, and the potential is enormous. For exam-

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[8] Lyons, *Satellite-Borne Dowsing Rod to be Orbited*, New York Times, Feb. 4, 1972, at 11, col. 4.
[9] U.N. Doc. A/AC.105/C.2/SR.233, at 61 (1975).
[10] F. NOZARI, LAW OF OUTER SPACE 152 (1973).

> ple, we now are developing earth resources survey satellites, with the first experimental satellite to be launched sometime in the decade of the seventies. Present indications are that these satellites should be capable of yielding data which could assist in as widely varied tasks as these: the location of mineral deposits on land, and the health of agricultural crops. I feel it is only right that we should share both the adventures and the benefits of space. As an example of our plans, we have determined to take actions with regard to earth resources satellites as this program proceeds and fulfills its promise. *The purpose of those actions is that this program will be dedicated to produce information not only for the United States but also for the world community . . . [such an adventure] belongs not to one nation but to all mankind and should be marked not by rivalry but by the same spirit of fraternal cooperation that has long been the hallmark of the international scienee community.*[11]

(emphasis added)

The United States has vigorously pursued the policy of sharing and cooperation enunciated by President Nixon. The Landsat program has encompassed many nations, a variety of shared experiments and a vast array of multinational programs. To date "[s]cientific and research projects in progress using [Landsat-11 data have taken place in *55* countries and in at least five major international organizations." [12] For example, the United Nations Food and Agricultural Organization has over fifty projects using Landsat-1 gathered data.[13] Some of the countries that have participated in Landsat-1 experiments include Argentina, Bangladesh, Belgium, Brazil, Canada, Chile, Columbia, Switzerland, Peru and the United Kingdom.[14]

Landsat-1 has been replaced by Landsat-2. The projected research to be accomplished by this satellite is extensive, as was that of its predecessor. The proposed program for Landsat-2 was recently outlined by Mr. Bennet, one of the United States Representatives on the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), in an address to that committee:

> Landsat-2 like the first earth resources technology satellite, is serving as a focus for international cooperation. Investigators from **45** countries and five international organizations have been selected to conduct studies with data they obtain. . . . Some countries have es-

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[11] Nixon, *Strengthening the Total Fabric of Peace*, DEP'T OF STATE BULL., Oct. **6, 1969,** at 301.
[12] U.N. Doc. A/AC.105/PV.155, at 5 (1975).
[13] U.N. Doc. A/AC.105/C.1/SR.139, at **37 (1975).**
[14] Galloway, *Teledetection of Earth Resources by Satellites,* SIXTEENTH COLLOQUIUM 90 (1975) [hereinafter cited as Galloway, SIXTEENTH COLLOQUIUM].

> tablished their own data acquisition, processing and dissemination facilities. Stations in Canada, Brazil and Italy are now operating, and stations in Iran and Zaire are expected to become operational during the coming years.'"

The United States currently contemplates launching Landsat-3 to augment Landsat-2.[16]

Until quite recently, only the United States was actively pursuing an ERS program. It now appears that the Soviet Union has launched ocean surveillance satellites [17] and other satellites that perform experiments very similar to those of Landsat. Evidence of such satellites abounds. For instance, the Soviet Union and Bulgaria recently concluded an agreement wherein it was stated that the two nations would ". . . conduct joint work on the development and *improvement* of aerospace methods of remote sensing of the earth and technical means of processing and interpreting the material obtained. . . ." [18] (emphasis added). A more recent agreement just concluded between the Soviet Union and various Eastern European countries provides in Article 2:

> [C]ooperation shall be carried on in the following basic areas:
> . . . .
> Study of the natural environment by means of space devices.[19]

Further, the Soviet Union has declared that it intends to establish a system that is capable of "systematically surveying a number of resources." [20]

Both the United States and the Soviet programs are still experimental. Until the recent Soviet announcement just mentioned, no country had established, or even made a commitment to establish, an operational earth resources survey satellite system.[21] However, it is now obvious that such an operational system will be a reality within the decade.

B. TECHNOLOGY

The process of remote sensing of the earth's resources by satellite

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[15] U.N. Doc. A/AC.105/PV.146, at 54-55 (1975). Negotiations are also being conducted by the United States with Germany, Japan, Kenya, Spain and Turkey for direct acquisition rights. Aviation Week and Space Technology, Nov. 4, 1974, at 19; Aviation Week and Space Technology, Oct. 28, 1974, at 20-21.
[16] U.N. Doc. A/AC.105/PV.147, at 21 (1975).
[17] *See* Aviation Week and Space Technology, June 23, 1975, at 18.
[18] U.N. Doc. A/AC.105/125, at 12 (1974); see *also* U.N. Doc. A/AC.105/125, at 8 for a further discussion of Soviet remote sensing.
[19] U.N. Doc. A/C.1/31/3, at 2-3 (1976).
[20] U.N. Doc. A/AC.105/C.1/SR.176, at 10 (1977).
[21] *See* U.N. Doc. A/AC.105/125, at 21 (1974).

is technologically complex and involved. Thus, a detailed examination of the technical operation of Earth Resource Satellites (ERS) is beyond the scope of this article. However, it is necessary to provide a basic outline of the system's technical function before attempting any meaningful legal analysis of the impact of the system in operation.

Remote sensing of earth from space has been defined as ". . . a methodology to assist in characterizing the nature and condition of the natural resources, natural features and phenomena, and the environment of the Earth by means of observations and measurements from space platforms.'' [22] The technical systems that can be used for monitoring, measuring and recording such information include: [23]

> (1) Conventional optic cameras that operate in the visible bands of the electromagnetic spectrum;
>
> (2) infrared and multispectral line scanners that survey heat signals;
>
> (3) radiometers that measure radiant energy;
>
> (4) radar monitoring;
>
> (5) spectometers and spectographs that scan light frequencies emitted or absorbed respectively by radiant or dark bodies; and
>
> (6) laser beams.

From this array of possible equipment, Landsat-1 was equipped with a television scanning system and a multispectral scanning system which simultaneously view single areas of the earth 115 miles by 115 miles square.[24] Landsat-2 possesses essentially the same equipment.[25]

The television scanning system of Landsat takes pictures once every twenty-six seconds as it moves along its orbital path. Each camera of the system is ". . . sensitive to a different part of the visible and near infrared spectrum." [26] The multispectral system

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[22] U.N. Doc. A/AC.105/118, at 12 (1974).
[23] Dauses, SIXTEENTH COLLOQUIUM. *supra* note 4, at 122.
[24] NOZARI, *supra* note 10, at 153.
[25] *Hearings on Remote Sensing of Earth's Resources Before the House Comm. On Science and Astronautics,* 92d Cong., 2d Sess. 57 (1972) [hereinafter cited as 1972 *Hearirigs*].
[26] Christol, *Space Sensing of Harms to the Marine Environment—Damages in International Law*, SIXTEENTH COLLOQUIUM 108 (1974).

scans in four spectral bands taking pictures in different parts of the visible and near infrared spectrum.[27] When transmitted back to Earth, the pictures produced are eerie multicolors, but highly informative.[28]

It should be noted, however, that raw, unprocessed sensing data, even in the form of photographs, coming from a satellite ". . . have little intrinsic value. To be of use, they must be processed, interpreted and combined with other data of a corroborative nature before they can be readily interpreted. . . . The use of remote sensing data assumes the availability of trained scientists and specialists. . . ." [29] This was recognized by the United States which created a reception and processing center, located at Goddard Space Flight Center, for all Landsat data.[30] Goddard is currently processing 13,000 scenes per week [31] that are ultimately transferred to the Earth Resources Observation Systems Data Center in Sioux Falls, South Dakota. The information is then made available to anyone at a nominal cost.

C. *OBJECTIVES*

It is rather simple to enunciate in a broad, general way, the objective of ERS. The use of such satellites ". . . is for the enrichment of man's knowledge about his surroundings with the purpose of using the knowledge so obtained for the betterment of living conditions in the international community." [32] Within this broad objective various tasks and related objectives have been established.

Prior to the launching of Landsat-1, much discussion occurred concerning the uses that could be made of remote sensing satellites. It was discussed in law reviews,[33] congressional hearings,[34] and newspapers.[35] The program originally suggested for the United States ERS program covered a wide range of discovery. For example, Dr. James C. Fletcher, Administrator of NASA, testifying before the House Committee on Science and Astronautics, outlined the following possibilities:

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[27] *Id.*
[28] NOZARI, *supra* note 10, at 153.
[29] U.N. Doc. A/AC.105/PV.155 (1975).
[30] Dauses, *supra* note 4, at 123.
[31] *Id.*
[32] NOZARI, *supra* note 10, at 149.
[33] *See, e.g.*, 65 NW. L. REV. 759 (1970).
[34] *See, e.g.*, 1972 *Hearings, supra* note 25, at 18.
[35] *See, e.g.*, Teltsch, *Space Plans Frustrate the 'Have-Nots,'* New York Times, May 14, 1972, at 14.

> Vegetation surveys, not only to measure crop quantity, quality, and distribution, but to use vegetation as an indicator to assess damage produced by highway construction, effectiveness of crop disease control, and the degree of success in reclamation of strip mining areas.
>
> Pollution surveys will deal with coastal waters, estuaries and lakes, haze over metropolitan areas. . .
>
> Measurement of ocean color . . . in an attempt to aid commercial fishing.
>
> Repetitive coverage over large areas . . . to learn fundamental cause and effect relations governing storm and tidal erosion of barrier islands, the effects of sedimentation and pollution on coastal ecology. . .
>
> Investigations in land use planning. . . .[36]

The objectives ultimately defined by NASA for ERS were, if anything, broader in scope than those postulated by Dr. Fletcher. Five areas were to be explored: agriculture, geology, hydrology, oceanography and geography. The type of information generally sought was:

> *Agriculture*—Information gathered [to] aid in land use planning, range management, identification and combating of crop disease and improved irrigation planning.
>
> Geology — Information for use in study of glaciers and volcanoes, earthquake fault systems, and identifying terrain features associated with oil and mineral deposits.
>
> *Hydrology*—Information for use in detecting water pollution trends; providing an inventory of surface water in lakes, reservoirs, and rivers; determining snow levels; and measurement of factors needed to predict the potential of floods and the location of water reserves.
>
> Ocen*nography* — Observation of environmental sea surface conditions which can be related to fish location, sources of pollution, behavior of major ocean currents, changes in shorelines and shores due to storms. . .
>
> Geogrnphy — Data can be used to produce a constantly updated map showing the various changes in the earth's surface. . . .[37]

Actual experiments conducted with the data from Landsat-1 have covered the entire spectrum of projected uses. Eilene Galloway acknowledged the success of the program in her introductory report to the Sixteenth Colliquium on the Law of Outer Space:

> Reports from 320 investigators revealed that ERTS [Landsat-I] data could be successfully applied to managing environmental problems

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[36]1972 Hearings, supra note 25, at 18-19.

[37]Galloway, The Role of the United *Natzons in* Earth *Resources* Satellites, in PROCEEDINGS OF THE FIFTEENTH COLLOQUIUM OF THE LAW OF OUTER SPACE 21 (1973) [hereinafter cited as Galloway, FIFTEENTH COLLOQUIUM].

> arising from forest fires, floods, snow, ice, diseased crops, volcanic action, pollution of the air, land and sea. The value of satellites for mapping the earth's surface has exceeded expectations.[38]

A few examples of specific projects that have been accomplished using ERS data include:

> (1) Canada has employed the data in permafrost mapping, soil surveys and pipeline location studies.[39]
>
> (2) Brazil has corrected charts relating to the tributaries of the Amazon River.[40]
>
> (3) Saudi Arabia has been able to determine invasion areas of the desert locust.[41]
>
> (4) Pakistan used ERS data following floods of the Indus River to assess damage and assist recovery efforts.[42]

As far ranging as are the uses to which ERS data has already been put, the future possibilities seem limited only by the imagination and ingenuity of man. Some future prospects for ERS include streamflow forecasting for increased hydroelectric power generation; [43] predicting and studying changes in climate; [44] and studying increased "desertification" of the world, causes therefor and control thereof.[45]

The vast range of possibilities for ERS data use has given rise to intense interest in many nations and has sparked demands by some for new international agreements for the control of remote sensing satellites. The demand is particularly great in "developing countries" which fear that such satellites, if not regulated, will provide the means for launching countries, or groups within those countries, to exploit the resources of nonlaunching countries.

III. CURRENT LEGAL FRAMEWORK APPLICABLE TO ERS

> That the activities of States in outer space and celestial bodies should be governed by international law including the U.N. Charter . . ., is both clear and necessary.[46]
>
> *Law of Outer Space*

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[38] Galloway, SIXTEENTH COLLOQUIUM, *supra* 14, at 92.
[39] U.N. Doc. A/AC.105/135, at 7 (1974).
[40] U.N. Doc. A/AC.105/125, at 8 (1975).
[41] *Id.*
[42] *Id.*
[43] U.N. Doc. A/AC.105/135, at 9 (1975).
[44] U.N. Doc. A/AC.105/PV.145, at 27 (1975).
[45] *Id.*
[46] NOZARI, *supra* note 10, at 39-40.

It is very difficult to determine the exact extent to which international law applies to remote sensing activities. What is the legal framework within which ERS must operate?

A. CHARTER OF THE UNITED NATIONS

It has at times been suggested that the Charter of the United Nations applies only to states' activities that are confined to the earth. Thus, before examining the Charter vis-a-vis remote sensing activities, it is essential to make explicit the fact that the Charter ". . . is not limited to the confines of the earth. . . ." [47] but is ". . . applicable to the relations of earthly states in outer space as well." [48]

Article 1 of the U.N. charter establishes the purposes of that body, which include the maintenance of international peace and security; [49] the promotion of friendly relations among nations and the strengthening of universal peace; [50] the achievement of international cooperation in solving international economic, social, cultural and humanitarian problems; [51] and the establishment of a center of action for nations to attain the Charter's purposes.[52]

In light of these complex and far reaching goals, it is virtually impossible to accept any argument that would deny the Charter's applicability to extraterrestrial matters. This is even more apparent when it is remembered that no activity in outer space affects only outer space. Instead, every activity that is pursued in outer space by any nation is important to that nation primarily as it relates to the earth. For instance, communication satellites expand man's means of rapid communication on the earth; long range probes increase man's knowledge of his universe; and ERS adds to man's understanding of his planet.

Finally, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies [53] (hereinafter referred to as the

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[47]Statement of Legal Adviser Becker before the United Nations Committee on the Peaceful Uses of Outer Space, XL BULLETIN, DEP'T OF STATE, NO. 1942, June 15, 1959, at 885 [hereinafter cited as BECKER].
[48]*Id.*, at 886.
[49]U.N. Charter, art. 1, para. 1.
[50]U.N. Charter, art. 1, para. 2.
[51]U.N. Charter, art. 1, para. 3.
[52]U.N. Charter, art. 1, para. 4.
[53]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 3 U.S.T. 2410, T.I.A.S. No. 6347 [hereinafter cited as Outer Space Treaty].

Outer Space Treaty) specifically provides in Article III that "States Parties to the Treaty shall carry on activities in. . . outer space . . . in accordance with international law, including the Charter of the United Nations. . . ." [54] Hence, any remote sensing activity in outer space must comply with the United Nations Charter. The question then becomes: what does the U.N. Charter require in this respect?

The Articles of primary importance in the Charter as it relates to ERS are those, such as Articles 1, 2, 55 and 56, that establish broad purposes to be pursued by all members of the United Nations. These general purposes set the tone for ERS activities. They establish broad parameters within which remote sensing can be conducted.

As previously noted, Article 1 enunciates the purposes of the United Nations: maintenance of international peace and security, development of friendly relations among nations, and international cooperation in solving world problems. Remote sensing is a program that by its very nature lends itself to promoting the purposes of the United Nations. It is oriented toward the development of data the use of which can directly affect the economic and social well being of countries involved. An examination of the United States ERS program reveals just how true that is.

The United States has managed the Landsat experiments in a manner that promotes the international cooperation in solving international problems which is called for by paragraph 3 of Article 1. A large number of nations have participated in experiments using Landsat data [55] to remedy ills at home and to participate in solutions to worldwide problems. Such close scientific cooperation cannot help but develop friendly relations among nations, called for by paragraph 2 of Article 1.

Additionally, the social and economic benefits to be derived from ERS can and have been used to meet the goals set out in Article 55 of the United Nations Charter by promoting:

> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, and health related problems; and international cultural and educational cooperation; and

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[54] *Id.*, art. 111.
[55] *See* history of earth resources satellites discussed, *supra* at 4-7.

> c. universal respect for, and observance of, human rights and fundamental freedoms for all. . . .[56]

For instance, ERS data has promoted economic and social progress by providing informational means to manage environmental problems arising from forest fires, floods, snow, ice, diseased crops, pollution and volcanic action.[57] It has provided North Dahomey with the means to locate new water supplies for small scale irrigation; Korea with information upon which to formulate future plans to combat saline water intrusion into the Natkong Delta; and the Food and Agricultural Organization the data needed to compile a world soil map.[58] This cooperative approach to ERS research is not only desirable, but, under the United Nations Charter, essential, if a launching nation, such as the United States, is to conduct its program in accordance with that document.

Although ERS will promote U.N. purposes, and under the Charter must be so employed, controversies remain as to the manner in which ERS programs must be conducted to conform to Charter principles. The Soviet Union, for instance, maintains that the United States Landsat activities threaten their security interests, and hence their territorial integrity and political independence, in violation of Article 2, paragraph 4 of the Charter.[59] This has provoked arguments from the United States that Landsat is primarily a peaceful operation and that any military use derived from the program is justified on the basis of self-defense under Article 51. Other nations assert that ERS provides a means for unscrupulous nations to exploit the natural resources of others.[60] This is deemed by the nations presenting the argument to be an activity that is inconsistent with the purposes of Article 1, paragraph 2 of the Charter.[61]

Both of these problem areas are fully explored later in this article. Neither is really capable of full resolution. However, the mere existence of such disagreements demonstrates the need to consider carefully the U.N. Charter when conducting an ERS research program.

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[56]U.N. Charter, art. 55.
[57]Galloway, SIXTEENTH COLLOQUIUM, *supra* note 14, at 92.
[58]*Id.*
[59]*See* this article, *infra* at section III. C.
[60]For a discussion of the legal concepts associated with this argument, *see* Dauses, SIXTEENTH COLLOQUIUM, *supra* note 4, at 128-130; *see also* this article, *infra* at section III. B.
[61]Outer Space Treaty, *supra* note 53.

B. THE OUTER SPACE TREATY OF 1967

The Outer Space Treaty[62] meshes very well with the United Nations Charter. Like that document, the Outer Space Treaty contains general, guiding principles. Unlike the U.N. Charter, the Space Treaty, of course, relates specifically to exploration and use of outer space and celestial bodies.

The title of the Outer Space Treaty alone suggests that there should be no question about the Treaty's applicability to ERS. Unfortunately, this has not been the case. Article I, paragraph 3 of the Treaty provides "There shall be freedom of scientific investigation in outer space . . . and States shall facilitate and encourage international cooperation in such investigation.'' [63] Earth and its atmospheric environment are not part of outer space or a celestial body as those terms are used in the Outer Space Treaty. Arguably, remote sensing is not a "scientific investigation in outer space," but a probing and investigation of the earth's surface. All analysis, data interpretation and data use are earth oriented. However, it must be remembered that this is basically true of all outer space experiments. There is no difference between the activities carried out by Skylab and the Soviet orbiting laboratory and those of remote sensing satellites. Communications and meteorological satellites perform no "investigations" in outer space. Both are earth oriented satellites and yet both are deemed to be within the general ambit of the Outer Space Treaty.[64] Logically, earth resources satellites cannot be treated differently.

This conclusion is bolstered by the Preamble to the Outer Space Treaty and the negotiating history of the agreement. The preamble emphasizes the use of outer space for the benefit of all peoples, encourages cooperation in space that will contribute to the development of friendly relations among nations, and recognizes the common interest of all mankind in conducting space exploration and use for peaceful purposes. Such recitations indicate that all space activities under the treaty should be used to ameliorate conditions on the earth's surface. Further, the negotiating history of the treaty indicates that ". . . primary interest had been evinced in the use of space technology to improve conditions on the earth." [65] It is ex-

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[62] *Id.*
[63] *Id.*, art. I.
[64] *See* Brital, *Survey From Space of Earth Resources*, in the PROCEEDINGS OF THE THIRTEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 198 (1971) [hereinafter cited as Brital, the THIRTEENTH COLLOQUIUM].
[65] U.N. Doc. A/AC.105/C.2/SR.233, at 62 (1975).

tremely difficult to infer that a treaty with this emphasis would not cover earth oriented activities conducted in outer space. Consequently, most writers on the subject have now concluded that the Outer Space Treaty does apply to ERS.[66]

It is vital that there be no doubt about the applicability of the Outer Space Treaty to earth resources satellites. It is the basic agreement from which has grown all other treaties relating to outer space. Its broad principles create the basic guidelines for use of outer space and provide controls to prevent abuses in outer space activities. As it relates to remote sensing by satellite, the Outer Space Treaty requires nations conducting such investigations to do so in conformity with the following:

(1) For the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. (Article I)

(2) On a basis of equality, and in accordance with international law, including the United Nations Charter, in the interest of maintaining international peace and security and promoting international cooperation and understanding. (Article I and Article III)

(3) Not orbit any objects carrying weapons of mass destruction and use outer space only for peaceful purposes. (Preamble and Article IV)

(4) Bear international responsibility for national activities in outer space including liability for damage to another State Party to the treaty by any space object or component. (Article VI and Article VII)

(5) Conduct all activities in outer space with due regard to the corresponding interests of all other States Parties to the Treaty. (Article IX)

(6) Consider on a basis of equality any requests by other States Parties to the Treaty to be afforded an opportunity to observe the flight of space objects.

(7) Inform the Secretary-General of the United Nations and the public, to the greatest extent feasible, of the nature, conduct, locations and results of outer space activities. (Article XI)

It is clear from the foregoing that ". . , the principle of freedom of

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[66] Dauses, **SIXTEENTH** COLLOQUIUM, *supra* note **4,** at **127.**

exploration and use of outer space and celestial bodies, as contained in Article I, is a limited principle," [67] It is limited in the sense that all countries conducting a program of remote sensing of earth's resources by satellite must consider the consequences of that program as it relates to other states and insure that the program comports with the principles outlined above.

Of all of the Articles of the Space Treaty, the two that are most fundamental with respect to ERS are Articles I and 111. As such, they deserve a somewhat more detailed examination. Although very general in nature, they establish certain controls and requirements that have affected the United States' implementation of its Landsat program and should equally affect the remote sensing program of any other nation.

Article I requires that outer space activities be carried out for the "benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. . . ." [68] This imposes a duty upon space powers to share the benefits derived from their use of outer space.[69] It supports the United States position that ERS gathered data must be shared and not held exclusively by one country or a small group of countries. This has certainly been the United States practice with Landsat data. Article I also implies a prohibition, the converse of the proposition just stated. It precludes the use of remote sensing in a manner that would be detrimental to particular nations or the nations of the world generally.[70]

Article III has particular value because it explicitly provides that the use of outer space shall be in accordance with international law, including the United Nations Charter. At least for the States Parties to the Treaty, this provision removes any doubt as to the Charter's applicability to states' conduct in outer space. As to states not parties to the Treaty, it is evidence of the customary international law to be applied to outer space.[71] This is particularly true since both major space powers, and most of the countries that have participated in outer space experiments, are parties to the Outer Space Treaty.

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[67] NOZARI, *supra* note 10, at 39.
[68] Outer Space Treaty, *supra* note 53, art. I.
[69] *See* Brital, THIRTEENTH COLLOQUIUM, *supra* note 63, at 197-99.
[70] *Id.*
[71] *See* The Pacquete Habana, 175 U.S. 677 (1900); see also U.S. DEP'T OF ARMY, PAMPHLET 27-161-1, INTERNATIONAL LAW, para. II.A.2, at 10 (1964) [hereinafter cited as DA PAM 27-161-1].

Article III imposes one more requirement: that the use of outer space shall promote peace, security and international cooperation. Undoubtedly, ERS has played a significant role in promoting international cooperation. Arguably, it contributes to peace and security as well, but there is some disagreement in this area. The Soviet Union has made claims to the contrary that are explored more fully later in this article.[72]

C. RESCUE AND RETURN AGREEMENT

In 1968 the Agreement on the Rescue of Astronauts, The Return of Astronauts and The Return of Objects Launched Into Outer Space [73] (hereinafter referred to as the Return Agreement) was completed. It was the result of many months of effort to provide concrete rules to implement the more general requirements established by Articles V and VIII of the Outer Space Treaty. Article V requires all States Parties to protect and safely return astronauts to the State of registry of their vehicle in the event of accident, distress, or emergency landing.[74] Article VIII establishes similar requirements for recovered space objects.[75]

The key article of the Return Agreement concerning the return of objects launched into outer space is Article 5. That Article requires "[e]ach Contracting Party which receives information or discovers that a space object or its component parts has returned to Earth in territory under its jurisdiction or on the high seas or in any other space not under the jurisdiction of any State, [to] notify the launching authority and the Secretary-General of the United Nations." [76] Resources satellites are launched into outer space and, hence, are "space objects" covered by the Return Agreement. As such, any state that is a Contracting Party and discovers a remote sensing satellite on its territory, or in areas not under the jurisdiction of another state, has a duty to "take such steps as it finds practicable to recover the object or its component parts." [77] It must then return the object to the launching authority [78] unless the object or its component part is of a hazardous or deleterious nature.[79]

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[72] *See* this article *infra* at section 111. C.
[73] Agreement on the Rescue of Astronauts, The Return of Astronauts and The Return of Objects Launched Into Outer Space, *done* Apr. 22, 1968, 6 U.S.T. 7570, T.I.A.S. No. 6599 [hereinafter cited as Return Agreement].
[74] Outer Space Treaty, *supra* note 53, art. V.
[75] *Id.*, art. VIII.
[76] Return Agreement, *supra* note 72, art. 5.
[77] *Id.*, art. 5, para. 2.
[78] *Id.*, art. 5, para. 3.
[79] *Id.*, art. 5, para. 4.

Thus, the duties imposed by the Return Agreement are simple and straightforward. They present little opportunity for disagreement or discord, with one possible exception. For some reason known only to themselves, the drafters of the Return Agreement wrote into that agreement a conflict with the Outer Space Treaty. Article VIII of the Space Treaty requires a state recovering a space object to return the object to the state of registry.[80] However, the Return Agreement provides that recovered space objects "shall be returned to or held at the disposal of representatives of the *launching* authority''[81] (emphasis added). Because the provisions of both treaties deal with the same subject, it would appear that the international custom announced by the proposed Vienna Convention on the Law of Treaties[82] would control. Article 30 of the Vienna Convention provides in pertinent part:

> 3. When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article *50,* the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[83]

As most States Parties to the Outer Space Treaty are also Parties to the Return Agreement, it would seem, generally, that the specific provisions of the Return Agreement will control over the provisions of the Space Treaty. This creates the anomaly that the return of space objects, including remote sensing satellites, to a launching state might be required, while, under the Space Treaty,[84] jurisdiction over those objects remains with the state of registry. Although this will present few practical problems because the launching state and the state of registry are usually the same, it creates an unnecessary possibility of conflict.

D. THE LIABILITY CONVENTION

The state of registry has full jurisdiction and control over objects in outer space.[85] However, the Convention on International Liability For Damage Caused By Space Objects (hereinafter referred to as the Liability Convention)[86] places liability on the launching state

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[80] Outer Space Treaty, supra note 53, art. VIII.
[81] *Id.*, art. 5, para. 3.
[82] U.N. Doc. A/CONF.39/27 (1969).
[83] *Id.*, art. 30, para. 3.
[84] Outer Space Treaty, supra note 53, art. VIII.
[85] *Id.*
[86] Convention on International Liability for Damage Caused by Space Objects, *done* Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 6347 [hereinafter cited as Liability Convention].

for any damage caused by such objects.[87] A launching state is a state "which launches or procures the launching of a space object" [88] or a state "from whose territory or facility a space object is launched." [89] Under the current United States Landsat program and the Soviet ERS program, this definition would cover not only the United States or the Soviet Union, states from "whose territory or facility a space object is launched," but other participating nations. For example, many nations have included experimental packages and had experiments performed for them on Landsat.[90] Arguably, this is sufficient to find that such participating nations have "procured the launching of a space object" and are jointly liable for any damage caused by that object. The Liability Convention certainly contemplates such joint liability in Article V.

1. Whenever two or more States jointly launch a space object, they shall be jointly liable for any damage caused.[91]

The problem is the lack of definition for "jointly launched." Just how much participation is required before a nation is deemed to have "procured the launching of a space object" under Article I or "jointly launch[ed]" such an object within the meaning of Article V?

The mere inclusion of experimental packages aboard projects such as Landsat, alone, is probably insufficient to constitute "jointly" launching a space object. On the other hand, joint liability may arise if the experimental package is the actual cause of the damage. What is the effect of ten, twenty or more nations combining to include experiments on a remote sensing satellite that only one of the nations ultimately launches? Certainly the latter nation is liable under Article I of the Liability Convention. Must that nation carry the burden of liability alone when a multitude of other nations have enjoyed the benefits of the satellite? No answers are currently available and no precedent exists.[92] However, a very real problem will exist if a remote sensing satellite causes damage within the meaning of the Liability Convention.

The liability imposed by the Convention when damage occurs on the surface of the earth or to aircraft in flight is absolute. This is

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[87] *Id.*, art. 11.
[88] *Id.*, art. I.
[89] *Id.*, art. I.
[90] U.N. Doc. A/AC.105/125, at 7-8 (1975).
[91] Liability Convention, *supra* note 85, art. 5, para. 1.
[92] The particular problem of joint liability resulting from damage caused by remote sensing satellites has not been addressed in any legal writing related to such satellites.

comparable, with minor variations, to "strict" liability in tort law. Article II provides: "A launching State shall be absolutely liable to pay compensation for damage caused by its space objects on the surface of the earth or to aircraft in flight."[95] Damage caused elsewhere than on the earth's surface imposes liability on the launching party on the basis of fault.[94]

In any event, Article I of the Liability Convention limits liability caused by a space object to "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of intergovernmental organizations." Further, absolute liability does not attach if a launching state can establish that the damage resulted "either wholly or partially from gross negligence or from an act or omission [of another state] done with intent to cause damage." [95] A launching state is never liable under the Convention to its own nationals or to foreign nationals who participate in launching the space object.[96]

Within the above parameters, earth resources satellites are not likely to cause damage that results in liability. Such satellites are passive and produce no harmful emissions. Instead, they monitor emissions coming *from* the earth. Further, some of the possible transgressions that could result from ERS operations (*e.g.*, nonphysical interference, such as telemetry interference) do not fall within the meaning of the term "damage" as it is defined by Article I of the Liabiltiy Convention.[97]

Naturally, liability will arise under the Convention if remote sensing satellites or any of their hardware causes damage on reentry or by collision in orbit. Beyond these possibilities, which are common to all space objects, there is no peculiar effect upon ERS of the Liability Convention. This may not be true in the future if "active" sensing, using such instruments as laser probes, is instituted, because such activities physically intrude into the air space and borders of the observed state.

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[93] Liability Convention, *supra* note 85, art. II.
[94] *Id.*, art. III.
[95] *Id.*, art. VI, para. 1.
[96] *Id.*, art. VI.
[97] Brooks, *New Developments Of Earth Satellite Law*, THIRTEENTH COLLOQUIUM, at 342 (1971).

IV. SPECIFIC LEGAL PROBLEMS

A. SOVEREIGNTY

The question of where air space ends and outer space begins is one that will not be resolved easily, because thorny questions of national sovereignty are involved. Approximately 90 percent of the work in space law is related to this problem[98] which continues to haunt and occupy the "minds of scholars and decision makers everywhere."[99]

The great concern over the boundary arises because of the legal distinctions between outer space and air space. The former is "not subject to national appropriation by claim of sovereignty . . . or by any other means."[100] It is free for peaceful use by all nations.[101] The latter is subject to the sovereignty of the subadjacent state and is conceived to be part of the territory of that state.[102] Despite the significance of this boundary, it remains undefined.

The need for a definition of outer space becomes more acute when technological advances such as ERS are made. Such advances increase the complexity of the problem because they effect vital states' interests, such as the preservation of natural resources and security. Many nations are now concerned about the release of ERS data to potentially hostile third parties. These nations assert that such data gathering by satellite is an infringement of their territorial sovereignty. This growing tide of concern was discussed in 1972 in hearings before the House Committee on Science and Astronautics.

> [D]uring the last debate on the item of remote sensing of the earth by satellite which took place in the General Assembly, the number of representatives who intervened in the discussion was the highest recorded so far on the space matter. The stress of all the speeches was on the need for a careful evaluation of the programs by the working groups and *on developing some criteria to cope with the posszble rise of political and economical programs especially in regard to the sovereign rights of States over data concerning their terrztory.*[103]

(emphasis added)

At a recent meeting of the United Nations Committee on the Peace-

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[98] Bhatt, *Legal Controls of Outer Space.* n.1, at 75 (1973) [hereinafter cited as Bhatt].
[99] *Id.*, at 76.
[100] Outer Space Treaty. *supra* note 53, art. II.
[101] *Id.*, art. I.
[102] DA PAM 27-161-1, para. I.F., at 72 (1964); Bhatt, *supra* note 97, at 86.
[103] 1972 *Hearings*, *supra* note 25, at 242.

ful Uses of Outer Space, Mr. Nourai of France summarized the situation very well:

> With regard to the definition of space, the record is not so good. . . . [T]his question will be raised with increasing urgency. The development of space vehicles and, generally speaking, the spate of activities going on in air and space, give rise to serious problems of boundaries. . . . The scope of the application of space law must be defined, because it is always dangerous to build a house without bothering about its foundations. Boundary disputes are often very arduous and difficult to resolve. And we cannot avoid them — quite the contrary — by failing to define the boundaries.[104]

The failure to define outer space is not the result of a lack of theories or suggestions. Some writers urge the application to outer space of the old Anglo-Saxon rule of usque ad coelum.[105] In simple terms, this rule holds that sovereignty extends up to the infinite. The concept is carried on in modern times by agreements and conventions on the use of air space. The Paris Convention of 1919[106] provided the following in Article 1: "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. . . ." The doctrine remained unchanged almost thirty years later. The 1947 Convention on International Civil Aviation[107] provided in Article 1: "The Contracting States recognize that every state has complete and exclusive sovereignty over the air space above its territory."

Two factors, one legal and one practical, prevent serious consideration of the extention of sovereignty infinitely upward. First, a doctrine of territorial sovereignty in outer space is contrary to the practice of states and specific provisions of the Outer Space Treaty.[108] Second, any projection of territorial sovereignty into outer space is inconsistent with basic scientific facts such as the rotation of the earth around the sun and its revolution on its own axis. No particular place on the earth is ever constant in relationship to space beyond the atmosphere. A nation's "territorial sovereignty" in outer space would never be certain because the horizontal boundaries of that sovereignty would overlap with those of other na-

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[104] U.N. Doc. A/AC.105/PV.146, at 48 (1975).
[105] *See generally* G. Gal, *Space Law*, 65-67 (1969).
[106] III Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers 3768.
[107] Convention on International Civil Aviation, 61 Stat. 1180, T.I.A.S. No. 1591 (1947).
[108] Outer Space Treaty, *supra* note 53, art. II

tions.[109] Chaos, not order, would result if the theory of usque ad coelum were applied to space.

Other proposed definitions of outer space recognize the distinction between air space and outer space. These definitions attempt to provide a rational means of dividing one from the other.

The gravitational theory proposes to extend the limit of sovereignty to the "outer limit of the earth's gravitational attraction."[110] This theory is objectionable for the same reasons as the doctrine "usque ad coelum." The earth's gravitational attraction reaches deep into space. All satellites orbit within the earth's gravitational sphere. Even the moon is within this gravitational pull. The practical problem of the earth's rotation, both on its axis and around the sun, again raises its ugly head. Article II of the Outer Space Treaty would be rendered meaningless except in the case of long range space probes. Further, this theory of demarcation will not be acceptable to many nations because of the past practice of states that treats satellites as orbiting in outer space, unfettered by considerations of sovereignty. Certainly the United States and the Soviet Union, the only major space powers, will not recognize this limitation on their right to launch and orbit satellites.[111]

Another theory, the air space (atmosphere) theory, would make air space coextensive with the geophysical atmosphere of the earth. This theory is generally urged by the Soviet Union.[112]

Two very similar theories are the satellite orbit theory and a recent Italian theory laid before the United Nations. The satellite orbit theory argues that ". . . the boundary of state sovereignty should be drawn at the lowest level at which a satellite can be put in orbit." [113] The Italian proposal is more complex, but arrives at the same result.

> The vertical frontier should be situated in such a way as to ensure that all air activity takes place beneath it and all space activity takes place above it. . . . [A]ir activity cannot go beyond, at the maximum, 60 kilometers from the surface of the earth and space activity cannot be developed below approximately 120 kilometers. If we take the median of the values corresponding to these two limits . . . we can place

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[109] For a general discussion of the scientific difficulties involved with the attempt to extend sovereignty into outer space, *see* Jenks, *International Law and Activities in Space*, 5 INT'L C.L.Q. 103-4 (1956).
[110] G. Gal, supra note 104, at 71.
[111] *See* U.N. Doc. A/AC.105/C.2/SR.7, at 4-5 (1962); U.N. Doc. A/AC.105/C.2/SR.233, at 62-63 (1975).
[112] *See* G. Gal, *supra* note 104, at 73.
[113] *Id.*, at 85.

> the vertical frontier at approximately 90 kilometers from the surface of the earth.[114]

Under these two theories, the lower limit of outer space is the lowest orbital position for satellites. Hence, satellites would not violate the sovereign rights of any overflown state because the Outer Space Treaty provides that outer space "is not subject to national appropriation by claim of sovereignty."[115] This result is particularly vital to continued use of earth resources satellites because it renders baseless the claims that such satellites do violate an overflown nation's sovereignty. One of these two theories should be accepted, not only because they permit free use of outer space by ERS, but because they represent what many legal scholars believe is a customary rule of law.[116]

Customary international law arises "when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to international law, obligatory."[117] The existence of customary international law is a factual determination that should be based on the following factors:

> (a) Concordant practice by a number of States with reference to a type of situation falling within the domain of international relations.
> (b) Continuation or repetition of the practice over a considerable period of time.
> (c) Conception that the practice is required by, or consistent with, prevailing international law.
> (d) General acquiescence in the practice by other states.[118]

Concerning the material requirements of concordant practice, general acquiescence, and conception of consistency with prevailing international law, those states that are capable of doing so "have uniformly and continuously utilized [sic] the claimed right to orbit satellites; and those states who were not able to actively participate have made use of the doctrine by their open support of the United States and the Soviet action, or by their failure to protest and claim sovereignty."[119]

An examination of the history of space flight supports the conclusion that a rule of international law exists that permits one state to launch and orbit satellites without the prior consent of any other

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[114] U.N. Doc. A/AC.105/PV.155, at 12 (1975).
[115] Outer Space Treaty, *supra* note 53, art. II.
[116] *See, e.g.*, G. Gal, *supra* note 104, at 86.
[117] DA PAM 27-161-1, para. II.A.1, at 8 (1964).
[118] *Id.*, at 9.
[119] J. MORENOFF, WORLD PEACE THROUGH SPACE LAW 185 (1967).

state. History indicates that satellites are generally considered to be in the lower limit of outer space and, hence, the countries launching them are free to pursue peaceful goals and uses of that space including remote sensing activities.[120] In the past both the Soviet Union and the United States have orbited satellites without seeking permission from the countries over which the satellites passed. No protests were registered by any country. For example, in the International Geophysical Year (1957 to 1959) both countries announced their intent to orbit satellites. No state objected, claimed a requirement for prior consent or attempted to prevent such flights.[121] When the U.S.S.R. subsequently orbited the first satellite, silence continued to prevail among the other nations of the world. This enabled the Ad Hoc Committee on the Peaceful Uses of Outer Space to report to the General Assembly of the United Nations in 1959 that: "[D]uring the International Geophysical Year 1957-1959 and subsequently, countries throughout the world proceeded on the premise of permissibility of the launching and flight of the space vehicles . . . , regardless of what territory they passed 'over' during the course of their flight through space."[122] This total acceptance by the nations of the world is implicit consent to space overflights and tacit recognition that such flights are consistent with international law.[123]

The final criterion used to determine whether or not a custom has become international law, the time element, is the most variable and the most difficult to address. The purpose of a time element is to insure "a comprehensive understanding of contemporary expectation." If other means are available to assess the general understanding, an extensive duration is unnecessary. This is particularly true when a developing rule of law does not negate any pre-existing rule or concept.[125] A rule of law that satellites orbit in outer space does not replace or negate any pre-existing rule. Moreover, other means are available to assess the "contemporary expectations" of nations, namely, the past and present practice of States.[126] That

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[120]Outer Space Treaty, *supra* note 53, preamble.
[121]J. MORENOFF, *supra* note 119, at 175.
[122]14 U.N. GAOR, Ad Hoc Committee on the Peaceful Uses of Outer Space 64 (1959).
[123]*See* U.N. Doc. A/C.1/PV.982, at 47 (1958); A. HALEY. SPACE LAW AND GOVERNMENT 57 (1963).
[124] J. MORENOFF, *supra* note 119, at 171.
[125]*See* The Scotia, 81 U.S. (14 Wall) 170 (1871).
[126]North Sea Continental Shelf Cases, [1969] I.C.J. 3, 8 Int'l Leg. Mat'ls 340 (1969), wherein it was stated that " . . . it might be, even without the passage of

nations of the world accept almost uniformly the fact that satellites orbit in outer space is demonstrated by the tremendous participation of many nations in programs such as ERS.[127]

Thus, all the necessary elements exist to support the operation of a principal of customary international law that satellites orbit in the lower part of outer space, and that such satellite operations, including ERS, do not violate the territorial sovereignty of any nation.

B. DEVELOPING COUNTRIES AND NATURAL RESOURCES

Earth resources satellites "offer an invaluable opportunity to developing nations [by] permitting the acceleration of national processes of surveying and exploiting natural resources in agriculture, mineral resources, water resources, economic development, and regional engineering and urban development projects."[128] However, developing nations are loudest in their demands for controlled and restricted use of those very satellites. The problem perceived by developing countries is inextricably entwined with aspects of national sovereignty. Developing countries largely depend upon economical exploitation of mineral and biological resources, the supply of which is not unlimited. The developing countries believe that the means to exploit those resources are provided to nations other than themselves by earth resources satellites. Consequently, they are concerned "lest satellite remote sensing data be used for detrimental purposes."[129] This fear of abuse was voiced even prior to the launching of the first remote sensing satellite, Landsat-1. The following appeared in the New York Times of May 14, 1972.

> It was during debate [in the United Nations] expert group dealing with remote sensing of the earth by satellite that the sharpest disagreements emerged.
>
> Sweden tried to steer the members into preliminary discussion of what the United Nations might do to protect the economic interest of small, non-space powers from possible exploitation by countries col-

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any considerable period of time, a very widespread and representative representation of nations in [a practice] might suffice of itself [to establish a rule of law]."

[127] *See* U.N. Doc. A/AC.105/125, at 7-8 (1975); Galloway, SIXTEENTH COLLOQUIUM, *supra* note 14, at 91. For a complete discussion of the theories proposed to define and delimit outer space, *see* U.N. Doc. A/AC.105/C.2/7/Add1 (1977).

[128] U.N. Doc. A/AC.105/136, at 2 (1975).

[129] Galloway, SIXTEENTH COLLOQUIUM, *supra* note 14, at 99.

> lecting data from satellites. . . . Argentina supported the Swedish view. . . .[130]

This problem, which has not been cured by the passage of time, remains a primary concern of many nations of the world.

A state has jurisdiction and control over everything, including natural resources, within its territorial boundaries.[131] This concept, which is as old as the nation state itself,[132] has been reaffirmed in numerous United Nations resolutions concerning natural resources. The preamble of Resolution 523 (VI) of January 12, 1952 provided that under-developed countries have

> the right to determine freely the use of their natural resources and that they must utilize such resources in order to be in a better position to further the realization of their plane of economic development in accordance with their national interests, and to further the expansion of the world economy. . . .[133]

In Resolution 1720 (XVI), December 1961, the phrase "permanent sovereignty over natural resources" was first used. The Resolution expressed the will of the General Assembly "to promote the strengthening of permanent sovereignty of peoples and nations over their natural resources."[134] Other Resolutions of a similar vein followed in close succession.[135] One of these, Resolution 1803 (XVII),[136] proclaimed that a "[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of United Nations. . . ." In view of territorial sovereignty over natural resources and the repeated United Nations reiteration of that principle, how reasonable, then, is the developing countries' fear of exploitation?

Earth resources satellites are only data gatherers. They cannot capitalize upon this data. Only man on the ground can accomplish this task. Direct exploitation of any natural resource requires access to the nation within which the resource lies. As is so vividly demon-

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[130] Teltsh, *Space Plans Frustrate the 'Have-Nots,'* New York Times, May 14, 1972, at 15.
[131] *See* Galloway, SIXTEENTH COLLOQUIUM, *supra* note 14, at 99; *see also* DA PAM 27-161-1, *supra* note at 65-67.
[132] *Id.*, at 65.
[133] 6 G.A.O.R., Supp. (No. 20) (1952); *see also* G.A. Res. 626, 7 G.A.O.R., Supp. (No. 20) (1952).
[134] 16 G.A.O.R., Supp. (No. 17) (1961).
[135] *See, e.g.*, G.A. Res. 2692, 25 G.A.O.R., Supp. (No. 28) (1970); G.A. Res. 2158, 21 G.A.O.R., Supp. (No. 17) (1966); G.A. Res. 1803, 17 G.A.O.R., Supp. (No. 17) (1962)
[136] G.A. Res. 1803, 17 G.A.O.R., Supp. (No. 17) (1962).

strated by the United Nation resolution, such access is entirely within the sovereign control of the country whose resources are involved. In addition, sensed nations are free to obtain all Landsat gathered data from the United States.[137] The United States ensures that countries are directly informed of any promising data.[138] With such complete access, any observed nation has sufficient information and time to protect its national interest. Under these circumstances, direct exploitation requires the active cooperation of the resource holding country.

The possibility of indirect exploitation is a somewhat more serious concern. Sabastian Estrade of Spain raised this possibility during the proceedings of the Fifteenth Colloquium on the Law of Outer Space in 1973.

> [I]t is obvious that some control of information about Earth's resources by powerful financial groups on an international scale can cause great pressure on the economic structure of certain countries. . . . The powerful trusts, the large companies controlling natural resources and consumer goods, can use information provided by remote sensors and direct not only their buying and selling policies, but also their power over foreign energy and mineral sources and force them to grant development rights under financial pressure applied to certain sectors: for instance, by means of loans to foreign countries where natural resources have been detected. This could eventually lead to servitude among nations.[139]

Mr. Estrade overstates the problem. First, he implies that only powerful financial groups have or might have access to the data. However, the United States policy is open access.[140] Second, he forgets that to control natural resources, that is, to exercise "power over foreign energy and mineral sources," one must have some means of physical access to those resources. States have not hesitated in the past to nationalize industries when foreign trusts or companies were operating them in a manner apparently inconsistent with the national interests. A prime example is the Arab oil nations. Pressure through loans may be possible, but nations have been known to renege upon loans. Also, other sources of capital are generally available to a country that is too hard pressed in today's world.

Other examples of indirect exploitation have been offered to sup-

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[137] *See* U.N. Doc. A/AC.105/C.2/SR. 233, at 61-65 (1975).
[138] *Id.*
[139] Estrade, ***Detection*** *of Earth* ***Resources*** by ***Remote Sensing,*** FIFTEENTH COLLOQUIUM, 13-14 (1973).
[140] U.N. Doc. A/AC.105/C.2/SR.233, at 61-65 (1975).

port the need for restricted dissemination of ERS data. For instance, I.M. Pikus presented the following possibility to the members of the proceedings of the Sixteenth Colloquium on the Law of Outer Space:

> [I]f a particular nation's economy is heavily dependent upon the sale of a certain agricultural commodity on the world market, it is possible that world-wide knowledge of the existence of oversupply of that commodity would produce an undesirable effect on prices. There is a converse to that proposition which would demonstrate a desirable effect on prices if the presence **of** an abnormally small supply were known.[141]

The conclusion reached in the example makes too much of ERS data because it presumes no other sources of information are available. States "can and do collect general information on economic matters and use this information in their own interests.''[142] **A** variety of methods are employed, such as market reports or reports by diplomats to their own nation. ERS is only an additional source for such information.

The concern of the developing countries is understandable, but unnecessary upon close examination. They possess all the necessary means for protection of their own natural resources. One means is remote sensing data. If all states have access to data provided by remote sensing satellites, no single nation or group of nations would be able to use that data to the detriment of others. Nations would be able to take countermeasures and affirmative action to prevent economic interference with their own wealth. Mr. de Jager of the United Nations Committee on Space Research urged such countermeasures when necessary: "The increased potential of space technology for the discovery of. . . resources may make it necessary for the States, where . . . resources are discovered, to take necessary measures to ensure that the information is used primarily for the benefit of the State concerned.''[143] True opportunity for nefarious dealings will exist only if remote sensing data is bottled up or made available to only a few nations.

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[141]Pikus, *Possibility of Technical Control Over Resources Surveying From Space,* SIXTEENTH COLLOQUIUM **147 (1974).**
[142]Brooks, *supra* note **96,** at **348.**
[143]U.N. Doc. A/AC. 105/PV/145, at **26** (1975).

C. MILITARY SURVEILLANCE AND ESPIONAGE

Earth resources satellites have a dual character. They develop data that is both scientifically important and at the same time militarily useful. It is impossible to establish a "workable dividing line between [these] military and nonmilitary uses." [144] This inability to divide the two raises numerous questions. Does it violate the Outer Space Treaty to use ERS for military surveillance? Is such use consistent with international law and the United Nations Charter? Does the activity constitute some form of espionage? There is substantial disagreement in the international community on the answers to these questions.

Two divergent views exist as to whether or not military surveillance using remote sensing satellites is a violation of the Outer Space Treaty. The divergence centers around the meaning of the term "peaceful" as it is used in that treaty. The Soviet Union maintains that "peaceful" equates with "non-military," and thus it asserts that any military activity in outer space is prohibited.[145] The United States, on the other hand, maintains that military activities by ERS can be peaceful within the meaning of the Outer Space Treaty. The Space Treaty, argues the United States, forbids only aggressive activities.[146]

Article IV of the Outer Space Treaty is the single Article that uses the term "peaceful" and is the only Article of the Treaty that specifically addresses military activities. The Article provides:

> States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction . . . ,
>
> The moon and other celestial bodies shall be used by all States Parties to the Treaty *exclusively for peaceful purposes.* The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden.[147]

(emphasis added)

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[144] M. COHEN, LAW AND POLITICS IN SPACE 82 (1964).

[145] U.N. Doc. A/C.1/PV.1289, at 57 (1962); Dauses, SIXTEENTH COLLOQUIUM, *supra* note 4, at 128. The Soviet position is particularly interesting in light of the aggressive development by that nation of an ERS system. *See* discussion at end of section II. A. of this article, *supra*.

[146] Although other nations of the world generally support either the Soviet or United States position, this article shall refer to the positions, respectively, as the Soviet view or position and the United States view or position. *See,* J. MORENOFF, *supra* note 119, at 187-89.

[147] Outer Space Treaty, *supra* note 53, art. IV.

Article IV relates only to the use of the moon and celestial bodies. No Article of the Treaty applies the phrase "exclusively for peaceful purposes'' to uses made of outer space. However, logic requires one to conclude that the framers of the Treaty intended the use of outer space to be peaceful. Certainly, it would be paradoxical to prohibit other than peaceful activities on celestial bodies, but allow complete free play of activities in space itself. This conclusion is supported by the preamble to the Outer Space Treaty.

> Recognizing the common interest of all mankind in the progress of the exploration and *use of outer space for peaceful purposes* . . . .
> "*Desiring* to contribute to broad international cooperation in the scientific as well as the legal aspects of *the exploration and use of outer space for peaceful purposes* . . . .[148]

(emphasis added)

Any other construction of the Space Treaty would be inconsistent not only with the primary purpose of that document, namely, the regulated, beneficial use of outer space for all mankind,[149] but with the principles and purposes of the United Nations Charter as well.[150]

Recognizing the requirement for the peaceful use of outer space, are remote sensing satellites, when used for military purposes, "peaceful"? As previously noted, they would not be under the Soviet view.[151] The Soviet position is well presented in an article prepared by Mark C. Markov for the Eleventh Colloquium on the Law of Outer Space.

> Since Article I, para. 1 [of the Outer Space treaty] expressly recognizes that exploration and use of outer space should be carried out for the benefit and in the interest of all states and should be the province of all mankind, it is doubtless that this disposition shuts out automatically from the field of the lawful Space activities *all kinds* of military actions without exception. That is because no military activity can nowdays be envisaged as being beneficial to all mankind and being carried out in the interest of all countries of the world. Clear enough, all military action in present international conditions may serve only the interest of ***ONE*** particular State, or a *Group* of states.[152]

A space activity does not violate the Outer Space Treaty merely

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[148] *Id.*, preamble.
[149] *Id.*, art. I, para. 1.
[150] *See* U.N. Charter, art. 1-2.
[151] *See, e.g.*, Dauses, SIXTEENTH COLLOQUIUM, *supra* note 4, at 128.
[152] M. Markov, *The Juridical Meaning of the Term "Peaceful" in the 1967 Treaty*, ELEVENTH COLLOQUIUM *30* (1968).

because every nation in the world is not benefitted. If Mr. Markov's reasoning were applied strictly to other space activities, such as Skylab or communications satellites, it would render those activities unlawful because they tend to benefit limited groups of nations.

Mr. Markov also concludes too "automatically" that no military activity in outer space can benefit mankind as a whole. Military surveillance is just such an activity because it can help to maintain international peace and security. Today's world still lives with the threat of war and, conceivably, nuclear holocaust. As observed by Mr. Lenard Meeker in his article *Observation in Space,* "[o]ne of the greatest problems in today's world is the uncertainty generated by the secret development, testing and deployment of national armaments and by the lack of information on military preparations within closed societies."[153] Because their very existence may depend upon it, states must know the capacity for war possessed by other countries and be able to take the steps necessary for national survival. Also, knowledge of the world military situation can ease tensions. For instance, if it can be readily determined that a nation is not preparing a surprise attack, " . . . confidence [will be increased] in world security which might otherwise be subject to added and unnecessary doubts." [154] Furthermore, ultimate success in disarmament requires knowledge of other countries' weapons and an ability to monitor compliance with treaty terms. These needs have been recognized by the Soviet Union: " . . . In arms control and disarmament negotiations, the Soviet Union has recognized, at least in principle the need for verification and inspection . . . ."[155] In fact, satellites have been recognized specifically in the ABM Treaty and Interim Agreement as a means for Treaty verification.[156] Thus, peaceful purposes can be furthered through the use of satellite surveillance.

The better view of the term "peaceful" within the context of the Outer Space Treaty is the one advanced by the United States. An early expression of that view was rendered by Senator Gore when speaking as the United States Representative to the United Nations General Assembly in **1962.**

> It is the view of the United States that outer space should only be used for peaceful—that is, non-aggressive and beneficial purposes.

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[153] M. COHEN, *supra* note 144, at 81.
[154] *Id.*
[155] *Id.*, at 81-2.
[156] Message from the President, Executive Letter, The ABM Treaty & Interim Agreement and Associated Protocol, 92d Cong., **2d** Sess. 1-6 (1972).

> The question of military activity in space cannot be divorced from the question of military activities on earth . . . . Until [complete disarmament] is achieved, the test of any space activity must be not whether it is military or non-military but whether or not it is consistent with the United Nations Charter and other obligations of international law . . . .[157]

This position is consistent with current practice. Numerous satellites, other than ERS, have been launched that are capable of executing military purposes. From the very beginning of the space age, there was recognition that peacekeeping equipment such as communications and meteorological satellites could be employed militarily.[158] For example, meteorological satellites can provide weather data for planning military operations. Communications satellites can be employed for propaganda purposes. Yet, no effort has been made to exclude these satellites as "non-peaceful" uses of space.

The United States position also reflects the consensus of the members of the United Nations when the Outer Space Treaty was opened for signature. At that time it was recognized that some military activity would occur in outer space.[159]

Accepting the United States definition of peaceful as nonaggressive, the question then arises whether aggression is committed when earth resources satellites are used for military surveillance. The Soviet Union believes that such use is aggressive. They argue that this activity is a threat to their territorial integrity and political independence in violation of Article 2, paragraph 4 of the U.N. Charter. Soviet Representative Morozov made this point clear in a speech to the General Assembly in 1962:

> We cannot agree with the claim that all observation from space, including observation for the purpose of collecting intelligence data, is in conformity with international law . . . The object to which such illegal surveillance is directed constitutes a secret guarded by a sovereign state . . . [W]e consider that the activities involved are incompatible with the provisions of the United Nations Charter.[160]

Conversely, it is the United States position that military surveillance is entirely consistent with that document. The United States

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[157] J. MORENOFF, *supra* note 119, at 189-90.
[158] *See* J. MORENOFF, *supra* note 119, at 82.
[159] When U-Thant made his official comment on the Outer Space Treaty, "he was aware of [its] compromise [nature], and he cautiously commended the Treaty by stating that it would *almost* insure the use of outer space exclusively for peaceful purposes." (Emphasis added) U.N. Doc. A/AC.105/PV.150, at 21 (1975).
[160] U.N. Doc. A/C.1/PV.1289, at 57 (1962).

contends "that the maintenance of its security is directly dependent on the reliability of the available intelligence concerning the opposition's military potential." [161] If it is demonstrated that military surveillance by ERS is necessary to United States security, or world security, then it is a necessary function justified under the international law of self-defense.

Article 51 of the United Nations Charter acknowledges the inherent right of self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . . ." [162] This Article, as all others, of the Charter, is applicable to outer space pursuant to Article III of the Outer Space Treaty.[163]

A dispute exists over the effect of Article 51. In the view of some authorities, this article limits self-defense to situations involving the threat of armed attacks.[164] However, Article 51 also talks in terms of preserving the inherent right of self-defense which includes the right of anticipatory self-defense.[165] Certainly, the United States did not perceive Article 51 as limiting the inherent right of self-defense when it ratified the United Nations Charter. Testifying in the Senate, Secretary of State Dulles stated: "NOW, there is nothing whatever in the charter which impairs a nation's right of self-defense. The prohibition against the use of force is a prohibition against the use of force [not consonant with the] purposes of the Charter. Among the purposes of the Charter is security." [166] Even the Soviet Union admits that Article 51 permits a state to "take necessary and corresponding measures for safeguarding its security." [167] Such measures are not aggressive either under the Charter or within the meaning of that term as defined by Gen-

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[161] J. MORENOFF, *supra* note 119, at 15-16.

[162] U.N. Charter, art. 51.

[163] Outer Space Treaty, *supra* note 53, art. III. For a complete discussion of the application of the United Nations Charter to outer space, see this article, *supra* at section III. A.

[164] A complete analysis of the various views concerning the limiting effect of article 51 of the United Nations Charter is made by M. MCDOUGAL AND F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, Ch. III (1961). *See also*, McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L. L. 597-598 (1963); BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958). Self-defense in outer space is dealt with specifically by Schrader, *Defense in Outer Space*, 49 MIL. L. REV. 157-62 (1970).

[165] *See* De Saussure & Reed, *Self-Defense — ARight in Outer Space, 7* A.F. JAG L. REV. **40** (Sept.-Oct. 1965).

[166] Hearings on the Charter of the United Nations Before the Senate Comm. on Foreign Relations, 79th Cong., 1st Sess. 650 (1945).

[167] G. Gal, *supra* note 105, at 184, *citing* G. P. Zhukov.

eral Assembly Resolution 3314.[168] Resolution 3314 defines aggression as ". . . the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." [169] The examples of aggression used in the resolution also related to the use of armed force include:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> (b) Bombardment . . . or the use of weapons by a State against the territory of another State;
>
> (c) The blockade of the parts or coasts of a State by the armed forces of another state;
>
> (d) An attack by the armed forces of a State of the land, sea or air forces, or marine and air fleet of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement . . . ;
>
> (f) The action of a State in allowing its territory . . . to be used by [other States] for perpetrating an act of aggression . . .
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State . . . .[170]

Clearly, the resolution definition and examples of aggression do not encompass remote sensing activities because such activities do not involve the use of "armed force by a State against the sovereignty, territorial integrity or political independence of another State." [171] Instead, military surveillance by earth resources satellites is a necessary measure for safeguarding a nation's security.

As previously noted,[172] countries of the world today must know

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[168] U.N. Doc. A/RES/3314 (1974).
[169] *Id.*, art. 1.
[170] *Id.*, art. 3.
[171] *Id.*, art. 1.
[172] This article, *supra* at 49.

the abilities of other states to wage war. This is particularly important in so far as the nuclear superpowers are concerned. The ever present possibility of sudden devastation looms like a shadow over the world. ERS discoveries can reduce this shadow's presence by insuring that the nuclear powers of the world are forewarned of nuclear attack or nuclear buildup. An interesting example of the application of ERS to provide such advance and continuing knowledge was presented in Aviation Week and Space Technology of July 1, 1974. Referring to a picture the comment stated: "Mainland China's Lop Nor missile test and nuclear development site area is shown in this Landsat image received at NASA Goddard Space Flight Center." [173] With this potential, this ability to monitor nuclear developments, the nuclear powers of the world are far less likely to take precipitate action based on unknown fears. They are far more likely to act only in self-defense and only when necessary to insure their national security.

The final spear hurled at military surveillance by remote sensing satellites is a claim that such activities constitute espionage.[174] This claim was made early in the 1960's by the Soviet Union.[175] It continues to be presented, but with much less frequency as the Soviet Union develops its own earth resources satellite program.

Espionage is the acquisition of information by clandestine acts with the intent of transferring that information to an enemy.[176] The term is operative only in wartime in the zone of operation of a belligerent.[177] As so aptly pointed out by Jerome Morenoff in his book *World Peace Through Space Law,* " . . . wartime espionage is thus, under the definition of crimes against war, not to be considered an international crime, nor is it a violation of international law . . . ." [178]

In light of this legal framework, a quick examination of the Soviet claim that ERS is a form of espionage reveals that the assertion has little merit. First, earth resources satellites are not operating during time of war or in a zone of belligerence. Second, their activities, as opposed to being clandestine or hidden, are open and notorious. In fact, the data from United States resources satellites is available

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[173] Aviation Week and Space Technology, July 1, 1974, at 22.
[174] A discussion of the various national laws of espionage is beyond the scope of this article. Espionage is examined only in an international legal framework.
[175] *See, e.g.*, The New York Times, July 1, 1964, at 6, col. 3; The Washington Post, July 1, 1964, at A1, col. 5.
[176] Hague Convention Respecting the Laws and Customs of War on Land, 18 Oct. 1907, Annex, art. 29, 36 Stat. 2277, T.S. No. 539.
[177] *Id.*
[178] J. MORENOFF, supra note 119, at 206.

to the world.[179] Third, no intrusion into the territory of any nation results from ERS. In this respect, remote sensing is comparable to observation from the high seas and just as consistent with international law. This has been recognized by the Committee on the peaceful uses of outer space: "[Alny nation may use space satellites for such purposes as observation and information gathering. Observation from space is consistent with international law, just as is observation from the high seas."[180]

Thus, remote sensing by satellites, even for military purposes, is not a direct invasion by one state of the territory of another. It is not an illegal or aggressive act prohibited by international law and it does not constitute espionage. Instead, the satellites provide data needed to protect the environment, enhance man's knowledge and improve man's living conditions.

V. THE ROLE OF THE UNITED NATIONS

The United Nations has actively dealt with earth resources satellites (ERS) and remote sensing since 1969. It serves primarily as a meeting ground for all nations to study, discuss and propose solutions to the various social, economic, scientific and legal questions presented by this new technology.

Most of .the international activity at the United Nations takes place through the Committee on the Peaceful Uses of Outer Space. This Committee conducts its work through two subcommittees. The Scientific Subcommittee is charged with study, consideration and reports related to scientific and technological aspects of outer space use. The Legal Subcommittee is responsible for study and recommendations related to all legal implications of space applications. This latter subcommittee seriously began considering ERS in 1972. At that time "[m]atters relating to activities carried out through remote sensing satellites of earth resources"[181] were first placed on its agenda.

The Committee on Peaceful Uses of Outer Space [hereinafter referred to as The Committee] and its subcommittees have acted diligently on the subject of remote sensing. However, most of the early work was the product of a working group convened under the direction of the Scientific Subcommittee. Many of the items currently on

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[179]U.N. Doc. A/AC.105/C.2/SR.233, at 61-65 (1975).
[180]U.N. Doc. A/C.1/PV.1289, at 13(1962); *see* U.N. Doc. A/AC.105/C.2/SR.10, at 4 (1962).
[181]U.N. Doc. A/AC.105/C.2/11.

the Committee's agenda are the work product of that Group. The Group was established pursuant to General Assembly resolution 2733 (XXV) of December 16, 1970.[182] The stated Objective of the Working Group is "to proniote the optimum utilization of [remote sensing] including monitoring the total earth environment for the benefit of individual states and of the international community. . . ."[183] It is also charged with studying the social, economic and *legal* implications of ERS.[184] Since its establishment, the working group has met many times and has contributed many valuable suggestions to the Committee.[185]

Specialized agencies of the United Nations are active in remote sensing study and use. The World Meteorological Organization is conducting four major remote sensing programs.[186] UNESCO is using ERS to provide information on natural resources and hydrologic information.[187] The United Nations Committee on Space Research is investigating possible applications of the technology.[188]

Within this organizational frame, the United Nations has pursued a variety of ERS related programs. In 1974 panel meetings, seminars and training workshops were held on this space application. For instance, on September 14, 1974, Cairo, Egypt was the site of a United Nations Food and Agricultural Organization seminar on remote sensing by satellite.[189] The United Nations distributed audio visual kits describing the benefits to be derived from ERS. The kits were provided at no cost to developing countries.

The following year, 1975, was particularly fruitful for ERS. This year saw three draft international agreements on remote sensing satellites presented to the United Nations for consideration.[190] The U.N. continued to conduct its workshops and training groups on remote sensing technology. Regional seminars were held in Canada, Mexico, and Kenya.[191] The program for 1976 carried on the activities of the prior two years. In addition, the outline for five draft principles related to ERS was prepared.[192]

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[182]U.N. Doc. **AiAC.1051125,** at **2 (1975).**
[183]*Id.* at **4.**
[184]U.N. Doc. A/AC.105/95, at **4-5 (1971).**
[185]*See* U.N. Doc. A/AC.105/111 **(1973);** F. NOZARI, *supra* note **10,** at 150-52.
[186]Galloway, SIXTEENTH **COLLOQUIUM,** *supra* note **14,** at **94.**
[187]*Id.; see also* U.N. Doc. A/AC.105/C.1/SR.176, at **14** (1977).
[188]U.N. Doc. A/AC.105/PV.145, at **26 (1975).**
[189]U.N. Doc. A/AC.105/144, at **1** (1975).
[190]U.N. Doc. **AiAC.1051133, Annex IV (1975);** U.N. Doc. A/C.1/1047, at **2-5** (1974).
[191]U.N. Doc. A/AC.105/144, at **7 (1975).**
[192]Stowe, *The Development* of *International Law Relating to Remote Sensing* of

The long range future role of the United Nations with respect to earth resources satellites is uncertain. At a minimum, the Committee on the Peaceful Uses of Outer Space will remain very active until some form of international agreement on ERS can be reached. In all probability, the U.N. will continue its panels, seminars and training workshops. The real issue is the extent to which authority will be vested in the United Nations to *control* ERS and data developed as a result of their use.

Many nations have presented proposals that would define the United Nations role in the future. Most of them would internationalize the entire earth resources satellite system.[193] Typical of such proposals is the one made by Sweden in 1970 and reiterated in 1975.[194] Sweden's proposal would place total ownership and control of the space vehicle or object, its data and information, ground stations, repositories, and all operating systems under an international organization. Sweden maintains that such internationalization would avoid offending national sensitivities, prevent discrimination, and ensure free access to all data. Sweden failed to discuss, however, who would bear the great expense of maintaining such an international system. It did not address how compensation, if any, would be made for the equipment and facilities taken. Many of these facilities have been bought and paid for in recent times by developing countries, such as Brazil. It would seem that Brazil's "sensitivities" would certainly be offended if its ground station were to be internationalized. Sweden also ignores the fact that the United States provides nondiscriminatory access to all Landsat gathered data. The Swedish proposal would also reduce the incentive to build ERS facilities or to launch new remote sensing satellites. This is particularly true if internationalization occurs without compensation. The Swedish proposal, and those of similar ilk, are too sweeping in nature. They go much further than is necessary to insure nondiscriminatory, free access to all data.

Instead of internationalization, a data bank for receipt, storage, analysis and dissemination of *processed* data should be established in the United Nations. This should not be a substitute for, but an

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the Earth from Outer Space, in PROCEEDINGS OF THE NINTEENTH COLLOQUIUM ON THE LAW OF OUTER SPACE 93 (1976) [hereinafter cited a8 Stowe, NINETEENTH COLLOQUIUM].

[193]U.N. Doc. A/AC.105/C.2/SR.233, at 68 (1975); U.N. Doc. A/AC.105/125, at 13 (1975); F. NOZARI, *supra* note 10, at 189; M. COHEN, *supra* note 144, at 6.

[194]U.N. Doc. A/AC.105/C.2/SR.233, at 68 (1975); U.N. Doc. A/AC.105/C.1/SR.66, at 16-18 (1970).

addition to, already existing storage and dissemination areas. All countries conducting remote sensing activities should be required to supply to the United Nations' facility a master copy of all data obtained by remote sensing. The United States has already agreed to provide such copies in the event a United Nations facility is established.[195] No duplication in the full sense of the word would result from this proposal because only the United Nations' facility would contain the remote sensing data gathered by *all* nations of the world.

The expense of a United Nations data center would not be onerous. All data could be supplied at no cost and user nations could be assessed a reasonable charge for data requested. Special circumstances, such as developing countries unable to pay for large amounts of information, could be met either by reduction of charges or by outright gifts of the desired data.

The United Nations must continue, logically, to play a role in remote sensing satellite development. That body is the only central meeting place today for most of the countries of the world. However, the role it plays must be kept within its resources. Unrealistic goals, such as internationalization of ERS and associated equipment, must not be established. As a central locale for all remote sensing data, the United Nations would aid in maximizing the full benefit of earth resources satellite data and would be able to promote the use of that information for the betterment of all.

VI. PROPOSED GENERAL PRINCIPLES AND AGREEMENTS ON EARTH RESOURCES SATELLITES

Remote sensing of earth resources by satellite is not unregulated. Various rules — whether created by treaty or the result of international use — provide a legal framework for such programs. Certainly, the Outer Space Treaty establishes principles within which such activities must operate. However, all existing law is general. It does not address itself directly to ERS. This has resulted in growing disagreement, concern and dispute over resources satellites and their future. Each year the problem becomes worse.

The problems with ERS can be remedied cleanly by treaty or allowed to linger until forced resolution, satisfactory to no one, occurs. It is apparent that there is a need "to reconcile the interest of

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[195] U.N. Doc. A/AC.105/111, at 10 (1973).

the different States engaged in remote sensing activities. . . ."[196]

Numerous draft agreements and general principles on remote sensing have been presented to the United Nations. The Soviet Union offered one of the first sets of draft principles in April 1973.[197] Following closely on the heels of the Soviet proposal was a similar set of draft principles submitted by the French.[198] Only the Soviet proposal will be analyzed, with comparative references to the French document, because the two are very similar.

Principle 1 of the Soviet draft reiterates portions of Article I and III of the Outer Space Treaty. The Soviets proposed the following: "1. Activities connected with the study of the natural resources of the earth by means of space technology shall be conducted in accordance with the principles of international law, including the United Nations Charter, and in the interests of peace and progress for all peoples."[199] This is primarily introductory in nature and ties in with that which has gone before, to wit: Articles I and III of the Outer Space Treaty. It emphasizes that the rule of law applies to ERS activities. The first principle of the French draft is almost identical with the Soviet principle.[200]

The second Soviet draft principle deals with a subject that inevitably crops up in any discussion related to remote sensing satellites: sovereignty. The principle reads: **"2.** States which make use of space technology for the purpose of studying earth resources undertake to respect the sovereignty of other states and, in particular, their *inalienable right* to *dispose* of their natural resources and *of information concerning those resources.*"[201] (emphasis added) The unemphasized portion of the quotation is merely a statement of well recognized rules of international law that states do control resources within their borders and do have the right to develop and dispose of their own national wealth as they see fit. Further, remote sensing satellites *alone* do not affect these rights because exploitation of resources requires access to the ground. This is under the sole control of the observed state.

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[196]Brital, THIRTEENTH COLLOQUIUM, at 198-99 (1971).

[197]U.N. Doc. A/AC.105/115, Annex III, at 7 (1975).

[198]U.N. Doc. A/AC.105/L.69 (1973).

[199]U.N. Doc. A/AC.105/115, Annex III, at "i (1975); republished in U.N. Doc. A/AC.105/133, Annex IV, at 9 (1975).

[200]U.N. Doc. A/AC.105/L.69 (1973). The first draft principle rontained in the French document states:

> 1. Outer spacr may be used freely by all Stater. without any discrimination. under conditions of equality and in accordance with international law, including the United Nations Charter and the 1967 Outer Space Treaty, for engaging in the remote sensing of earth resources exclusively for peaceful purposes. U.N. Doc. A/AC.105/L.69 (1973).

[201]U.N. Doc. A/AC.105/115, Annex III, at 7 (1973). The French proposal is sub-

The interesting portion of the second draft principle is the emphasized phrase. This language creates a sovereign right in the observed state to control disposition of all ERS data (information) concerning natural resources *no matter which state develops the data.* Thus, the Soviet Union would have **a** "sovereign right" to control the release of any United States Landsat gathered data relating to the Soviet Union. Of course, the reverse would also be true. This right of absolute control is reinforced in the Soviet fifth draft principle.

> 5. A state which obtains information concerning the natural resources of another State through the use of space technology shall not be entitled to make it public or transmit it to third States or international organizations without the clearly expressed consent of the State to which the natural resources belong, nor shall it be entitled to use the information in any other manner to the detriment of the latter State.[202]

(emphasis added)

A similar provision is found in the French draft. "Use of the documents resulting from a remote-sensing operation may not be granted to third parties, whether Governments or private persons, without the consent of the State whose territory is affected."[203] These principles impose the sovereignty of the sensed state upon the data gathering nation. For instance, it would allow the Soviet Union to direct the Sioux Falls, South Dakota, data center's release policy where data involving the Soviet Union is concerned. Where is the vaunted "respect [for the] sovereignty of other States" urged by the Soviets in their second draft principle?

The thrust of both the French and Soviet drafts is a step back from the free use of outer space envisioned by the Space Treaty. The ultimate effect is to destroy the usefulness of remote sensing from space. This is true although it may be urged that the proposed principles relate only to dissemination and use of remote sensing data and do not prevent the orbiting or operation of remote sensing satellites. Clearly, if you restrict and reduce the benefits to be derived from such satellites to the point of worthlessness, no country will launch them. These satellites operate most effectively with data gathered on regional and global scale.[204] Their observation covers

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stantially the same. One important difference is that the French proposal makes no attempt to extend sovereignty to information gathered by remote sensing. U.N. Doc. A/AC.105/L.69 (1973).

[202] U.N. Doc. A/AC.105/115, Annex III, at 7 (1973).

[203] U.N. Doc. A/AC.105/L.69 (1973).

[204] *See* U.N. Doc. A/AC.105/PV.155, at 6 (1975).

single areas 115 miles by 115 miles. They can provide a wealth of information on pollution, forestry, flood prevention, movement and silting of rivers, and so forth. Unfortunately, such phenomena do not restrict themselves to the limits of artificial international boundaries. Thus, where the solution to a regional problem might require data covering many nations, under the French and Soviet proposal, one country would be able to stymie the efforts of all of the others.

It is extremely difficult to reconcile proposals, such as the Soviet and French, that "restrict dissemination of data with the practical fact that indeed to be useful data must be widely circulated and widely understood."[205] The Soviet and French drafts are more concerned with protecting limited national interest than with promoting full use of ERS data "in the interests of peace and progress for all people."

The French and Soviets have also submitted a joint draft treaty.[206] This draft contains minor variations from the Soviet draft treaty, just discussed, but the thrust of the joint Soviet/French proposal remains the same.

One other draft agreement,[207] presented by Argentina and Brazil, should be examined. Article IV of that proposal emphasizes the sovereign rights of states. It provides in part:

> . . . The principles of sovereign equality of States and self-determination of peoples embrace not only the right to internal sovereignty and independence, but also the economic aspect of the freedom to use and distribute their wealth, whereby peoples may exercise their legitimate and exclusive sovereign rights over their own natural resources.[208]

This is nothing more than a statement of existing international law. However, the emphasis on sovereign rights over natural resources was merely the prelude to the eight Articles that followed.

Article V precludes states "from undertaking activities of remote sensing of natural resources belonging to another State party . . . without the consent of the latter." This does not differ materially from the Soviet and French consent requirements. Like those requirements, it is subject to objection because it infringes upon the sovereign rights of the data gathering states, contrary to the prin-

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[205]R. STOWE, UNITED STATES REPRESENTATIVE TO THE COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE, U.N. Doc. A/AC.105/PV.155, at 6 (1975).
[206]U.N. Doc. AIAC.105/C.2/L.99 (1975).
[207]U.N. Doc. A/C.1/1047, at 2 (1974).
[208]*Id.*, at 3.

ciples of the Outer Space Treaty and inconsistent with the full use of ERS for the benefit of all mankind.

Article VI is not only objectionable, but possibly dangerous. It provides: "States parties will take all measures authorized by international law to protect their territory and maritime areas under their jurisdiction from remote sensing activities for which they have denied consent.'' [209] Does this mean that observed states have the right to shoot down satellites that without consent overfly their borders? If not, what other means are reasonably available to states "to protect their territory . . . from remote sensing" activities? Even if reasonable answers are available, this article is unacceptable merely because it raises such questions.

Article VII, VIII, and XII have the effect of internationalizing remote sensing activities without specifically saying so. These articles require any data gathering state to permit any other state to participate in the remote sensing program. It would require the United States to accept all requests for participation in its Landsat program on an "equitable basis." Once the program was finished, only the observed states, not the state that built, owned or launched the satellite, could determine the disposition of any gathered data. The inequity of this result is readily apparent.

The Argentine/Brazilian draft is, as are the Soviet and French, too restrictive. It destroys the greatest value, wide area coverage, to be obtained from ERS. If the desire is, as it seems to be, to limit remote sensing to territorial limits, it would be more rational, and certainly cheaper, to simply outlaw all remote sensing by satellite and return to the use of aircraft.

At the other end of the spectrum from the Soviet, French and Argentine/Brazilian position is that of the United States. "The surest way to protect States from being disadvantaged or discriminated against [is] to ensure that all states [have] equal access to [ERS] data." [210] Under the United States working paper, offered in 1975 to the Committee on Peaceful Uses of Outer Space, all data would be "made available to all interested states, international organizations, individuals, and the scientific community on a timely and nondiscriminatory basis.'' [211]

The United States position would maximize the global benefits available from ERS. It is more consistent with the Outer Space

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[209] *Id.*, at 3.
[210] U.N. Doc. A/AC.105/C.2/SR.233, at 63 (1975).
[211] U.N. Doc. AiAC.105/C.2/L.103 (1975).

Treaty's provisions authorizing full and free use of outer space for the benefit of all mankind. It provides full protection for the natural resources of all nations because it provides full knowledge upon which to act to protect those interests.

The latest set of draft principles is that formulated by the United Nations working group of the Legal Subcommittee of the Outer Space Committee. The principles are five in number and provide: [212]

Principle I

Remote sensing of [the natural resources of the earth] [and its environment] from outer space and international co-operation in that field [shall] [should] be carried out for the benefit and in the interests of all countries [mankind], irrespective of their degree of economic or scientific development, and taking into consideration, in international co-operation, the particular needs of the developing countries.

Principle 11

Remote sensing of [the natural resources of the earth] [and its environment] from outer space [shall] [should] be conducted in accordance with international law, including the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and other Celestial Bodies.

Principle 111

1. States carrying out programmes for remote sensing of [the natural resources of the earth] [and its environment] from outer space [should] [shall] promote international co-operation in these programmes. To this end, sensing States [should] [shall] make available to other States opportunities for participation in these programmes. Such participation should be based in each case on equitable and mutally acceptable terms due regard being paid to elements . . .

2. In order to maximize the availability of benefits from such remote sensing data, states are encouraged to consider agreements for the establishment of shared regional facilities.

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[212] Stowe, NINETEENTH COLLOQUIUM, *supra* note 192, at 93.

Principle IV

Remote sensing [of the natural resources of the earth] [and its environment] from outer space [should] [shall] promote the protection of the natural environment of the earth. To this end States participating in remote sensing [should] [shall] identify and make available information useful for the prevention of phenomena detrimental to the natural environment of the earth.

Principle V

States participating in remote sensing of [the natural resources of the earth] [and its environment] from outer space [should] [shall] make available technical assistance to other interested States on mutually agreed terms.

The major significance of these principles is that some agreement has been reached by the many nations concerned. The disquieting fact is that none of the five draft principles address the very thorny problems raised by ERS. The principles tacitly recognize ERS as peaceful, but fail to lay to rest the problems of whether all ERS activities are nonaggressive and whether such activities are violations of sovereignty. Prior consent to overflight is not addressed. The principles wili not quiet the fears of developing nations because the principles do not recognize the need to reach some compromise solution between total control of ERS data by an observed state and free access by all states. A draft treaty designed to effect such a compromise, as well as solve other areas of disagreement related to ERS, is set out in the Annex. The more important provisions of the document are explained in the following discussion.

Articles I and II are verbatim adoption of the first two draft principles formulated by the Legal Subcommittee of the Outer Space Committee of the United Nations.

Article IV explicitly provides that military surveillance is consistent with the United Nations Charter and international law. It confines such surveillance to nonaggressive purposes by requiring it to be conducted in the interest of maintaining world peace and security. This is a necessary provision in any treaty on remote sensing satellites because it will lay to rest the now old disagreement concerning the legality of such military surveillance.

Article V establishes a definite role for the United Nations in remote sensing activities. It makes that body the central focus for all data storage and dissemination. This role fills the need for centralization of all ERS data and yet does not burden the United Nations with a task beyond its resources.

The most important Article in the draft document is Article VI. This Article attempts to provide the middle ground between total control and unencumbered release of data. It provides:

> 1. States Parties to this Treaty shall transmit, on a priority basis, all facts, findings and other pertinent remote sensing data gathered through a program of remote satellite sensing involving the national territory and jurisdictional waters of any state or states to the state or states concerned.
>
> 2. States Parties, and the United Nations Data Center established pursuant to Article of this Treaty, shall not release, distribute or disseminate any remote sensing satellite data within one hundred and twenty days from the date such data is released to an observed state as provided for in paragraph 1 of this Article VI. Upon the expiration of one hundred and twenty days, all data shall be made available upon request to any state, international organization, regional organization, scientific community, body or group, or private party.

The Article establishes protection for an observed state by requiring first release to that state of data concerning its territory while requiring that data to be withheld for at least one hundred and twenty days from any other state or party. The observed state will be able, during the one hundred and twenty day grace period, to take such steps as it deems necessary to protect its national interests. However, no single state will be able to block regional programs because the data will become free for distribution at the end of the grace period.

The one hundred and twenty days is a somewhat arbitrary figure and could be negotiable. However, any time limit accepted must be long enough to allow the observed state time to act, but short enough to prevent the data from becoming useless by the passage of time.

Acceptance of Article V which will allow full use of ERS data without presenting a real danger for exploitation of the natural resources of any state, is a most reasonable settlement of a difficult dispute. It provides a workable middle ground upon which all concerned parties should be able to meet.[213]

VII. CONCLUSION

Earth resources satellites offer an effective means to achieve real management of the world's natural resources. They open " . . . new

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[213] This approach is beginning to achieve great interest in the world community and there is evidence that it may well be the most acceptable solution. *See* Stowe, NINETEENTH COLLOQUIUM, *supra* note 192, at 96.

horizons . . . and offer new beginnings in ways we can manage this precious planet with all the attendant aspirations, hopes and opportunities for creative action.'' [214] Every effort must be made to preserve these unique opportunities and to prevent acts of ignorance, self-interest or indifference from diminishing or preventing the development of the full potential of earth resources satellites. As a first step, it is essential that all nations concerned move rapidly to establish by treaty the international law that is to govern remote sensing activities. The long festering disagreements over the peaceful nature of ERS, data release and use, sovereignty and the role of the United Nations must be resolved by any treaty that is adopted. The draft treaty set out in the Annex would provide a workable compromise of the multitude of positions on the subject and would establish finally the place of ERS in the community of legal satellite operations.

[214] 1972 *Hearings, supra* note 25, at 243.

ANNEX

Draft International Agreement On Remote Sensing of Earth by Satellite

The States Parties to the Present Agreement:

Considering the need for global surveys of earth resources by means of remote sensors installed in satellites,

Reaffirming the principle of free use of outer space for peaceful purposes,

Recognizing the sovereign right of states to control their natural resources,

Bearing in mind United Nations General Assembly resolution 1314 (XIII) of 12 December 1958 which declares that permanent sovereignty of peoples and nations over natural wealth and resources is a constituent of the right of self-determination,

Accepting the need to regulate on an international level activties carried out through remote sensing satellites,

Have agreed on thefollowing:

Article I

Remote sensing of the natural resources of the earth and its environment from outer space and international co-operation in that field shall be carried out for the benefit and in the interests of all mankind, irrespective of their degree of economic or scientific development, and taking into consideration, in international cooperation, the particular needs of the developing countries.

Article II

Remote sensing of the natural resources of the earth and its environment from outer space shall be conducted in accordance with international law, including the Charter of the United Nations and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies.

ARTICLE III

Such use shall, in particular, respect the principle of the sovereignty of States, with special reference to the right of permanent sovereignty of peoples and nations over their wealth and resources as a basic constituent of their right to self-determination.

ARTICLE IV

Remote sensing of earth from outer space for military purposes, when conducted in the interest of maintaining world peace and security, is consistent with international law and the Charter of the United Nations.

ARTICLE V

1. There shall be established under United Nations auspices a data center for the receipt, storage, analysis and dissemination of data developed by remote sensing satellites.

2. States Parties to the Treaty shall furnish to the United Nations Data Center a master copy of all data obtained from any program of remote sensing by satellite.

3. All nations, international organizations and scientific groups or individuals shall be entitled to request and receive a copy of any data held by the United Nations data center, provided, however such release is consistent with Article V of this Treaty.

ARTICLE VI

1. States Parties to this Treaty shall transmit, on a priority basis, all facts, findings and other pertinent remote sensing data gathered through a program of remote satellite sensing involving the national territory and jurisdictional waters of any state or states to the state or states concerned.

2. States Parties, and the United Nations Data Center established pursuant to Article V of this Treaty, shall not release, distribute or disseminate any sensing satellite data within one hundred and twenty days from the date such data is released to an observed state as provided for in paragraph 1 of this Article V. Upon the expiration of one hundred and twenty days, all data shall be made available upon request to any state, international organization, regional organization, scientific community, body or group, or private party.

ARTICLE VII

States Parties are entitled to conclude agreements, whether bilateral or regional, in conformity with the stipulations of the present treaty.

MZRANDA V. ARIZONA — THE LAW TODAY*

Captain Frederic I. Lederer **

I. INTRODUCTION

You have the right to remain silent; anything you say may be used against you at trial; you have a right to consult with a lawyer and to have a lawyer present during this interrogation and if you cannot afford a lawyer one will be appointed for you.

Thus speaks the Supreme Court in *Miranda v. Arizona*,[1] surely one of the Court's most controversial decisions in criminal law, and one almost certain to be modified by the Court in the near future. The decision is complex and will be discussed at length later. However, it is important to note at this point that the decision in *Miranda* supplied an affirmative duty on the part of police desiring to conduct custodial interrogations to warn an accused of his right to remain silent and of a right to counsel at interrogations far broader than had ever existed before the decision. Contrary to some impressions, the basic nature of *Miranda* was far from unpredictable—what was unusual was the specificity found within the opinion and the strictness with which it had to be applied to be of value.

The history of the Supreme Court's dealings with the confession problem is a story of partially futile attempts to find a tool with which to control improper police conduct. In the development of the contemporary law of confessions, the tool the Court ultimately seized was the right to counsel. This right was considered, if not the perfect tool, at least far better than its nearest competitors. The first decision of nationwide scope was *Massiah v. United States*,[2] finding a sixth amendment right to counsel at post-indictment inter-

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*The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** JAGC, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, on extended leave to study European criminal law on a Fulbright-Hays Fellowship at the Max Planck Institut fur auslandisches und internationales Strafrecht, at Freiburg, Germany. B.S., **1968,** Polytechnic Institute of New York; J.D., **1971,** Columbia University; LL.M., **1976,** and S.J.D. candidate, University of Virginia. Member of the Bars of New York, the United States Court of Military Appeals, and the United States Supreme Court.

[1] **384** U.S. **436 (1966).** The warnings listed represent only one variation of those in general use, and do not include the required waiver questions.

[2] **377** U.S. **201 (1964).** The Court had previously been disturbed by police interfer-

rogations when the defendant had retained counsel. *Massiah* was followed in a few months by *Escobedo v. Illinois.*[3]

Within the military service, a requirement for counsel warnings has been in effect since at least the 1967 decision of the Court of Military Appeals in the case of *United States v. Tempia.*[4]

11. *ESCOBEDO V. ILLINOIS*

On January 19, 1960, Danny Escobedo's brother-in-law was fatally shot. Escobedo was arrested, interrogated and released the next day. On January 30th an accomplice turned state's evidence, and Escobedo was arrested and taken to the police station. During the ride to the station house Escobedo refused to answer questions, stating that he wanted advice from his lawyer.[5]

Notified by the mother of a friend, Escobedo's lawyer arrived at the station house soon after Escobedo. Despite his best efforts, in which he spoke to virtually every policeman in the area including the chief of police, the lawyer was refused permission to speak with his client until questioning was completed. Escobedo repeatedly requested permission to see his counsel. Confronted with an accusation that his accomplice had blamed the crime on him, Escobedo admitted participation in the crime. At trial Escobedo's motions to suppress the statements were overruled. The Supreme Court reversed on right-to-counsel grounds. Through Mr. Justice Goldberg,

ence with a suspect's desire to contact counsel. ***See*** Haynes v. Washington, 373 U.S. 503 (1963) (police refused to allow accused to call wife or attorney).

[3] 378 U.S. 478 (1964).

[4] 16 C.M.A. 629, 37 C.M.R. 249 (1967). ***See*** Lederer, *Rights Warnings in* ***the Armed Services***, 72 MIL. L. REV. 1, 46 (1976). While there is some small confusion relating to the right to counsel at interrogations prior to ***Miranda v. Arizona***, it appears that the Court of Military Appeals, apparently applying the sixth amendment. had held that a suspect who requested counsel had a right to *consult* with a lawyer. ***See*** United State; v. Wimberley, 16 C.M.A. 3, 36 C.M.R. 159 (1966); United States v. Rose. 8 C.M.A. 441, 24 C.M.R. 251 (1957); United States v. Gunnels. 8 C.M.A. 130, 23 C.M.R. 354 (1957). The right to consult with counsel meant only that the suspect had the right to speak with privately retained counsel or the staff judge advocate or his representative. It did not include the right to have counsel present at the interrogation and did not include the right to have counsel appointed for any but the most limited purpose. ***See*** Wimberley, 16 C.M.A. at 10, 36 C.M.R. at 166. *But* ***see*** Gunnels, 8 C.M.A. at 139, 23 C.M.R. at 369. Clearly no right existed for a suspect to be warned of his limited right to consult with counsel. Wimberley, 16 C.M.A. at 10, 36 C.M.R. at 166. *Miranda* was adopted by the Court of Military Appeals in United States v. Tempia, 16 C.M.A. 629, *37* C.M.R. 249 (1967). While it seems far from clear, it would appear that the pre-*Tempia* decisions of the Court of Military Appeals were implicitly overruled by ***Tempia***, requiring one to presume that the primary right to counsel at interrogations is found only in the fifth and sixth amendments as interpreted by ***Miranda***.

[5] Escobedo v. Illinois, 378 U.S. 478, 479.

the Court reasoned that when Escobedo was refused the right to see his lawyer he had become an accused and the purpose of the interrogation was to "get him." [6] According to Mr. Justice Goldberg, "it would exalt form over substance to make right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." [7] Thus, the Court's prior decision in *Massiah* was extended to the *Escobedo* fact pattern.

The decision was otherwise buttressed by stating that for the right to counsel at trial to have any meaning counsel would be necessary at pretrial interrogation, for otherwise the conviction would already have been assured.[8] Interrogation was thus a "critical stage." The holding of the case was stated thusly:

> Where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements. the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment. . . .[9]

Surely a more limited decision could scarcely have been imagined. Yet Mr. Justice White,[10] dissenting, viewed the decision more expansively, stating that "[a]t the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel." [11] As time proved, Justice White's prediction was remarkably accurate. Taken at his word, however, Justice Goldberg's decision was limited to cases in which a defendant was made aware of his right to remain silent and requested and was refused access to his counsel. A warning of the right to counsel was not required. Further, for *Escobedo* to apply, the investigation had to have "focused" on the accused who had also to have been taken into custody. The definition of focus was left open.

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[6] *Id.* at **485.**
[7] *Id.* at **486.**
[8] *Id.* at **487,** citing *In re* Groban, **352** U.S. **330, 344** (1957) (Black, J. in an opinion joined by Warren, C.J., and Douglas and Brennan JJ., dissenting).
[9] *Id.* at **490–91.**
[10] *Id.* at **495.**
[11] *Id.*

Ultimately, *Escobedo,* a limited decision when taken at its word, proved of limited value.[12] Far more important was the use of the decision as a stepping stone to what Justice White feared was likely, the case of *Miranda V. Arizona.*

III. *MIRANDA V. ARIZONA* [13]

The Supreme Court's decision in *Escobedo* v. *Illinois* [14] left the law of confessions in uncertainty. While the decision itself had been narrow and virtually limited to the facts of the case, potential for broad expansion was clearly evident. Deeply concerned by the need to predict the Supreme Court's ultimate interpretation of the fifth amendment, the organized bar struggled to delimit the final boundaries of the *Escobedo* decision.[15] Foremost among the questions left by *Escobedo* were:

> When did a suspect who desired to see retained counsel have a right to see him?
>
> Did a suspect who desired counsel during or before interrogation but who lacked the funds to retain one have a right to have one appointed free of charge?
>
> Did government interrogators have to affirmatively warn suspects of their right to counsel prior to interrogation?

The questions left by *Escobedo* were almost solely ones relating to a right to counsel. At stake was the suspect's right to consult

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[12] Taken literally, the opinion was of little consequence. However, the case rapidly came to be viewed as prescribing a right to counsel whenever an investigation had "focused" on a suspect subjected to police interrogation. The definition of "focus" defied easy resolution until it was subsumed into *Miranda's* definition of "custody." *Escobedo* was, in one respect, a critical decision for it clearly extended the right to counsel to the investigatory process. Mr. Justice Stewart, dissenting, found this particularly objectionable: "[T]he vital fact remains that this case does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him," 378 U.S. at 492; and

> the Court today converts a routine police investigation . . . into a distorted analogue of a judicial trial. It imports into this investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings. By doing so, I think the Court perverts those precious constitutional guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police investigation.

378 U.S. at 494.

[13] 384 U.S. 436 (1966).

[14] 378 U.S. 478 (1964).

[15] *See,* Miranda, 384 U.S. 436, 440 at n.2 (1966). Ultimately, the Court held *Escobedo* to its facts. Michigan v. Tucker, 417 U.S. 433, 438 (1974). *citing* Kirby v. Illinois, 406 U.S. 682, 689 (1972); Frazier v. Cupp, 394 U.S. 731, 739 (1969); Johnson v. New Jersey, 384 U.S. 719, 733–34 (1966).

with a lawyer prior to or during a custodial interrogation. The right to counsel became the focal point of the problem because of the Court's belief that the police-dominated atmosphere surrounding most interrogations could be offset only by the presence of a lawyer whose sole responsibility was to the suspect. Ultimately of course the post-Escobedo issues reached the Supreme Court.

The vehicle which the Court chose to resolve the Escobedo problems was Miranda, consolidated with three other cases,[16] all of which raised related fifth amendment and confession problems. While it is beyond the scope of this article to discuss the individual cases, it is important to point out that as a group they included most of the factual variations important to an attempted definitive resolution of the Escobedo issues. Both state and federal cases were included; warnings of one type or another had been given in some cases but not in others.[17] Similarly, while the relief requested in each case was identical, the reversal of a conviction, or the affirmance of a reversal, the legal arguments raised by the various defendants varied from a limited reliance on the due process voluntariness doctrine to a claim that the Constitution required automatic assignment of counsel before a custodial interrogation could yield admissible evidence. In almost all the cases the defendants placed their primary reliance on the fifth amendment right against self-incrimination, arguing that the right to counsel was essential to a realistic exercise of the privilege.

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[16] Vignera v. New York; Westover v. United States; and California v. Stewart, consolidated with Miranda v. Arizona, 384 U.S. 436 (1966).

[17] *Miranda, Vignsra,* and *Stewart* were state cases, while *Westover* was a federal case. In *Miranda,* the accused was suspected of rape and kidnapping. After a lineup in which Miranda was identified, he was interrogated without prior warnings for about thirty minutes after which he confessed. Prior to trial, a court-ordered psychiatric examination found Miranda to be an immature 23-year-old with an 8th grade education, with a prior record and a sociopathic personality disorder or disturbance since an early age. The written confession ultimately signed by Miranda contained a paragraph stating that it was given voluntarily and with knowledge that it could be used against him. At trial the defense counsel objected to its admission on the grounds that the defendant had had a right to counsel at the time of his arrest.

Vignera was arrested for armed robbery of a dress shop. He confessed to police after arrest and after a successful lineup. Subsequently, Vignera made a full confession again to an assistant district attorney. This confession, recorded by a stenographer, was admitted against Vignera at trial over defense objection.

In *Stewart,* the defendant was charged with robbery and murder. Stewart was questioned after a successful search of his house. He made a number of admissions during three days of questioning. On the fifth day of questioning he admitted the robbery of the murder victim, although not the murder or the other robberies he

Perhaps the best and most comprehensive argument was made by the Americal Civil Liberties Union appearing as *amicus curiae*:[18]

> The protection of the Fifth Amendment privilege afforded by the presence of counsel in police custodial interrogation designed to elicit a confession has been spelled out in other briefs in this case, is well known to this Court, and therefore, can be here quickly summarized. These include giving an effective warning of the suspect's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his will"; providing someone in whom the subject can confide and who is a contact between the subject and the outside world; assuring that if the subject chooses to tell his story, he does so in a way that conveys his intended meaning; and providing an outside observer to the interrogation proceedings.
>
> Obviously an effective warning of the privilege is a keystone of its effective enforcement. It is equally clear that there is a need to provide the presence of someone at interrogation in whom the subject can confide and who will bolster his confidence. As discussed above, it is a prime function of police custodial incommunicado interrogation to tear a subject away from all things on which he can rely for support and place him in complete subservience to the interrogator. The aim is to have him dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim. Not only is counsel a person outside the police force, he is one who can meet the accomplished police interrogator on a level of at least partial equality. By training and experience he should not be afraid to stand up to unrestrained governmental power. He is someone in whom the subject can freely confide. It is his

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was charged with. The statements were apparently made without warnings and without a request for counsel. They were received into evidence against Stewart. After the California Supreme Court reversed the conviction for failure to supply counsel, utilizing the expansive reading of *Escobedo.* People v. Dorado, 62 Cal. 2d **338, 398** P.2d **361, 42** Cal. Rptr. **169 (1965).** the State of California appealed. The defense reply appears to have argued reliance on due process voluntariness as well as right to counsel.

Westover was arrested by Kansas City police on suspicion of robbery and was then held for the FBI because of possible involvement in two California robberies. The FBI interrogated Westover in the Kansas City jail after the local police had completed their own questioning. Westover was first advised by the FBI that he had the right to remain silent, that anything he said could be used against him in a court of law, and that he had the right to consult with an attorney. Westover then confessed. He made similar statements with corrections the day after and was finally arraigned on federal charges eleven days after the initial state arrest. At the Supreme Court the defense claimed that Westover should have been actually supplied with counsel. Further, the delay in arraignment was attacked. ***See*** J. MEDALIE, FROM ESCOBEDO TO MIRANDA: THE ANATOMY OF A SUPREME COURT DECISION **31–42** (1966).

[18] Brief for Amicus Curiae, American Civil Liberties Union, at **21–23,** *reprinted* in Medalie at **66–67.**

> job to be a whole-hearted advocate for the subject with no conflicting interests in this regard.
>
> In order to make effective the privilege against self-incrimination it is also necessary to ensure that if a person desires to tell his story he is allowed to do so in a way that conveys his intended meaning. A police interrogator, however, is basically an accomplished cross-examiner who is trained to allude to a particular piece of incriminating evidence but then to "be on guard to shut off immediately any explanation the subject may start to offer at that time." Counsel present will tend to ensure that the accused has a real opportunity, if he so desires, to tell his story effectively and to eliminate distortions and ambiguities. In short, counsel can aid in examining the accused so that his story comes out as he aims to tell it as well as protecting him from unrestrained cross-examination. . . .[19]

Appeals to the sixth amendment right to counsel, though present, were rare. Just as the claims made by the convicted defendants were quite varied in scope, so too did the positions taken by the counsel for the state and federal prosecution vary widely, ranging from an outright denial of any right to counsel or warnings to the comparatively mild position taken by then Solicitor General Marshall [20] in which he conceded the right to counsel at interrogations but denied the need to warn suspects of the existence of that right.[21] Government counsel were united in their concern for the possible consequences to law enforcement that might flow from an absolute right to counsel at interrogations.[22]

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[19] *Id.*

[20] Now Mr. Justice Thurgood Marshall of the Supreme Court.

[21] *See,* J. MEDALIE, *supra* note 17, at 133–34, 140. Marshall believed that a defendant had a right to see his own counsel but that the Government was not required to appoint a lawyer for an accused without counsel. While he supported the concept of warnings as a matter of policy or procedure, he denied that the Constitution required such warnings.

Note that official transcripts of Supreme Court arguments are not available. However, in view of the importance of *Miranda* and its associated cases, a private transcript was made by the Institute of Criminal Law and Procedure of the Georgetown University Law Center, portions of which are reprinted in J. MEDALIE, *supra* note 17, at 77–188, and in Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 531–39 (4th ed. 1974) [hereinafter cited as KAMISAR].

[22] Counsel asserted that the consequences of such a right would be severe. On the one hand it was assumed that it would be impossible to supply the number of lawyers needed, and on the other that defense counsel would automatically tell their clients to remain silent. Any way that the prosecution viewed the situation, the usefulness of interrogation would be nil. It is interesting to compare these dire predictions with the actual results of *Miranda;* it appears that most suspects routinely waive their rights to counsel and to remain silent.

The Supreme Court's decision became of course even more controversial than its earlier decision in *Escobedo*. The Court announced a prospective rule [23] that required police desiring to conduct a custodial interrogation to warn a suspect of his right to remain silent and his right to have and consult with a lawyer at the interrogation. In the oft quoted critical passage of the majority opinion, Chief Justice Warren stated:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements. whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[24]

Although a definitive analysis of the *Miranda* decision is beyond the scope of this work, it can be suggested that the Court's decision flows smoothly from its earlier voluntariness decisions. One can only presume that incommunicado custodial police interrogation

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[23] The Court subsequently announced that *Miranda* applied only to cases the trial of which began after June **13, 1966,** the date of the decision in *Mirnndn*. Johnson **v.** New Jersey, **384 U.S.719 (1966). But see** Michigan v. Tucker, **417** U.S. **433** (1974), allowing use of derivative evidence obtained in a pre-*Miranda* interrogation. The Court has also held Miranda inapplicable to statements obtained before *Miranda* but used in retrial taking place after *Mimnda*. Jenkins v. Delaware. **395** U.S. **213 (1969).** Note that state rules may differ and be more beneficial to an accused. ***See*** Commonwealth v. Romberger, **454** Pa. **279, 312** A.2d **353** (1975).

[24] **384 U.S.** at **444–45** (footnotes omitted).

tends to be inherently coercive [25] and accordingly must be compensated for through the giving of an explanation of a suspect's rights and through the extension of a right to a lawyer at the interrogation. The Court drew such a conclusion relying upon the fact, as it viewed it, that modern custodial interrogation is psychologically rather than physically oriented. The right to counsel then was the "protective device to dispel the compelling atmosphere of the interrogation." [26] The Court also noted that without protections during pretrial interrogation, all the safeguards supplied at trial would become empty formalities.[27]

The holding of the *Miranda* decision can thus be viewed as an extension of the voluntariness doctrine. The critical parts of the decision extend the right to counsel to custodial interrogations,[28] require that the suspect in such a setting be informed of his rights, and require an affirmative waiver before questioning can take place.

Having once recognized not only the right of a suspect to consult with a lawyer at an interrogation, but the desirability of such representation, the Court was faced with problems of equal protection. Those who were wealthy enough to have counsel would receive not only full information as to their right to remain silent but also tactical advice and assistance and the psychological support the Court deemed vital to overcome the coercive station house atmosphere. Those too poor to have counsel would automatically be placed in a far more vulnerable and dangerous position.

Faced with a dichotomy in result based solely on economic factors, the Court chose not to regard the presence of counsel on behalf of those who could afford them as a lucky gratuitous assist but rather a basic dilemma which could be resolved only by granting the right to counsel to all regardless of indigency. Thus the core of the

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[25] The Supreme Court has consistently held that police custody and questioning are not "inherently coercive" so as to render a statement involuntary. *See* Bram v. United States, **168** U.S. **532, 556–58** (1897). However, *Miranda* leaves the reader with the unmistakable impression that the Court finally held otherwise. Certainly it is not the type of "inherent coercion" that makes all statements involuntary, for spontaneous statements are admissible without warnings of counsel, and the *Miranda* rights can be waived despite custodial circumstances. Accordingly, the term "inherently coercive" is used here in an attempt to describe accurately the Court's reasoning despite clear restrictions on the ultimate utility of the expression.

[26] 384 U.S. at **465.**

[27] *Id.* at **466,** *citing* Mapp v. Ohio, **367 U.S. 643, 685 (1964).**

[28] If, after being warned, the suspect requests counsel and counsel is unavailable, the police may not question him. The police always have the option of making counsel available or not interrogating.

Miranda decision is its affirmative extension of the right to counsel to all suspects subjected to custodial interrogation. The rights warnings required by the opinion not only directly implement the right against self-incrimination by informing suspects of its existence, but also support the right via the warning that the suspect may have counsel present to assist him regardless of possible poverty.

Perhaps as important as the Court's holding, however, is the additional language which accompanies it. The Court did not announce hard and fast rules; it expressly recognized the possibility of superior safeguards being created for custodial questioning of suspect. Having done so, it simply stated that *until* such safeguards were developed by a jurisdiction, the right to counsel, accompanied by its warnings, was to be given before resulting evidence could be admissible at trial.[30]

IV. OBJECTIONS TO *MIRANDA*

Criticism of *Miranda* has taken many forms, not the least of which has been a broadside attack on the decision's entire holding. Perhaps best expressed by Mr. Justice Harlan's dissent,[31] such a view finds the expansion of the right to counsel to interrogations to be both unfounded in precedent and necessity.

Justice Harlan took issue with the majority's attempt to eliminate all possibilities of coercion in its attempt to create what he viewed as a utopian conception of voluntariness.[32] Justice Harlan viewed some form of pressure as inherent in interrogation and felt that unacceptable forms of pressure could easily be dealt with via the Court's earlier voluntariness precedents. Showing a keen degree of insight, he also questioned the validity of the waiver allowed by *Miranda*, asking how such a waiver could be voluntary when the right to counsel itself had been extended to cope with what was viewed as inherent coercion. Similarly, he asked how spontaneous statements uttered in a custodial setting could be considered voluntary when the answer to the simplest question, unaccompanied by the required waiver, would be inadmissible.

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[29] **384** U.S. at **467.** Note that the Court later classified the warning requirements of *Miranda* as only "prophylactic rules developed to protect" the right against self-incrimination. Michigan v. Tucker, **417 U.S. 433, 439 (1974).**

[30] It now seems apparent that the Court is preparing to modify the *Miranda* warning requirement.

[31] **384** U.S. **436, 504** (Harlan, J. dissenting, joined by Stewart and White, JJ.).

[32] *Id.* at **505.** Mr. Justice Harlan also questioned the application of the privilege against self-incrimination in the police station house, claiming that historically the privilege had been inapplicable to "extra-legal confessions." *Id.* at 510.

Justice Harlan, like many others, also assumed that a lawyer present during an interrogation would normally advise his client to remain silent, Accordingly, he felt that the *Miranda* opinion would substantially interfere with necessary police investigation without adequate justification. While the recognition of a right to counsel at interrogations was the heart of *Miranda*, its requirement that a suspect be *warned* of his rights to counsel and to remain silent were also questioned.

The majority opinion referred to the experience of a number of agencies [33] and foreign jurisdictions [34] which utilized rights warnings. While the FBI, military, and English experiences all appeared relevant, only one [35] of the jurisdictions utilized a right to counsel at interrogations [36] and accordingly the experience of those jurisdictions had at best limited validity for general American application. The English [37] Judges' Rules, cited by the Court, did require that

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[33] The Court cited with approval the warnings required by the Federal Bureau of Investigation pursuant to departmental instruction, and the warnings required to be given in the military prior to criminal investigation, UNIFORM CODE OF MILITARY JUSTICE art. 31(b), 10 U.S.C. § 831(b) (1970) [hereinafter cited as UCMJ]. 384 U.S. at 483–86, 489.

[34] The Court referred to safeguards found at the time in England, Scotland, India, and Ceylon. 384 U.S. 436, 486–89. *See* note 37 *infra*.

[35] While the FBI gave a right to counsel warning, it did not include the right to obtain counsel for indigents until counsel was granted by a judge and it did not include the affirmative waiver apparently required by *Miranda*. 384 U.S. 436, 521.

[36] While the right to counsel, apparently based on sixth amendment considerations, had been evolving in the military, *see* United States v. Wimberley, 16 C.M.A. 3, 36 C.M.R. 159 (1966), the cases cited by the Supreme Court, 384 U.S. at 489 n.63, only recognized that a suspect who requested a lawyer had to be allowed to consult with an attorney. Thus, military experience supplied minimal support for the Court's holding as to counsel warnings. The statutory military rights warnings did not include a right to counsel. *See generally*, Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976). However, the statutory warnings had not caused any great difficulty in military police investigations.

[37] As presently promulgated, the JUDGES' RULES state:

JUDGES' RULES

These Rules do not affect the principles

(a) That citizens have a duty to help a police officer to discover and apprehend offenders;

(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;

(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;

(d) That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offense, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence:

suspects be informed of their right to remain silent but not only lacked a right to counsel but were and are enforced at the discretion of the trial judge who may choose to admit evidence seized in violation of the Rules.

Accordingly, the *Mirandn* warnings requirements had to be regarded as experimental and possibly dangerous to society. Even now it is difficult to judge how effective the warning requirements

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(e) That it **is** a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage. exercised or held out by a person in authority, or by oppression.

The principle set out in paragraph *(e)* above **is** overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Son-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

I. When a police officer is trying to discover whether. or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody *so* long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions. relating to that offence.

The caution shall be in the following terms:—

"You are not obliged to say anything unless you wish to do so hut what you say may he put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement. a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III. *(a)* Where a person **is** charged with or informed that he may be prosecuted for an offence he shall he cautioned in the following terms:—

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may he given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:—

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may he given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned. or elects to make a statement, a record shall be kept of the time and place at which every questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:—

(a) If a person says that he wants to make a statement he shall be told that it **is** intended to make a written record of what he says.

He shall always he asked whether he wishes to write down himself what he wants to

are.[38] Of course there is every logical justification to require that suspects be warned of their right to remain silent if only because the fifth amendment privilege would seem a useless formality if suspects are not made aware of its existence.

Another objection to the *Miranda* decision has been that the Court seemingly abandoned its judicial role and functioned as a legislature. Certainly the specificity of its holding makes such a criticism highly telling. Yet the objection ignores the central issue. The Court certainly has the constitutional responsibility to interpret the Constitution. Arguably it may also have increased responsibility

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say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:—

"I, ——————————, wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that shatever I say may be given in evidence."

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him whet matters are material.

(c) The person making'the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:—

"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.

(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement:—

"I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

(f) If the person who has made a statement refuses to read it or to write the above mentioned Certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III *(a)*.

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may he practicable, comply with these Rules.

HOME OFFICE CIRCULAR NO. 31/1964, APP. A, JUDGES' RULES AND ADMINISTRATIVE DIRECTIONS TO THE POLICE (London, 1964) [hereinafter cited as JUDGES' RULES]. Note that the Administrative Directions have been omitted.

[38] *See* section XIII, *infra*.

in the area of the administration of justice. The Court had been confronted with decades of coerced confessions. Faced with the perception that abuse of individual rights had taken a new and more difficult-to-detect turn — that psychological coercion was now superseding physical brutality — the Court chose the only instrument it could find to cope with its constitutional responsibilities. Further, it recognized the possibility of alternative forms of protection for the individual's right against self-incrimination and expressly noted that its decision was not meant to be the only acceptable solution.

While the long term vitality of *Miranda* is questionable,[39] it not only is the law at present but also is highly likely to remain important if not determinative in the future. Accordingly, the remainder of this chapter is devoted to an analysis of the *Miranda* decision as it has been interpreted by the courts of the United States.

V. THE *MIRANDA* REQUIREMENTS, A FRAMEWORK FOR ANALYSIS

Despite the Supreme Court's unusual attempt to be specific in the *Miranda* holding, the Court left open a substantial number of questions dealing with the application of its decision. Not only was there some doubt as to the exact nature of the warnings required, but more importantly it was unclear when the warnings had to be given. After all, the Court had used the words "custodial interrogation," words open to some debate. Was the question of an arresting officer on the street the type of "interrogation" that the Court had meant to include within *Miranda*'s ambit? What test was to be used to determine the presence of custody? Was it a subjective test — and if so, was it the suspect's or policeman's view that was to be determinative — or an objective one? What manner of waiver was to be required? Was the case to be applied in a relaxed fashion or perhaps in a hyper-technical one? Further, what obligations did the decision place on the police when a suspect exercised his rights to remain silent? Could he be asked to reconsider and was any violation fatal in all ways to resulting evidence? These and other questions flowed from *Mirandn*.

In order to analyze best the contemporary interpretation of *Miranda*, the following questions will be addressed in turn:

What warnings must be given?
Who must give warnings?

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[39] *Id.*

Who must receive warnings?
When must warnings be given?
How is the *Miranda* waiver obtained?
What is the effect of exercising one's *Miranda* rights?

VI. THE *MIRANDA* WARNINGS

At first impression, the Court would seem to have been more than adequately specific in its rendition of the warnings required by *Miranda*. The Court's language states: "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." [40] Later in the opinion, the Court makes it clear that the latter warning means not only that the suspect has a right to consult with an attorney, but that "if he is indigent a lawyer will be appointed to represent him." [41] Beyond this the opinion is silent.

Despite the seeming clarity of the *Miranda* requirements, numerous courts have been compelled to interpret the validity of variations on the *Miranda* commandments. Most of these cases would appear to have been concerned with the right-to-counsel warning although a respectable number of cases exist considering the other warnings and suggesting that still further warnings may be necessary.

A. THE RIGHT TO COUNSEL

Miranda requires that a suspect entitled to warnings be warned that he has a right to have an attorney present during the interrogation and that if he cannot afford an attorney one will be appointed for him.[42] Failure to advise a suspect of his right to *free* counsel is usually considered noncompliance with *Miranda* [43] and fatal to the admissibility of any resulting statement.[44]

While the use of the word "attorney" rather than "lawyer" has

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[40] **384** U.S. **436, 444 (1966).**
[41] *Id.* at **473.**
[42] *Id.*
[43] *See* United States v. Cullinan, **396** F. Supp. **516** (N.D. Ill. **1975);** People v. Hermance, **35** N.Y. 2d **915, 324** N.E. 2d **367,** ___ N.Y.S.2d ___ (1974). Note Batteaste v. State, — Ala. App. —, **331** So. 2d **832** (Ct. Crim. App. 1976), holding that the warning that if the suspect cannot afford a lawyer, one will be appointed for him need not include the specific statement that such a lawyer will be "free of charge."
[44] *See* Commonwealth v. Bomberger, **454** Pa. **279, 347** A.2d **460 (1975).** For an

been controverted, there appears little general objection to the use of the term attorney. Far more important has been the question of exactly when the right to counsel attaches in relation to the warning given by the police to the suspect. The suspect has a right to consult with counsel before interrogation and to have counsel present during the interrogation. No interrogation may take place if the suspect wants a lawyer until counsel is supplied.

A number of courts have determined that the failure to advise suspects of their right to consult with counsel *prior* to interrogation does not constitute error when the right to have counsel present *during* the interrogation is made clear.[45] Presumably the right to consult with counsel is subsumed in the general right to counsel in most courts.

Cases in which the police warning has suggested that the right to counsel might attach at some substantially later time have proven far more troublesome. In the usual case the suspect is either advised that a court will appoint counsel if needed or, "We have no way of giving you a lawyer if you cannot afford one, but one may be appointed for you, if you wish, if and when you go to court." [46] As the accused has both an absolute right to remain silent and the right to have counsel present to assist during any interrogation to which the suspect voluntarily consents, such a warning means only that a suspect desiring appointed counsel cannot be interrogated until counsel is available. In short, the only option that is foreclosed is that of making an "immediate" statement with the assistance of counsel.

However, the usual warning that refers to a future right to counsel is confusing at best and creates a substantial risk of leading a suspect to believe that no effective right to appointed counsel exists at the interrogation. The courts are divided completely insofar as the propriety of admitting statements obtained after warning indicating that counsel is not immediately available.[47] Although final

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interesting decision, *see* United States v. Cullinan, 396 F. Supp. 516 at 518 (N.D. Ill. 1975), holding that failure to warn a suspect of his right to free counsel in the event of indigency would be harmless if the prosecution could present adequate proof of the suspect's ability to afford to retain counsel.

[45] *See* United States v. Floyd, 496 F.2d 982 (2d Cir. 1974); State v. Ralls, 167 Conn. 408, 356 A.2d 147 (1974); Sands v. State, 542 P.2d 209 (Okla. 1975).

[46] Grennier v. State, 70 Wis. 2d 204, 214, 234 N.W.2d 316, 321 (1975).

[47] *See* Wright v. North Carolina, 415 U.S. 936 (1974) (Douglas, J. dissenting from denial of a petition for grant of a writ of certiorari) and cases cited therein. Note that both federal and state courts are divided on this issue. *See also* Note, *Criminal Procedure: Miranda Warning and the Right to "Instant Counsel"—A Growing Schism.* 29 OKLA. L. REV. 957 (1976).

resolution of the issue awaits future decisions, a trend towards acceptance of statements given after warnings of this kind seems to be developing.[48] It is interesting to note that while the American Law Institute's Model Code of Pre-Arraignment Procedure expressly recognizes a warning that counsel will be appointed at a later time, it does so in an unusually clear and forthright manner that should cure most of the defects surrounding the present formulations.[49]

B. THE RIGHT TO REMAIN SILENT

Perhaps the most important *Miranda* warning is that the suspect "has the right to remain silent, and that any statement he does make may be used as evidence against him."[50] The basic warning itself is simple and difficult to abuse. However, a number of formulations have been used by various jurisdictions to explain the right to remain silent. No specific phrasing seems required so long as the right to remain silent is sufficiently communicated to the accused.[51] Occasionally police efforts to suggest that the suspect may refrain from incriminating himself but may not remain silent, or that the suspect may be charged with misprision of felony if he is not involved and remains silent, are improper and will result in suppression of any resulting statement.[52]

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[48] *See* Schade v. State, 512 P.2d 907 (Alas. 1973) (police officer was only telling the truth); United States v. Rawls, 322 A.2d 903 (D.C. 1974); State v. Maluia, 56 Hawaii 428, 539 P.2d 1200 (1975); Arnold v. State, 548 P.2d 659 (Okla. 1976); Grennier v. State, 70 Wis. 2d 204, 234 N.W.2d 316 (1975). *But see* Hock v. State, ___ Ark. ___, 531 S.W.2d 701 (1976) (warning valid on the facts of the case but would be invalid for indigents); People v. Buckler, 39 N.Y.2d 895, 352 N.E.2d 583, 386 N.Y.S.2d 396 (1976). A number of courts have accepted statements using these warnings but have done so with deep concern. ***See*** *Grennier, supra.*

[49] No law enforcement officer shall question an arrested person after he has been brought to the police station or otherwise attempt to induce him to make a statement unless he has been advised by the station officer in plain understandable language . . . (c) that if he wishes to consult a lawyer or to have a lawyer present duringquestioning, but is unable to obtain one, he will not be questioned untii a lawyer has been provided for him; such advice shall also include information on how he may arrange to have a lawyer so provided.

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8(1)(c) (1975).

[50] 384 U.S. 436, 444 (1966).

[51] ***See*** Commonwealth v. Spriggs, 463 Pa. 375, ___, 344 A.2d 880, 882–83 (1975) (warning that "you have the right to refuse to answer questions asked of you while you are in custody . . ." was sufficient to convey the right to remain silent despite the failure to use the word "statement").

[52] ***See*** United States v. Williams, 2 C.M.A. 430, 9 C.M.R. 60 (1953) (deals with the military's statutory analogue to *Miranda);* United States v. Allen, 48 C.M.R. 474 (A.C.M.R. 1974).

C. THE CONSEQUENCES OF MAKING A STATEMENT

Under the *Miranda* formulation, an interrogator must advise his suspect that any statement made "may be used as evidence against him." [53] Variations of the warning have used "will," "could," or "might" in place of the word "may" in the warning.[54] Stating that any comments "will be used against you" certainly provides the suspect with the strongest warning. However, it fails to take into account the possibility that the evidence might be used for the accused. Paralleling the *Miranda* formulation, the English Judges' Rules provide that an interrogating constable must tell a suspect that anything he may say "may be put into writing and given in evidence." [55] Telling the American suspect that his statement might be used for him may, however, be considered an improper inducement which will render a statement involuntary.[56]

D. OTHER WARNINGS

While *Mirandn* set forth a number of required rights warnings, defense counsel have frequently argued that given cases require a number of additional warnings not specifically spelled out in the decision.

Perhaps the most common additional warning said by the defense to be required is that the suspect who has chosen to make a statement may choose to change his mind at any time and remain silent. While there is no doubt that the suspect may indeed invoke the right to remain silent at any time during interrogation,[57] *Miranda* does not require that suspects be advised of that right to terminate an interview, so long as their decision to stop talking is respected;[58] accordingly, the courts have almost unanimously denied the defense claim that such a warning is required.[59]

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[53] **384** U.S. **436, 444 (1966).**
[54] ***See generally*** Kamisar *supra* note **21,** at **570–71.**
[55] **JUDGES'** RULES, *supra* note **37,** Rules 11, III & IV.
[56] ***See*** KAMISAR *supra* note **21,** at **570–71** for a discussion of this issue.
[57] **384 U.S.436, 473–74 (1966).**
[58] *Id.* at **444–45, 467–70, 473–74.**
[59] *See* Crowe **v.** State, **54** Ala. **App. 121, 305** So. **2d 396** (Ct. Crim. **App. 1974);** State v. Cobbs, **164** Conn. **402, 418–19, 324 A.2d 234, 244,** *cert. denied,* **414 U.S. 861** (1973); State **v.** Sherwood, **139** N.J. Super. **201, 204–05, 353 A.2d 137, 139** (1976); Commonwealth v. **Alston, 456** Pa. **128, 317 A.2d 241 (1974);** State v. Harbaugh. **132** Vt. **569, 577–78, 326 A.2d 821, 836** (1975);

Perhaps more important is the occasional defense claim that the suspect should be notified of sufficient facts to allow him to make an intelligent decision insofar as waiver is concerned. At a minimum, some counsel have argued, the suspect should be told of the nature of the offense of which he is suspected.[60] Others have argued that surrounding circumstances should be disclosed, such as whether the crime is a felony or misdemeanor; or whether a victim has died or been seriously injured. If evidence indicates that the suspect has been able to make a knowing and intelligent waiver, most courts have held that information as to either the nature of the offense or of surrounding circumstances is not required.[61]

While it seems unreasonable to require the police to give a complete briefing to a suspect prior to requesting a statement, there would appear to be no reason not to require the police to warn a suspect of the basic nature of the offense of which he is suspected. Such an approach has been in use in the military since 1951[62] and has not proven detrimental to investigation.

An additional warning that has been discussed by a number of noted commentators [63] is the statement that the silence of an accused will not be used against him. In the light of recent Supreme Court decisions,[64] that warning would now be legally true insofar as admission of evidence of a warned witness' silence at trial is concerned. However, as Professors Kamisar, LaFave, and Israel point out,[65] the accused's silence may well have detrimental effects in-

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[60] *See* U.C.M.J. art. 31(b), requiring that a suspect be advised of the nature of the offense of which he is suspected. The warning need not be overly specific or technical (*e.g.*, "you are suspected of killing Smith" is enough). Miller v. State, — Ind. —, 335 N.E.2d 206 (1975).

[61] *See* State v. Kenner, — La. —, 290 So. 2d 299 (1974) (defendant was not entitled to be warned that he was confessing to a felony); People v. Lewis, 43 App. Div. 2d 989, 352 N.Y.S.2d 248 (1974) (defendant was not entitled to be warned that the rape victim had died); State v. Owen, 13 Wash. App. 146, 149, 534 P.2d 123, 125 (1975) (general nature of charges against defendant are required). *But see* People v. Prude, 32 Ill. App. 3d 410, 415–17, 336 N.E.2d 348, 352–54 (1975) (juvenile suspects should have been warned of the possibility of trial for murder in normal adult courts); Harris v. Commonwealth, — Va. —, — S.E.2d —, 20 Crim. L. Rep. 2529 (Va. March 4, 1977) (interrogator was not required to warn juvenile that he might be prosecuted as an adult).

[62] *See* note 60 *supra; see generally* Lederer, *Rights Warnings in the Armed Services,* 72 MIL. L. REV. 1 (1976).

[63] *See* note 56 *supra.*

[64] Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975). *See generally* Comment, *Impeaching a Defendant's Testimony By Proof of Post-Arrest Silence: Doyle v. Ohio,* 25 CLEV. ST. L. REV. 261 (1976).

[65] *See* note 56 *supra.*

sofar as police decision making is concerned. Despite this, and inasmuch as most suspects feel a psychological necessity to speak (the underlying assumption of *Miranda*), one would think that a warning that the suspect's silence may not be used against him at trial would be desirable. It would at least minimize the inherent compulsion that *Miranda* deals with. However, such a warning does not appear to be required at this time and it would seem most unlikely that the Supreme Court would even consider extending *Miranda*.

VII. WHEN ARE *MIRANDA* WARNINGS REQUIRED?

For purposes of analysis the *Miranda* rule may be stated thusly: Warnings are required whenever a law enforcement agent subjects a suspect to custodial interrogation. The key terms are *law enforcement agent, suspect*, and *custodial interrogation*. It is critically important, however, to keep in mind that *Miranda* by definition applies only to those forms of communication protected by the fifth amendment privilege against self-incrimination. Thus, a number of actions that would appear to be "incriminating" in terms of consequence are not within *Miranda's* ambit. Examples of unprotected actions include the taking of handwriting and voice exemplars,[66] bodily fluids,[67] and obtaining consent to search.[68] Similarly, compelled psychiatric examinations normally will not require *Miranda* warnings.[69] For analytical purposes, these unprotected actions can best be viewed as not coming within the definition of "interrogation" for *Miranda* purposes.[70]

[66] *See* People v. Henderson, ___ Mich. App. ___, ___, 245 N.W. 2d 12, 74 (1974) (*Miranda* warnings held unnecessary when obtaining voice samples. as voice exemplars are unprotected by the fifth amendment).

[67] Schmerber v. California, 384 U.S. 757 (1967) (bodily fluids not protected by the right against self-incrimination).

[68] Schneckloth v. Bustamonte. 412 U.S. 218 (1973) (*Miranda* warnings or warning of the right to refuse to give consent are not required for a valid consent search).

[69] At present the majority rule is that an accused intending to raise a defense of insanity can be compelled to submit to a government psychiatric examination. The defendant in such a case is said to have impliedly waived his privilege to the extent necessary to allow the examination and to allow the examining psychiatrist to testify at trial as to his conclusions. *Miranda* warnings are thus inappropriate. For a reappraisal of this view, *see* Comment, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel. and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants.* 11 COLUM. J.L. & SOC. PROB. 403 (1975).

[70] Note that matters protected by the privilege may still escape *Miranda* because of other circumstances. *See* State v. Gwaltney, ___ N.C. App. ___, 228 S.E.2d 764

A. WHO MUST GIVE MIRANDA WARNINGS?

The *Miranda* warnings were designed to offset the psychological coercion assumed to be inherent in custodial questioning by law enforcement agents.[71] Generally, the cases have required police officers, prosecutors, and law enforcement agents with official status to give warnings,[72] and exempted private citizens from the warning requirements.[73] Part-time police and private security guards pose some difficulty. The primary question appears to be the existence of status as a local, state or federal officer.[74] Thus, cases involving private guards will frequently require a determination of the guard's arrest powers under local law. As one commentator has stated,[75] the private citizen exception to *Miranda* will generally not apply to citizens acting as police agents.[76] While police officers must give warnings before conducting custodial interrogations, under-

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(1976) (accident report questions did not require *Miranda* warnings because the questions were investigatory rather than accusatory and thus were not within the scope of *Miranda).*

[71]384 U.S. 436, 444 (1966).

[72]*See generally,* J. ZAGEL, CONFESSIONS AND INTERROGATIONS AFTER MIRANDA: A COMPREHENSIVE GUIDELINE OF THE LAW 46-47 (1972).

[73]*See, e.g.,* Reno v. State, ___ Ala. App. ___, 337 So.2d 122 (Ct. Crim. App. 1976) (company officer); Commonwealth v. Mahnke, ___ Mass. ___, 335 N.E.2d 660 (1974) (vigilante group of private citizens were not required to give warnings to suspect subjected to custodial interrogation); Brown v. State, ___ Miss. ___, 293 So.2d 425 (1974) (jail cell questioning by victim's mother did not require *Miranda* warnings when the conversation was not instigated by the police).

[74]Official status or a significant police connection will require warnings. *Compare* Tarnef v. State, 512 P.2d 923 (Alas. 1973) (private arson investigator who was a former police officer and who worked closely with the police and considered himself part of the "team" was required to give warnings); *and* Allen v. State, 52 Ala. App. 66, 297 So.2d 391 (Ala. Crim. App.), *cert. denied,* 292 Ala. 707, 297 So.2d 399 (1974) (interrogator who had occasionally acted as a part-time deputy sheriff in the past had sufficient connections with the sheriff that warnings should have been given) *with* United States v. Delay, 500 F.2d 1360 (8th Cir. 1974) (although interrogating newsman had acted as a part-time unpaid deputy sheriff, his past activities had been restricted to acting as a photographer, press secretary, or helping to search for drowning victims; accordingly, he was not a law enforcement agent for *Miranda* purposes).

[75]J. ZAGEL, *supra* note 72, at ___.

[76]Citizens acting as police agents may have to give warnings. *Compare* People v. Baugh, 19 Ill. App. 3d 448, 311 N.E.2d 607 (1975) (victim's attorney who questioned suspect in police custody was acting as a police agent and he should have given *Miranda* warnings) *with* State v. Jensen, 11 Ariz. 408, 531 P.2d 531 (1975) (prisoners who obtained a statement from cellmate were not "plants" and could testify to statements made by the accused). Note that a person investigating misconduct who is not a law enforcement agent may not have to give warnings despite holding an official position. *See In re* Brendan H., 82 Misc. 2d 1977, 372 N.Y.S.2d 473 (Schenectady Fam. Ct. 1975) (school principal investigating school misconduct not required to give warnings to students in the absence of police connection).

cover agents are usually exempted from the warning requirement simply because uqdercover work normally does not involve *custodial* interrogation.[77]

There are, of course, a number of persons likely to question a suspect as part of the law enforcement process who are not themselves law enforcement agents. Cases involving clerical personnel should be analyzed in terms of the status of the clerk, the purpose of the questioning, and the general policies served by *Miranda*. Government psychiatrists performing competency examinations, particularly examinations in response to sanity defenses, should theoretically present a problem, as the information gained from the suspect may well be used against him. However, inasmuch as the courts have nearly unanimously held that a suspect raising a sanity defense must consent to a government examination,[78] there would

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[77]If one were to be concerned only with questions of fairness there would appear to be some question why undercover agents should be allowed to question suspects without warnings when uniformed officers would be prevented from doing so. However, this avoids the rationale for *Miranda*. Undercover agents questioning suspects in a noncustodial setting by definition do not create the type of coercive atmosphere found in a police station.

[78]There has been general implicit acceptance that compelled psychiatric examination of this kind, usually on pain of preventing the defense from presenting all or part of its evidence on sanity, involves the types of coercion that allows the privilege to be invoked. However, the courts have distinguished the situation from the usual attempt to obtain incriminating testimony by concentrating on the intent and justification behind the examination. The overwhelming majority rule in the United States today is that when a defendant intends to raise a sanity defense he has impliedly waived in part his privilege against self-incrimination. ***See*** FED. R. CRIM. P. 12.2(c); United States v. Jines, No. 76-1102 (8th Cir. filed 1976); United States v. Cohen, 530 F.2d 43 (5th Cir. 1976); Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. 1976); United States v. Barrera, 486 F.2d 333, 338-39 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); United States v. Mattson, 469 F.2d 1234, 1236 (9th Cir. 1972); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Albright. 388 F.2d 719 (4th Cir. 1968); United States v. Babbidge, 18 C.M.A. 327, 40 C.M.R. 39 (1969); Lewis v. Thulemeyer, 538 P.2d 441 (Colo. 1975); Noyes v. State, 516 P.2d 1368 (Okla. 1973). ***But see*** United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975). ***See*** *generally* Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973); Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination*, 19 RUT. L. REV. 489 (1965); Lederer, *Rights Warnings in the Military, 72* MIL. L. REV. 1 (1976); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970). Under the decisions, the defendant must submit to a government psychiatrist (who need not give *Miranda* warnings) but who will not be allowed to testify at trial to any specific incriminating remarks made during the interview and must limit himself to his conclusions on the issue of sanity. ***See*** United States v. Bohle. 445 F.2d 54, 66-67 (7th Cir. 1967). Note that Virginia allows a coerced examination as long as the defendant is not forced to answer questions regarding the of-

appear to be no reason for warnings to be given.[79]

Foreign police have not been required to give *Miranda* warnings [80] when interrogating an American suspect if only because the United States cannot compel foreign jurisdictions to comply with American law. Clearly the prophylactic function served by *Miranda* domestically is irrelevant in foreign jurisdications with their own legal rules. This is not, however, to suggest that *Miranda* should not apply to foreign investigations which are conducted in conjunction with American authorities and are simply part and parcel of an American investigation.[81] American efforts to circumvent the *Miranda* requirements are to be discouraged. However, this approach creates a substantial risk of deterring American prosecution and leaving the American accused in the hands of foreign authorities. The balance is yet to be struck.

B. SUSPECT

While it is possible to have a custodial interrogation of a person who is not a suspect,[82] by the very nature of American law the number of custodial interrogations of nonsuspects will be extremely low. After all, if a person is not a suspect, what justification will the

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fense with which he is charged. Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975). Refusal by the defendant to submit may result in an adverse inference, preclusion of the use of defense expert witnesses, preclusion of the entire sanity defense, or perhaps even contempt. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), paras. 122(b) (2); 140(a) (2); 150(b), *as amended* by Exec. Order No. 11,835, 40 Fed. Reg. 4,247 (1975), ***reprinted*** as Change 1, MCM 1969 (Rev.).

[79] Where no right to remain silent exists there can be no reason for warning of its existence. However, the right to counsel at psychiatric examinations is not totally foreclosed and in those few jurisdictions recognizing a limited right to counsel some form of rights warning would seem appropriate.

[80] *See* United States v. Mundt, 508 F.2d 904, 907 (10th Cir. 1974) *(Miranda* warnings were not required in Peruvian investigation despite American participation in absence of American officers playing a "substantial role in events leading to the arrest").

[81] *See* Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975) (Mexican police acting on behalf of New Mexico police should have given *Miranda* warnings).

[82] A person in custody for one offense might be questioned merely as a witness to a second. Assuming that the questions relating to the second offense could not in any way touch on the first, a rather abstract and unlikely situation in view of the possibility of derivative evidence and the use of any information gained for impeachment and related uses, by implication *Miranda* would not appear to apply, as its purpose was to protect suspects from questioning. Note that the fact of custody is the determining feature for a suspect. Ih is unimportant that he is in custody for another offense so long as he is a supect. ***See*** Mathis v. United States, 391 U.S. 1 (1968).

authorities have to hold him in custody? Thus, normally, and in contrast to the statutory warning requirements [83] of military criminal law, the threshold question will often be whether the person questioned was in custody and not whether he was a suspect. The cases frequently exhibit in this regard an ambiguous use of the word "focus." While courts often attempt to determine if an investigation has "focused" on an individual to determine whether he was in custody at the time of questioning, the same question is also asked to determine whether the person questioned was truly a suspect at the time of interrogation. The two separate criteria for *Miranda* application are thus frequently merged, and careful analysis may be needed to distinguish a court's true holding.

C. CUSTODY

Miranda's use of the expression "custodial interrogation" is deceptively simplistic. The case defines it as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." [84] The problems engendered by this formulation can be grouped into two areas — the test to be applied in defining custody, and the determination of the presence of custody once a test has been arrived at.

The difficulty in arriving at a test is caused by *Miranda's* basic premise. If the warnings are to cope with psychological coercion felt by the suspect, the test at least arguably should be a subjective one that seeks to determine whether the *suspect* believed himself to be in custody. While such an approach may most fully implement *Miranda's* apparent intent, it may unreasonably open the door to perjury by the defendant. Similarly, the test makes determinative the suspect's perhaps unreasonable view of the situation. While there is much to be said for requiring warnings whenever a doubtful situation may exist, it was clearly not the intent of the Court in *Miranda* to foreclose *all* police questioning without warnings; and this could easily be the result of a purely subjective test.

An alternative test that was chosen by some jurisdictions after

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[83] The statutory military rights warnings, 10 U.S.C. § 831(b) (1970), apply, for example, whenever a suspect or accused is to be questioned without any requirement that the individual be in custody. Determination of whether a person was in fact a suspect becomes in the military a question of fact.

[84] 384 U.S. 436, 444 (1966). Note that in the deleted footnote which follows the quote, the Court stated, "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused."

Miranda was that of the *police officer's* view of the situation.[85] This subjective test eliminated unreasonable perceptions of the accused but substituted the perhaps unreasonable view of the police officer.

If the purely subjective tests are to be discarded, one is left with variations on an objective test. Two major variants seem possible: whether the defendant was in fact in custody—a purely objective test;[86] and, bearing in mind the accused's age, intellect, experience, physical condition, and so forth, whether he reasonably believed that he was in fact in custody.[87] This latter version has the advantage of taking into account the very factors that *Miranda* and its predecessors considered important.

The extent to which a jurisdiction may utilize any specific test is difficult to determine because of the necessity for a case-by-case approach and because of a tendency to use ambiguous language in decisions. A plurality of American jurisdictions seemingly using a single test appear to employ one or another type of objective standard to determine the presence of custody.

Many jurisdictions choose to use what they characterize as a "focus" test.[88] Deriving its origins from *Escobedo v. Illinois*,[89] this test in its purest sense (one seldom applied) attempts to determine whether the individual questioned was in fact the "focus" or central point of the investigation. The focus test, as a definitional test for

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[85] This test led to the question of the interrogating officer: "Would you have let the defendant leave?" No jurisdiction uses this test alone today.

[86] *See* J.M.A. v. State, 542 P.2d 170 (Alas. 1975); State v. Thomas, 22 N.C. App. 206, 206 S.E.2d 390 (1974).

[87] Or as often expressed—reasonably believe that he was free to leave. United States v. Luther, 521 F.2d 408 (9th Cir. 1975). *See* State v. Mayes, 110 Ariz. 318, 518 P.2d 568 (1974); People v. Herdan, 42 Cal. App. 3d 300, 116 Cal. Rptr. 641, ___ P.2d ___ (2d Dist. Ct. App. 1974); People v. Parada, ___ Col. ___, 533 P.2d 1121 (1975); State v. Inman, 350 A.2d 582 (Me. 1976); *In re* Brendan H., 82 Misc. 2d 1077, 372 N.Y.S.2d 473 (Fam. Ct. 1975); Commonwealth v. Fisher, ___ Pa. ___, 352 A.2d 26 (1976) (note that Pennsylvania uses both an objective test and the subjective view of the suspect, the positive results of either resulting in custody; *see* Commonwealth v. O'Shea, 456 Pa. 288, 318 A.2d 713 (1974)); Jordan v. Commonwealth, 216 Va. 768, 222 S.E. 2d 573 (1976).

[88] *See* Moore v. State, 54 Ala. App. 22, 304 So. 2d 263 (Crim. App. 1974); Reeves v. State, ___ Ark. ___, 528 S.W.2d 924 (1975); People v. Dunn, 31 Ill. App. 3d 854, 334 N.E.2d 866 (1975); State v. Carson, 216 Kan. 711, 533 P.2d 1342 (1975); State v. Ned, ___ La. ___, 236 So.2d 477 (1976); People v. Langley, 63 Mich. App. 339, 234 N.W.2d 513 (1975); State v. Raymond, ___ Minn. ___, 232 N.W.2d 879 (1975); State v. Simpson, ___ Utah 2d ___, 541 P.2d 1114 (1975).

[89] *See* note 84 *supra*. It seems likely that the Supreme Court was attempting through *Miranda's* footnote 4 to bring *Escobedo* into line with *Miranda*. While it may be possible to do so, the attempt is difficult at best and *Miranda* is better viewed as having created a new test for when warnings are required.

custody, has apparently been disavowed by the Supreme Court.[90] Cleansed, however, of its confusion with custody, focus remains a viable test to determine whether a person questioned was in fact a suspect,[91] and it may well be that use of the term that explains the frequent reference to focus in many of the opinions.

Following focus in popularity, is the variety-of-factors approach.[92] Perhaps best characterized by the fifth circuit's formulation, this test seeks to determine custody through a four-part approach: whether the police had probable cause to arrest the suspect: whether it was the officer's intent to hold the suspect in custody; whether the suspect believed that he was not free to leave; whether the investigation had focused on the suspect.[93] This approach allows the court to handle on an individual basis each case in which a formal arrest is lacking. While phrased in many fashions, many opinions in this area appear to follow a multi-factor approach leading to the distinct possibility that no majority rule exists in the nation today insofar as a specific definitional test for custody is concerned.

Regardless of the test adopted, the court in any specific case must determine whether the interrogated defendant was in custody. This is without question a matter totally dependent upon the facts of the case. Factors which have been considered important in this determination include the place of interrogation;[94] when the questioning

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[90]Beckwith v. United States, **425 U.S 341 (1976).** In *Beckwith*, **a** case involving the failure of IRS special agents to give warnings to the suspect whom they interviewed in a private home, the Court did concede the possiblity that "noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where the 'behavior of. . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' " **425** U.S. at **347-48** (citation omitted). While the failure to give warnings in such a case would be relevant, it would not be fatal. *See also* United States v.Gardner, **516** F.2d **334, 339-40 (7th** Cir. **1975).**

[91]*See* Steigler **v.** Anderson, **360 F.** Supp. **1286** (D. Del. **1973)** (questioning of family member whose relatives had died in an arson related fire were not part of an investigation which had focused on him); State v. Martin, **277** Minn. **470, 212** N.W. 2d **847 (1973)** (police simply wanted to know why defendant was in vacant apartment); State v. Bennett, **30** Utah 2d **343, 517 P.2d 1029 (1973)** (sheriff asked prisoner what had happened to fellow prisoner lying in a pool of blood; incriminatory answer came from nonsuspect (no focus)).

[92]*See* Smith v. State, **236** Ga. **12, 222** S.E.2d **308 (1976);** State v. Kalai. **56** Hawaii **366, 537 P.2d 8 (1975);** State v. Williams, **522 S.W.2d 641** (Mo. Ct. App. **1975);** State v. Godfrey, **131** N.J. Super. **168, 329** A.2d **75** (App. Div.), *aff'd*, **67** N.J. **267. 337 A.2d 371 (1974);** State v. Gill, **24** Ore. App. **541, 546 P.2d 786 (1976);** Ancira v. State, **516** S.W.2d **924** (Tex. Ct. Crim. App. **1974).**

[93]*See* United States v. Carollo, **507 F.2d 50, 52** (5th Cir. **1975);** Brown v. Beto, **468 F.2d 1284 (5th** Cir. **1972).**

[94]While a custodial interrogation may take place in the suspect's home, ***see*** Orozco

took place;[95] persons present, and the existence or absence of a formal arrest;[96] use of weapons or other physical restraint; whether the interview was initiated by the suspect or police;[97] whether the suspect attended the interview voluntarily;[98] whether the suspect was or felt free to leave the interrogation, and the length and nature of the interrogation itself. The mere fact that a person has been questioned by the police does not in and of itself create a custodial interrogation.[99] Accordingly, all the factors listed above may be relevant in determining whether custody existed for *Miranda* purposes.

The language of *Miranda* in speaking of any "*significant*" interference with the suspect's freedom of action is the key to the determination of custody. When the suspect has been formally arrested and brought to the police station house the determination is usually simple. Generally, it is only when the defendant has been questioned without an arrest, and usually outside the station house, that the numerous factors discussed above become critical.[100]

D. INTERROGATION— THEHEART OF MIRANDA

The *Miranda* warnings are designed to protect against coercive interrogation. The meaning of "interrogation" has tended, however,

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v. Texas, **394** U.S.**324 (1969);** Commonwealth v. Borodine, ___ Mass. ___, **353** N.E.2d **649** (1976), such a location is very likely to weigh heavily in a finding of no custody. *Cf.* Schneckloth v. Bustamonte, **412** U.S. **218, 247 (1973).** *See* Beckwith v. United States, **425** U.S. **341 (1976);** Roberts v. State, ___ Miss. ___, **301** So.2d **859 (1974)** (suspect's front yard); State v. Starkey, **536** S.W. 2d 858 (Mo. App. **1976)** (suspect's home).

[95] *See* Commonwealth v. O'Shea, **456** Pa. 288, **318** A.2d **713 (1974).**

[96] The Supreme Court has found the lack of a formal arrest to be of great— perhaps determinative— significance in a case involving the "voluntary" interrogation of a parolee. Oregon v. Mathiason, ___ U.S. ___, **97** S. Ct. **711 (1977)** (finding *Miranda* inapplicable). The Court's opinion suggests that the future may see *Miranda* limited to formal arrest situations that involve station house interrogations.

[97] *See* United States v. Victor Standing Soldier, ___ F.2d ___ (8th Cir. **1976).**

[98] *See* People v. Wipfler, **37** Ill. App. **3d 400, 346** N.E.2d **41 (1976);** Commonwealth v. Simpson, ___ Mass. ___, ___, **345** N.E.2d **899, 904 (1976).** This factor is by no means conclusive. ***See*** State v. Mathiason, **275** Ore. **1, 549** P.2d **673 (1976)** (voluntary attendance overcome by coercive environment and circumstances).

[99] For example, a recognized "exception" to *Miranda* exists for "general investigative questioning," a police officer's general questions at the scene of the offense. Despite the term "exception," frequently these cases are ones in which a suspect does not yet exist (the investigation has not yet "focused" on someone) or the individuals questioned are not in custody. *See* State v. Kalai, **56** Hawaii. **366, 537** P.2d 8 **(1975);** People v. Langley, **63** Mich. App. **339, 234** N.W.2d **513 (1975);** Jordan v. Commonwealth, **216** Va. **768, 222** S.E.2d **573 (1976).**

[100] *See generally* J. ZAGEL, *supra* note **72,** at **12-36,** for a complete list of factors with accompanying citation.

to become a term of art and defies easy definition. In its usual sense, interrogation for *Miranda* purposes refers to police questioning designed to elicit a response from a suspect. More than simple questioning is included, however. Any statement or action designed to elicit an incriminating response will be considered interrogation.[101] Whether a statement or physical act will indeed be considered interrogation will be determined on the facts of each individual case.[102]

Clearly exempted from *Miranda's* definition of interrogation, however, are volunteered or spontaneous statements.[103] If a suspect should initiate a statement or should respond to entirely neutral or innocuous questioning or statements with an incriminating comment, the comment is admissible[104] and the police need not

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[101] *See* Blackmon v. Blackledge, 396 F. Supp. 296, 299 (W.D.N.C. 1975) (confronting defendant suddenly after four hours of police interrogation with witness who accused him of murder was a form of interrogation requiring warnings). Some courts have held confrontations not to be interrogations.

[102] Police *statements* or actions are likely to be found to be noninterrogative. *See* United States v. Raines, 536 F.2d 796 (8th Cir. 1976) (police remark to suspect that a search warrant would be applied for after arrest was not an interrogation, and suspect's subsequent admission and surrender of evidence was not in violation of *Miranda);* United States v. Martin, 511 F.2d 148 (8th Cir. 1975) (police comment to defendant during search that they had arrived a day or so late to search was not an interrogation and the defendant's resulting admission was acceptable in evidence); People v. Mangum, ___ Colo. ___, 539 P.2d 120 (1975) (police statement to suspect that electronic equipment had had its serial number obliterated was not interrogation just as officer's greeting of the suspect was not); State v. Burton, 22 N.C. App. 559, 207 S.E.2d 344 (1974) (officer's act of handing white hat discovered at the scene of the crime to the defendant at the police station was not interrogation; defendant's acknowledgement of ownership did not violate *Miranda*). *But see* People v. Paulin, 61 Misc. 2d 289, 305 N.Y.S.2d 607 (Sup. Ct.), *aff'd*, 33 App. Div. 2d 105, 308 N.Y.S.2d 883, *aff'd*, 25 N.Y.2d 445, 255 N.E.2d 164, 366 N.Y.S.2d 929 (1969) (police statements concerning victim's death held to be interrogation). *See also* Brewer v. Williams, ___ U.S. ___, 45 U.S.L.W. 4287 (1977) (police transporting murder defendant emphasized to him the terrible weather and the fact that his victim's body was abandoned in it without Christian burial; the Court found this to be interrogation).

[103] 384 U.S. 436, 478 (1966). *See* Garcia v. State, ___ Ind. App. 2d ___, 304 N.E.2d 812 (1973) (statement by rape suspect: "It wasn't rape, it was assault with a friendly weapon" was admissible without warnings); State v. Hobson, ___ Minn. ___, 244 N.W.2d 654 (1976) (defendant refused to leave the police station without "his" gun; volunteered statement held admissible to establish possession of stolen weapon); Commonwealth v. Boone, ___ Pa. ___, 354 A.2d 898 (1975) (defendant asked policeman if he had heard what had happened; after his negative reply he told defendant they were going to the homicide division; she then admitted stabbing); State v. Valez, 30 Utah 2d 54, 513 P.2d 422 (1973) (as officer began to read the warnings to the defendant he volunteered: "You don't have to ask, I shot her."). *See generally* J. ZAGEL, *supra* note 72 at 37-40.

[104] *See* People v. Potter, 20 Ill. App. 3d 1049, 1054-55, 314 N.E.2d 201, 205 (1974)

interrupt the statement with *Miranda* warnings.[105] Further it appears probable, although the issue has not yet been finally resolved, that once a spontaneous statement begins the police may seek to have it continue or to flesh it out with neutral questioning.

The spontaneous statement exception to *Miranda* is difficult theoretically.[106] If *Miranda* presumes that the psychological coercion of custody requires an offsetting warning, the same coercive atmosphere would seem to compel a suspect to make volunteered statements to seek police approval. Removing volunteered statements from *Miranda's* coverage is thus inconsistent with its basic rationale.[107] However, the exception appears to be too well accepted to be modified at this stage.

Miranda and its related cases[108] dealt primarily with station house interrogations or their equivalent. Thus, the extent to which its comparatively broad holding involving custodial interrogations involved non-station-house questioning was unclear. It is now apparent that questioning a suspect in police custody will generally trigger the warning requirements regardless of the location of the questioning. However, a number of types of street encounter are not covered by *Miranda*.

Miranda expressly recognized the need for police investigation: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding."[109] The authors of the opinion seem to

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(deputy sheriff attempted to quiet a prisoner and had a neutral conversation with him; prisoner's volunteered statement that "he was going to con them like a snake and charm his way out . . ." was not obtained in violation of *Miranda).* Note that the nature of the statement made to the suspect will be of critical importance in determining whether it constitutes interrogation. *See* notes 101 & **102** *supra.*

[105] Miranda v. Arizona, **384** U.S. **436, 478** (1966).

[106] *See* United States v. Pauldino, **487** F.2d 127 (10th Cir. 1973) (police request for bill of sale for vehicle was proper after arrested suspect volunteered the statement that he had a bill of sale for the vehicle); United States v. Vogel, 18 C.M.A. 160, **39** C.M.R. 160 (1968). Whether questions are sufficiently neutral or have become improper interrogation must be determined from the individual facts of each case. State v. Taylor, **343** A.2d **11** (Me. **1975)** (policeman's question, "What do you mean?" held to be a neutral question following defendant's initiated statement, and reply was not in violation of *Miranda);* Commonwealth v. Yount, ___ Pa. ___, **314** A.2d **242** (1974) (defendant entered police station and announced that the police were looking for him; police questioning to determine why, and subsequently who had been his homicide victim, was proper).

[107] *Miranda* resolves the conflict by defining volunteered statements as those made "voluntarily without any compelling influences." **384** U.S. at **478.** Query, whether this statement applies to a volunteered admission made after station house detention?

[108] *See* note **17** *supra.*

[109] 384 U.S. at 477-78.

have envisaged a general investigation which lacked an identifiable suspect. The numerous cases in this area seem to break down into three major groups: those in which a known suspect did not exist at the time of questioning (*e.g.*, the investigation had not yet "focused" on the individual questioned or perhaps a violation of law was not yet clear);[110] those in which a suspect may have been known, but custody was lacking;[111] and those in which both a suspect and custody existed but police questioning was held to have been general investigation and not within the *Mirnndn* definition of interrogation.[112]

While there is some reason to doubt the propriety of the last-mentioned group of cases, the Supreme Court has in the years since *Miranda* evinced a hostility both to the case itself and to its application outside the station house.[113] Accordingly, this limit on *Miranda*'s scope may not be appropriate despite some question as to *Miranda*'s original meaning.

Similar to this last group of cases are the cases in which a suspect has been surprised in the commission of an offense by the police and is questioned, usually after he is taken into custody. A number of courts have approved questioning without warnings in such a situation, reasoning that *Mimndn* was never meant to apply to on-the-scene questioning. Presumably the courts involved believe that the coercive atmosphere of the station house is lacking in such circum-

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[110] *See* District of Columbia v. M.E.H., 312 A.2d 561 (D.C. App. 1973) (question of who owned the gun was addressed to the group, not to a given person); State v. Egger, 24 Ore. App. 927, 547 P.2d 643 (1976) (vehicle stop for erratic driving). *But* **see** People v. Norwood, ___ Mich. App. ___, 243 N.W.2d 719 (1976) (holding that sheriffs question, "What Happened?" to defendant who had summoned him to her home because she had shot the deceased was a violation of *Miranda); cf.* People v. Greer, 49 App. Div. 297, 374 N.Y.S.2d 224 (1975). Some courts have held *Miranda* inapplicable to stopping and frisking under much the same reasoning. ***See*** People v. Myles, ___ Cal. App. 3d ___, 123 Cal. Rptr. 384 (1975); Crum v. State, 281 So.2d 368 (Fla. Ct. App. 1973). ***See*** *also* note 100 *supra*.

[111] ***See*** State v. Shepardson, 194 Neb. 643, ___, 235 N.W.2d 218, 223 (1975) (vehicle registration check led to officer's noting marihuana seeds; questioning prior to formal arrest didn't require warnings); *cf.* Gedicks v. State, 62 Wis. 74, 214 N.W.2d 569 (1974) (defendant's I.D. checked by policeman to determine his reason to be on university grounds).

[112] *See* Owens v. United States, 340 A.2d 821 (D.C. App. 1975) (burglar was caught at the scene and handcuffed; his incriminating reply (made one or two seconds after the apprehension) to policeman's question of what he was doing on the roof was admissible as warnings were not required); State v. Henson, ___ Ore. App. ___, 541 P.2d 1085 (1975) (vehicle stop resulted in questioning about a hit and run; *Miranda* warnings held not to have been required despite fact that officer removed defendant's car keys and directed him to remain in the vehicle).

[113] *See* Schneckloth v. Bustamonte. 412 U.S. 218, 247 (1973).

stances.[114] Additionally, a number of decisions have mentioned the possibility that the suspect is in fact innocent and simply found in incriminating circumstances which can be cleared up quickly through limited police questioning. The propriety of such reasoning is questionable considering *Miranda's* intent.

There is general agreement that law enforcement officers may ask questions of suspects without *Miranda* warnings when the questions are motivated by safety considerations.[115] "While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent. It is inconceivable that the *Miranda* court or the framers of the Constitution envisioned such admonishments first be given under [the urgent circumstances involved]." [116] While presumably the suspects in these cases retain their right to remain silent, the cases suggest that safety overcomes the *Miranda* rationale which dealt with a lesser priority.

A large number of courts have held that traffic offenses constitute an exception to *Miranda*.[117] Generally, such stops will be noncustodial in any event. However, the rationale for excluding traffic stops seems to be that they are common events that are to be expected by most citizens; that the usual traffic violation is not the sort of crime *Miranda* dealt with; and that traffic questioning fits the general investigatory exception to *Miranda*.[118] While this may be appropriate for simple driving violations, the same rule has occasionally been applied to drunken driving and more serious offenses.[119] These cases tend to blend into those which hold that *Miranda* is inapplicable to misdemeanors.[120] In view of the substantial punishments

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[114] *See* United States v. Vigo, **487** F.2d **295** (2d Cir. **1973).**

[115] *See* United States v. Castellana, 500 F.2d **325** (5th Cir. **1974)** (en banc) (FBI agent participating in a gambling raid asked the defendant whether he had any weapons; the resulting seizure of illegal weapons was not in violation of *Miranda);* Norman v. State, **302** So.2d **254, 258** (Miss. **1974)** (questions to group which had fired at the police were motivated by safety and were not inquisitorial interrogation).

[116] People v. Dean, **39** Cal. App. 2d **875, 882, 114** Cal. Rptr. **555, 559 (1974).**

[117] *See* Clay v. Riddle, **541** F.2d **456** (4th Cir. **1976)** (defendant questioned after arrest for drunken driving during which he threatened police officers with a gun; *Miranda* held inapplicable); State v. Bowen, **336** A.2d 228 (Del. Super. **1975)** *(Miranda* held inapplicable to motor vehicle cases); State v. Cupp, **36** Ohio App. 2d **224, 304** N.E.2d **598 (1973)** *(Miranda* inapplicable to questions accompanying arrest for drunken driving). *But* see State v. Lawson, **285** N.C.2d **320, 204** S.E.2d **843 (1974)** *(Miranda* held applicable to traffic violations).

[118] *Cf.* J. ZAGEL, *supra* note **72** at **34-35.**

[119] *See* note **117** *supra.*

[120] *See* State v. Glanton, ___ Iowa ___, **231** N.W.2d **31 (1974);** State v. Gabrielson, ___ Iowa ___, **192** N.W.2d **792 (1971);** State v. Pyle, **19** Ohio St. 2d **64, 249** N.E.2d **826 (1969).**

for such offenses, one must question the legitimacy of limiting *Miranda* in such a fashion. If *Miranda* itself is correctly decided, how can a court accept improperly obtained statements just because the maximum sentence involved will be "no more" than a year in jail?

Any arrest requires a formal processing of the defendant, usually known as "booking." Whether through formal booking or other administrative questioning, information is occasionally obtained which is incriminating and which proves harmful to the accused at trial.[121] Four of five federal circuit courts of appeal that had considered the issue by the close of 1976 had held *Miranda* inapplicable to preliminary or administrative questions.[122] The rationale involved appears to be that the data is normally nonincriminating, is essential to an efficient criminal justice process, and constitutes *noninvestigative* questioning.

As suggested by one commentator,[123] there is limited Supreme Court authority to support this view. In *California v. Byers*,[124] the Court upheld a state reporting system which required drivers involved in accidents to stop and leave names and addresses. Clearly the Court found a limited infringement on the driver's privilege against self-incrimination to be appropriate.[125] The same reasoning

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[121] *See* United States *ex rel.* Hines v. LaVelle, 521 F.2d 1109 (2d Cir. 1975) (information gained through informal police administrative questioning while defendant was being transported to the station house proved important in identifying suspect as rapist).

[122] The Courts of Appeal for the Second, Fifth, Eighth, and Ninth Circuits have held such questioning to be proper without warnings while the District of Columbia Circuit has allowed questioning but rejected its results from use in evidence at trial. Note, *The Applicability of Miranda to the Police Booking Process*, 1976 DUKE L.J. 574, 576 (1976), and cases cited therein.

[123] *Id.* at 585-86.

[124] 402 U.S. **424 (1971).**

[125] In California v. Byers, **402** U.S. **424** (1971), the Court considered California's hit and run statute which required the driver of a vehicle involved in an accident to stop at the scene and to leave his name and address. Byers claimed that his conviction for failure to do so after an accident violated his privilege against self-incrimination. Reversing the Supreme Court of California, the Court upheld the state statute, finding that it did not involve "a highly selective group inherently suspect of criminal activities," and did not apply only in an area "permeated with criminal statutes." *Id.* at **430.** Leaving name and address was found to be an essentially neutral act even though it might supply a link in the evidentiary chain. *Id.* at **434.**

While the majority opinion, consisting of a plurality and a concurrence in the judgment by Mr. Justice Harlan, found that the privilege was inapplicable, the dissent stated that, contrary to the Court's holding, the driver of a vehicle involved in an accident was so likely to have violated a criminal statute that the Court's holding could not in truth be distinguished from its previous cases. This

may be applicable here. On the other hand, *Byers* dealt with a situation believed to be inherently noncriminal. While the preliminary information supplied during the booking process should normally be nonincriminating, it is part and parcel of the criminal justice process and is like either to yield incriminating information directly, or to supply leads to the prosecution. It may be that the proper compromise is to allow the questioning but to immunize the defendant from any use of the information gained through it.

The Supreme Court has expressly held *Miranda* inapplicable to grand jury proceedings in *United States v. Mandujano.*[126] The Court stated that *Miranda's* concern was with custodial interrogation and "simply did not perceive judicial inquiries and custodial interrogation as equivalents."[127] The Court also stated that the right against self-incrimination at a grand jury was somewhat more limited for a witness than the privilege available to an accused being questioned by the police, that no right to counsel existed at grand juries, and that accordingly the *Miranda* warnings would be inappropriate.[128] By implication, general custom, and in the military by

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appears in part to be true. However, in *Byers*, the act of reporting was not *necessarily* incriminating, while prior reporting requirements that were overturned were almost equivalent to conviction. The Court actually utilized a balancing test, attempting to balance the rights of the individual with the rights of society, *i.e.*,

> Tension between the State's demands for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other. . . .

Note also the Court's approach in fourth amendment cases, e.g., California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974). It seems clear that in the case of reporting requirements, the individual's rights have been limited and that, so long as a proper purpose is involved and the result of the report is not inherently incriminating, the requirement will be upheld. As *Byers* indicates, the probability of incrimination is relevant. The Government may not avoid the problem by using forfeiture proceedings rather than a criminal prosecution, United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971), although civil tax proceedings are possible. *But compare* Widdis v. United States, 395 F. Supp. 1015 (D. Alas. 1974), *with* Jensen v. United States, 29 A.F.T.R.2d 116 (Colo. 1972). The alternative is to find that the privilege is applicable but that, to sustain the reporting requirement, neither the information divulged nor derivative information can be used as a prosecution. The Court in *Byers* rejected this alternative, finding that it would place an insurmountable burden on the prosecution. Following Mr. Justice Harlan's dissent in *Byers*, the Virginia Supreme Court has sustained a state reporting requirement, despite a real threat of self-incrimination, because of an overriding state interest. Banks v. Commonwealth, 217 Va. 527, 230 S.E.2d 256 (1976).

[126] 425 U.S. 564 (1976). *See* also Commonwealth v. Columbia Investment Corp., 457 Pa. 353, 325 A.2d 289 (1974).

[127] 425 U.S. at 579.

[128] Id. at 579–80.

statutory design,[129] there is no necessity for a trial judge to stop a witness at trial who may incriminate himself and to warn him of his right to remain silent. It is important to note that although there is no legal duty to warn a witness of his right against self-incrimination at a grand jury proceeding or trial, warnings *may* be given.[130]

By its very nature *Miranda* was intended to deal with criminal interrogations. Its purpose was to give meaning to the fifth amendment right against self-incrimination. By definition, an administrative consequence cannot be criminal. Accordingly, interrogations which cannot result in criminal prosecutions are not interrogations within the scope of *Miranda*. The dividing line between criminal and adminstrative consequence is thin at times,[131] and it can be difficult in the absence of judicial decision to predict *Miranda*'s applicability.

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[129] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, **1969** (Rev. ed.) para. 140*a*(2), stating that a judge need not warn a witness at trial of his right to remain silent but that he may do so.

[130] *See* United States v. Jacobs, No. **75–1319** (2d Cir. filed Dec. 30, 1976), suppressing the grand jury testimony of a perjury defendant for failure to warn her during the proceedings that she was a "target" of the investigation. In reaching its decision, the court exercised its supervisory powers while concurring in the Supreme Court's decision in Mandujano. The Court noted that it had been the practice within its circuit for twenty years for United States Attorneys to warn putative defendants of their status; the failure of a strike force prosecutor in the circuit to do so resulted, in the court's opinion, in unequal protection of the law and required suppression to enforce conformity within the circuit. Despite *Jacobs*, the Supreme Court has held, as a matter of constitutional law, that even putative defendants need not be warned of their right to remain silent. United States v. Wong, **45** U.S.L.W. **4464** (U.S. **1977) (No.74-635).** The Court's decision may ultimately prove of little consequence as increasing support appears to exist for legislation that would grant witnesses the right to counsel when appearing before a grand jury. ***See*** ABA SECTION ON CRIMINAL JUSTICE, CRIMINAL JUSTICE **5** (Winter **1977).**

[131] Incrimination may refer to a ***consequence*** of an act (such as a criminal conviction), or to an *act* (a testimonial utterance) leading to a consequence.

The clearest form of incrimination is a judicially imposed criminal conviction.

The extent to which consequences other than a criminal conviction may constitute incrimination is unclear. In the past the Supreme Court has tended to look at the actual consequence of a proceeding and its intent, rather than at its label, to define incrimination. Thus, juvenile proceedings were generally found to be "criminal." ***In re*** Gault, **387** U.S. 1 **(1967).** However, the Court may be retreating.

In Baxter v. Palmigiano, **425** U.S. 308 (1976), the Court allowed prison officials to draw an inference of guilt from the silence of Palmigiano in a prison discipline proceeding. As the Court found that the State of Rhode Island had not attempted to make use of his silence at a criminal proceeding distinct from the disciplinary proceeding, it found that the adverse inference was justifiable. Since Palmigiano was "sentenced" to thirty days in punitive segregation and a downgrading in classification, somewhat obviously the Court found the consequence of restricted lib-

This has been particularly true with Internal Revenue Service investigations. The transition between administrative tax investigation and criminal tax evasion investigation is difficult to pinpoint, despite the IRS use of intelligence division agents for tax evasion

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erty not to be the equivalent of "incrimination." The Court appears to be looking at the social purpose served by the proceeding rather than either its label or consequence. Thus, a form of increased deprivation of liberty becomes noncriminal. The case is more than a little surprising because at the time of his hearing Palmigiano had *not* been granted immunity and could have been prosecuted. Palmigiano's offense was "inciting a disturbance and disruption of prison operations, which might have resulted in a riot." 425 U.S. at 312. Thus the possibility of later proceedings would seem to have been real and substantial. Despite this the Court simply found that proceedings had not in fact taken place, making the case a strange and perhaps important anomaly, for in the past the question had been one of possibility and not of hindsight. The Court did note that Palmigiano's silence was only one piece of evidence considered at the hearing, implying that a disposition based only on his silence might be improper.

In a case even more disturbing than *Baxter v. Palmigiano,* the Supreme Court found military summary courts-martial, which can impose a sentence of thirty days confinement at hard labor, to be similar to parole revocation hearings and not criminal convictions requiring counsel for the accused. Middendorf v. Henry, 425 U.S. 25 (1976). Clearly the Court is not troubling itself over a mere deprivation of liberty. Were it not for the provisions of the UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. $ 831, it would seem likely that the Court would also have removed the right against self-incrimination from service personnel receiving summary courts-martial.

While civil liability *per se* does not constitute incrimination, a civil penalty having a punitive intent may. *See generally* 8 WIGMORE, EVIDENCE §§ 2256–57 (McNaughton ed., 1961). There is an historic precedent for equating some civil actions with criminal sanctions. *See* Boyd v. United States, 116 U.S. 616, 634–35 (1885), holding that:

> As. therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason . . . of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . .

(in rem action).

Distinguishing between penalties that are quasi-criminal in nature is difficult. *See* People v. Superior Court, 12 Cal. 3d 421, 115 Cal. Rptr. 812, 525 P.2d 716 (1974), finding that authorization to award exemplary damages in a civil action does not expose the defendant to criminal sanctions against which he is protected by the privilege against self-incrimination.

Deportation is not equivalent to incrimination. *See* Woodby v. Immigration & Naturalization Service, **385** U.S. 276 (1966); Abel v. United States, 362 U.S. 217 (1960); Chavez-Raya v. Immigration & Naturalization Service, 519 F.2d 397 (7th Cir. 1975).

Loss of livelihood generally does not appear to be a relevant consequence although disbarment may. *Cf.* Gardner v. Broderick, 392 U.S. 273 (1968) (policeman may be dismissed if he fails to answer specific questions narrowly directed towards his duties and despite failure to grant immunity). *But see ex rel.* Vining v. Florida REC, 281 So. 2d 487 (Fla. 1973), finding that deprivation of livelihood may be penal in nature, and that, where license revocation or suspension is the possible result, compelling of testimony is a violation of the self-incrimination clauses of the United States and Florida constitutions.

cases. The Supreme Court has refused to apply *Miranda* to noncustodial tax investigations.[132]

While most tax investigations are noncustodial, the same is not true of deportation proceedings. However, as deportion is viewed as a noncriminal consequence, *Miranda* does not apply to deportation interrogations.[133] Investigations which are primarily administrative may not require warnings despite the possibility of later criminal prosecution.[134] As prison discipline proceedings have been deter-

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Disbarment has proven vexatious. In Spevack v. Klein, 385 U.S. 511 (1967), the Supreme Court reversed Spevack's disbarment for invoking the privilege when he was subpoenaed to produce financial records. While there is authority for believing that disbarment is quasi-criminal in nature despite its public service function, *see In re* Ruffalo, 390 U.S. 544, 550 (1968), most states have continued to treat it as civil in nature. *See* Segretti v. State Bar of California, 15 Cal. 3d 878, 126 Cal. Rptr. 793, 544 P.2d 929 (1976) ("the purpose of disciplinary proceedings against attorneys is not to punish but rather to protect the court and public from the official ministrations of persons unfit to practice." 544 P.2d at 933); Maryland State Bar Ass'n v. Sugerman, 273 Md. 306, 329 A.2d 1 (1974). *See generally* Note, *Self-Incrimination: Privilege, Immunity and Comment in Bar Disciplinary Proceedings*, 72 MICH. L. REV. 84 (1973); Chilingirian, *State Disbarment Proceedings and the Privilege Against Self-Incrimination*, 18 **BUFFALO** L. REV. 489 (1969).

Far more difficult to resolve than even the complex issues mentioned above is "treatment." Prior to *In re Gault*, it was believed that juveniles were unable to assert the right against self-incrimination because their proceedings were beneficial in nature and designed for corrective purposes rather than for punishment. Thus they were "non-criminal." While *Gault* has bestowed the privilege on juvenile proceedings, the rationale of beneficial "treatment" remains. Thus in one case a student suspected of smoking in violation of school rules was held not entitled to *Miranda* warnings because "the purpose of most school-house rules is to find facts . . . relating to special maladjustments of the child with a view toward correcting it [sic]." Doe v. New Mexico, 88 N.M. 347, 540 P.2d 827 (Ct. App. Rev. 489 (1975); dissent is at 542 P.2d 834 (1975). As the student was interrogated for forty minutes and ultimately confessed to smoking marihuana, the case seems far from a simple violation of school rules.

The same theory is used to justify denying the privilege to those who will be committed to mental institutions rather than prisons. *See* Williams v. Director, Patuxent Institution, 276 Md. 272, 347 A.2d 179, *cert. denied*, ___ U.S. ___ (1975) (defective delinquent treatment is not criminal in nature); Aronson, *Should the Privilege Against Self-Incrimznation Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973).

It would seem clear that the dividing line between a punitive consequence and legitimate treatment is rather fine. So too is the line between criminal conviction and state initiated loss of livelihood. While it seems unlikely that the Supreme Court will expand the definition of "incrimination" in the future, it and the state courts will presumably have to draw a more understandable line between those consequences which are incriminating and those which are not.

[132] Beckwith v. United States, 425 U.S. 341 (1976).

[133] *See* Chen v. Immigration and Naturalization Service, 537 F.2d 566 (1st Cir. 1976).

[134] *Cf.* United States v. Harris, 381 F. Supp. 1095 (E.D. Pa. 1974) (officer at airport checkpoint did not have to warn suspect of his rights after being warned that

mined to be administrative in nature,[135] *Miranda* warnings appear to be unnecessary in the course of such proceedings.[136]

VIII. WARNING SUSPECTS

Miranda does not require any specific method of warning a suspect, and the actual method used by law enforcement agents varies by jurisdiction and individual agent. Perhaps the most common method is the oral warning in which the police warn their suspects of their rights orally either from memory or by reading from a rights warning card of one type or another.[137]

Because oral warnings are susceptible both to error and to subsequent litigation at trial, many police use previously prepared warning forms in lieu of [138] or in conjunction with oral warnings.[139] Normally a suspect will be handed such a form, told to read it, and asked to acknowledge in writing receipt of his rights warnings. Frequently, the warning portions of the form will be combined with a waiver portion which will provide space for a suspect to either exercise his rights or to waive them. Use of written waiver forms tends to moot many of the usual errors that may accompany oral warnings if only because the form itself is admissible in evidence at trial while the officer who gives oral warnings is subject to cross-examination as to their content.

Written warnings and waiver certificates are not, of course, conclusive on the issue of *Miranda* compliance, for the suspect may misunderstand the written notice, feel compelled by the circumstances of the situation, or be motivated to waive his rights by other information given by the interrogating officers.[140] However, the

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the suspect had a gun inside his bag). *See generally* cases cited at notes 109–114 *supra* and accompanying text.

[135] Baxter v. Palmigiano, 425 U.S. 308 (1976).

[136] *Id.* at 315.

[137] Warning cards are in widespread use. *See* State v. Attebery, 110 Ariz. 354, 519 P.2d 53 (1974) (defendant was asked to read the card, then the police officer read to the defendant, and then the defendant signed the card after answering the officer's questions relating to his rights); Breedlove v. State, 516 P.2d 553 (1973) (officer read the card to the suspect and then asked him if he understood each of the rights).

[138] Written explanation of rights will be sufficient if the suspect can read and understand them. They need not be supplemented by oral explanation. *See* State v. McNeal, ___ La. ___, ___ So.2d ___ (1976) (18 Crim. L. Rep. (BNA) 2524 (Feb. 23, 1976)).

[139] Use of written explanation forms may moot errors made in previous oral warnings. *See* People v. Perry, 52 App. Div. 963, ___, 382 N.Y.S.2d 845, 846–47 (1976).

[140] When the warning form has a waiver portion it is not unknown for unscrupulous police officers to tell suspects that signing the waiver portion of the form

written format does place the prosecution in a better tactical position than does an oral warning.

IX. WAIVING THE *MIRANDA* RIGHTS

A. *THE WAIVER FRAMEWORK*

A suspect may not be subjected to custodial interrogation unless he waives his right to remain silent and his right to counsel. To be effective the waiver must be "made voluntarily, knowingly and intelligently." [141] Thus, in the absence of a "spontaneous" statement volunteered by the suspect, the burden is on the police to obtain a valid *Miranda* waiver before interrogation may take place.[142] In the words of *Miranda:*

> If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.[143]

It is apparent that there is no need for a suspect to exercise affirmatively his right to remain silent.[144] Rather, he must waive his privilege in order to make a statement. The right to counsel must, however, be affirmatively exercised.[145] Unless limited to future

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means only that the suspect has been warned of his rights. In such a case as a practical matter the defense must attempt to persuade the court of the accuracy of the defense story, in order to overcome the apparent voluntary defense waiver.

[141] Miranda v. Arizona, **384 U.S 436, 444 (1966).** However, full knowledge of the true circumstances surrounding the suspect's predictament is not required.

[142] If *Miranda* is violated, the resulting statement will be excluded from evidence.

[143] Miranda v. Arizona, **384** U.S. **436, 475** (1966) (emphasis added and citations omitted).

[144] While the suspect need not affirmatively exercise his right to remain silent. there are numerous cases attempting to determine whether a suspect has in fact exercised his privilege to remain silent, in whole or in part. ***See*** United States v. Marchildon, 519 F.2d **337, 343** (8th Cir. **1975)** (defendant's response to police request to inform meant only that suspect wouldn't talk about his sources of supply, not that he wished to remain silent). As suspects are wont to make comments when asked if they wish to make a statement, the courts are faced with an endless variety of factual settings which must be individually analyzed to determine whether the suspect was attempting to stop the interrogation.

[145] While a suspect who does not waive his rights to counsel must be given a

consultation [146] or to some specific limited use,[147] in the absence of the suspect's express permission to allow it to continue, a request for a lawyer will stop interrogation completely.[148]

The ideal form of waiver would consist of a proper rights warning followed by three questions: "Do you understand your rights? Do you want a lawyer? Do you wish to make a statement?''[149] An answer of yes to the first and third questions and a negative to the second create a proper waiver. However, such an express waiver is rare. Most cases dealt with in the courts [150] appear to involve alleged waivers in which either the suspect stated that he understood his rights and then proceeded to answer police questions,[151] or went immediately from the warnings to the interrogation.[152] Faced with this situation the courts have generally accepted implied waivers [153] when convinced of their existence. Of course, in doing so the courts must weigh all of the surrounding circumstances, for the waiver must be voluntary.

It is important to distinguish between cases in which the suspect spontaneously began making a statement after receiving warn-

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lawyer before an interrogation may take place, Miranda v. Arizona, 384 U.S. 436, 470–71 (1966), in the absence of interrogation, counsel need not automatically be supplied, and the suspect desiring counsel is well advised to affirmatively request one.

[146] *See* People v. Tunage, 45 Cal. App. 3d 201, 119 Cal. Rptr. 237 (1975).

[147] *See* People v. Madison, 56 Ill. 2d 476, 309 N.E.2d 11 (1974) (defendant's statement that he would give a statement but not sign it until a public defender was present held not to prevent interrogation as it was not a request for counsel).

[148] Miranda v. Arizona, 384 U.S. 436, 444–45 (1966). *See* State v. Nicholson, 19 Ore. App. 226, 232, 527 P.2d 140, 142 (1974), *contra* People v. Madison, 56 Ill. 2d 476, 309 N.E.2d 11 (1974). The court held that a defendant's refusal to sign his statement until he had a lawyer present was a general request for counsel which should have stopped the interrogation immediately.

[149] This form of express waiver is in use in the Army, for example. *See* Dep't of the Army Form 3881, Rights Warning/Waiver Certificate. Note that a defective warning will usually render any waiver a nullity.

[150] It must be remembered that perfect waivers are seldom litigated. Thus, it can be presumed that numerous express waivers are obtained by police, but that those cases involving implied waiver are apt to be challenged.

[151] *See* People v. Johnson, 13 Ill. App. 2d 1020, 1025, 304 N.E.2d 681, 685 (1973).

[152] *See* State v. Pineda, 110 Ariz. 342, 519 P.2d 41 (1974).

[153] *See* United States v. Moreno-Lopez, 466 F.2d 1205 (9th Cir. 1972); United States v. Gochenour, 47 C.M.R. 979 (A.F.C.M.R. 1973); Commonwealth v. Valliere, — Mass. —, —, 321 N.E.2d 625, 631 (1974); Braziel v. State, — Tenn. App. —, 529 S.W.2d 501 (Crim. App.), *cert. denied*, — Tenn. —, 529 S.W.2d 501 (1975); Moreno v. State, 511 S.W.2d 273, 276–77 (Tex. 1974); State v. Breznick, — Vt. —, —, 356 A.2d 540, 542 (1976). *But see* Bauer v. State, — Ind. App. 2d —, 300 N.E.2d 364 (1974) (printed waiver form insufficient in absence of "interrogative assurances" that the suspect understood his rights); State v. Harris, 24 N.C. App. 412, 219 S.E.2d 266 (1975) (explicit waiver required). *See also*, J. ZAGEL, *supra* note 72, at 61–63.

ings [154] and those in which he began answering questions after receiving warnings. In the first situation, the statement is voluntary and spontaneous and waiver is virtually automatic; in the second, waiver must be found from the circumstances. Presence of the suspect's attorney at the interrogation is persuasive, if not absolute proof, of waiver and will usually serve to do away with the need for either waiver and/or warnings.[155]

A recurring problem is that of the suspect who refuses to sign a written waiver. The courts have consistently held that the mere refusal to sign such a waiver does not make a subsequent statement involuntary.[156] On the other hand, it may be strong evidence of the suspect's desire not to waive his rights and may consequently result in a finding of nonwaiver.[157] A related problem is the suspect who makes an oral statement but refuses to make a written one. While such a refusal may mean only that the suspect has gotten "cold feet," it may also indicate a mistaken belief that *Miranda* bars oral statements from use in court but not written ones. In such a case, the oral statement will be inadmissible [158] because of a basic misunderstanding of the *Miranda* rights.

B. KNOWING AND VOLUNTARY WAIVER

A valid *Miranda* waiver presupposes that the suspect involved is aware of and understands his *Miranda* rights. A defect in the warnings may thus make waiver impossible.[159] Just as the warnings

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[154] Errors in warnings can frequently be cured by spontaneous statements from the suspect, for it is a rare case in which such a statement is found to have been an improper product of coercive circumstances.

[155] *See* White v. State, 294 Ala. 265, 314 So.2d 857 (1975). *See generally* J. ZAGEL, *supra* note 72, at 58–59. While warnings in such a case may be unnecessary, as Mr. Zagel suggests, they are well advised to moot future claims of error.

[156] *See* United States v. Sawyer, 504 F.2d 878 (5th Cir. 1974); United States v. Cooper, 499 F.2d 1060, 1063 (D.C. Cir. 1974); United States v. Reynolds, 496 F.2d 158 (6th Cir. 1974); United States v. Crisp, 435 F.2d 354, 358 (7th Cir. 1970); Hewitt v. State, 261 Ind. 71, 300 N.E.2d 94 (1973); State v. Jones, 35 Ohio App. 2d 84, 300 N.E.2d 230 (1973); Commonwealth v. Cost, ___ Pa. Super. ___, 362 A.2d 1027 (1976).

[157] *See* Millican v. State, ___ Ind. App. 2d ___, 300 N.E.2d 359 (1973).

[158] *See* State v. Jones, 37 Ohio St. 2d 21, 306 N.E.2d 409 (1974) (suspect made an oral statement but refused to continue while police took written notes).

[159] *Miranda* expressly rejects the possibility that warnings may be omitted because the suspect may have prior knowledge of his rights. "[w]hatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise his privileges at that point in time." 384 U.S. 436, 468–69 (1966). Note that the suspect who persistently interferes with a police attempt to warn him of his rights by claiming prior knowledge *may* be held to his statement if the

must be properly communicated,[160] so too must the suspect comprehend them and the effects of waiver. Should the suspect lack the ability to understand the rights or to make an intelligent [161] waiver decision, a waiver will be void. Thus, in any given case, questions relating to the suspect's intelligence, physical and mental condition,[162] and the circumstances surrounding the waiver will be highly relevant.[163] To a large extent the determination of the voluntariness of the waiver subsumes the traditional common law determination of the voluntariness of a confession. *Miranda* explicitly bars the use of threats, trickery, and cajolery to obtain waivers[164] although trickery that does not overbear the will of the suspect may be acceptable *after* a valid waiver.

C. STATE AND MILITARY RESTRICTIONS ON WAIVER

Many of the states have formulated their own statutory or judge-made restrictions on waiver of the *Miranda* rights. Perhaps the most interesting rule can be found in New York, which has

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police stop and proceed to obtain a waiver. ***See*** United States v. Sikorski, 21 C.M.A. 345, 45 C.M.R. 119 (1972); State v. Thomas, ___ Wash. App. ___, ___, 553 P.2d 1357, 1363 (1976).

[160] The warnings must, for example, be given in a language that the suspect understands. *Cf.* People v. Gonzales, 22 Ill. App. 2d 83, 316 N.E.2d 800 (1974). Another difficulty may be the rapid "ritualistic" fashion that the police sometimes use to give warnings, ***see*** People v. Andino, 80 Misc. 2d 155, 362 N.Y.S.2d 766, 770–71 (1974).

[161] ***See*** Greenwell v. State, ___ Md. ___, ___, 363 A.2d 555, 561 (1976) (minimum ability to understand must be found).

[162] ***See*** Commonwealth v. Hosey, ___ Mass. ___, ___, 334 N.E.2d 44, 48 (1975) (emotional upset complicated by gratuitous police information that it would be difficult to get a lawyer voided the waiver). Poor physical or mental condition does not necessarily make waiver impossible. ***See*** United States v. Choice, 392 F. Supp. 460, 469 (E.D. Pa. 1975) ("This District, however, has rejected a per se rule that a serious gunshot wound must be presumed to leave its victim incapable of exercising free volition and making rational choices " (citations omitted)); People v. Barrow, ___ Cal. App. 3d ___, ___, 131 Cal. Rptr. 913, 918 (1976) (waiver sustained despite evidence of alcohol use and emotional upset); McKittrick v. State, 541 S.W.2d 177 (Tex. 1976) (narcotics addict).

[163] Any form of threat or inducement may make the waiver a nullity, just as the same conduct may make a confession involuntary. Note People v. Andino, ___ Misc. 2d 155, 362 N.Y.S.2d 766, 770–71 (1974) (determination that uncounseled drug defendant may not waive *Miranda* rights when waiver may be induced by what amounted to plea bargaining in view of the unusually severe sentencing consequences of New York drug laws in the absence of plea bargaining). *Miranda* states that "lengthy interrogation or incommunicado interrogation before a statement is made is strong evidence of an invalid waiver." 384 U.S. at 476.

[164] 384 U.S. at 476.

held [165] that a suspect who has obtained counsel cannot waive his right to counsel at an interrogation unless an affirmative waiver is made in the presence of the attorney. Somewhat obviously the New York rule tends to prevent lawyerless interrogations after counsel has entered the scene. Such a rule prevents law enforcement agents from nullifying the right to counsel.[166] A counterpart is found in military law.

A number of states have created special restrictions on obtaining statements from juveniles, often requiring the presence of family members or an attorney before the *Miranda* rights can be waived.[167] Because of the diversity of state rules, statutes, and interpretations, it is essential in any state case to scrutinize state law carefully when determining what is necessary for a valid waiver.[168]

D. SHOWING WAIVER AT TRIAL

Prior to *Miranda* the primary issue surrounding a confession or admission was the voluntariness of the statement offered in evidence. While this voluntariness doctrine remains, *Miranda* has had the pragmatic effect of merging the traditional voluntariness inquiry into the *Miranda* waiver determination. As the waiver question takes into account all of the questions that usually surround the voluntariness inquiry, a finding of a valid waiver normally dictates a finding that the statement itself was made voluntarily. Consequently, the issue to be litigated is the validity of the *Miranda* waiver. The procedures and burdens that usually accompany the traditional voluntariness inquiry normally apply to the *Miranda* waiver inquiry.[169]

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[165] People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968).

[166] Interestingly, the Court of Military Appeals has held that interrogations of military personnel who have obtained counsel cannot take place unless counsel has been previously notified and given an opportunity to attend the interrogation. United States v. McOmber, 24 C.M.A. 207, 51 C.M.R. 452 (1976). *McOmber* was the product of a number of cases in which military interrogators obtained statements, after proper warnings and waivers, from defendants in the absence of their defense counsel.

[167] *See* Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972) (child's parents or guardians must be informed of the *Miranda* rights and child must be allowed to consult with parents or guardians or attorney before waiver can take place); *In re* F.G., 511 S.W.2d 370, 373–74 (Tex. Ct. Civ. App. 1974) (Texas Family Code held to require attorney's concurrence before juvenile can waive privilege against self-incrimination). *See also* Hall v. State, ___ Ind. ___, 346 N.E.2d 584 (1976).

[168] *See* Hogan v. State, 330 So. 2d 557 (Fla. App. 1976) (state statute, Fla. R. Crim. P. 3.111(d) (4), required written waiver of counsel in the presence of two attesting witnesses; failure to so waive held nonprejudicial, however).

[169] *See generally* Lederer, *The Law of Confesszons — The Voluntariness Doctrine.*

Once the issue is raised, the burden is on the government to prove, usually by a preponderance of the evidence,[170] that applicable rights warnings were given and that a valid waiver was obtained. Normally, this is done via testimony of the officer who gave the warnings and obtained the waiver, or of a witness to the event, although a written warning and waiver form may be used. Some courts will allow a police officer to testify that he read the warnings from a standard card that he carried, rather than requiring that he testify to the specific warnings from memory.[171] Others will reject such a procedure in the absence of the doctrine of past recollection recorded. The mere statement, "I read his rights to him,'' is insufficient.[172]

A written rights waiver certificate is admissible when the proper foundation is laid.[173] The defense will usually attempt to show an incomplete or confusing warning and either nonwaiver or a misunderstood waiver by the defendant. Because much of the usual litigation surrounding a waiver concerns what actually happened, interrogators are well advised to record their session on tape or videotape.[174] Similarly, when doubt exists as to what actually occurred, a defense counsel should, where local procedure permits, request that the judge make special findings as to the actual facts surrounding the warnings and alleged waiver.[175]

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74 MIL. L. REV. 67, 88 (1976), for a discussion of the specific procedural rules and burdens of proof in this area.

[170] *Miranda* requires that a statement taken without counsel places a "heavy burden" on the government to demonstrate a knowing intelligent waiver. 384 U.S. at 475. This has been interpreted to mean a preponderance. *Cf.* Lego v. Twomey, 404 U.S. 477, 487–89 (1972). ***See*** Hart. v. State, 137 Ga. App. 644, 645, 224 S.E.2d 755, 756 (1976). A number of states may require higher burdens.

[171] ***See*** Lewis v. State, 296 So. 2d 575 (Fla. App. 1974). Note that testimony as to the specific warnings should not violate the hearsay rule as the statement is not offered for the truth of its contents, but rather to establish that warnings were given. ***See*** State v. McClain, 220 Kan. 80, 551 P.2d 806 (1976).

[172] *Cf.* State v. Welch, ___ La. ___, 337 So. 2d 1114 (1976) (witness testified that officer had not advised defendant of his right to counsel).

[173] When the written waiver is the sole waiver in the case, the best evidence rule may be applicable. *Cf.* Sanders v. State, ___ Ind. ___, 348 N.E.2d 642 (1976) (issue not raised as no motion to suppress the confession was ever made).

[174] ***See*** Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972); People v. Gonzales, 22 Ill. App. 3d 83, 316 N.E.2d 800 (1974) (videotaped interrogation showed voluntary waiver). ***See*** *also* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975). Note that use of tape recordings will require special efforts to authenticate the evidence.

[175] *Cf.* United States v. Johnson, 529 F.2d 521 (8th Cir. 1976) *citing* Evans v. United States, 375 F.2d 355 (8th Cir. 1967), for the proposition that a federal trial court should make specific findings on the record with regard to *Miranda* warnings and waiver. (Failure to do so is not necessarily reversible error.) *Compare*

X. NOTICE TO COUNSEL OF INTERROGATIONS

Law enforcement agents have frequently questioned suspects known to have had counsel. When, as is often the case, the suspects in question waive their *Miranda* rights and make statements in the absence of their attorneys, the defense counsel have little alternative other than to allege at trial that either *Miranda* has been violated or that the attorney-client privilege has been infringed.

To date, at least two jurisdictions have fashioned rules to prevent such conduct. New York has interpreted its state constitution to make waiver of the *Miranda* rights impossible once counsel has been obtained unless waiver takes place in the presence of the attorney.[176] The Court of Military Appeals has construed the Uniform Code of Military Justice to require that when interrogators know that a suspect has counsel they must give that counsel notice of the planned interrogation and adequate opportunity to attend.[177]

However, overwhelmingly, the majority rule, both federal[178] and state,[179] is that the police need not warn counsel of an impending interrogation of their clients. Further, most courts have held that a suspect who has previously invoked his right to counsel may later waive it in the absence of counsel.[180] A number of courts have, however, while sustaining the legality of questioning without notice to counsel, raised significant ethical questions about its propriety[181] — particularly when the questioning is done by a prosecutor..[182]

Evans, supra, with United States v. Gardner, 516 F.2d 334 (7th Cir. 1975). Specific factual findings do not appear to be required. However, the defense would be wise in many cases to attempt to obtain them.

[176] *See* People v. Hobson, 39 N.Y.2d 448, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d *537,* 539, 292 N.Y.S.2d 663, 666 (1968).

[177] United States v. McOmber, 24 C.M.A. 297, 51 C.M.R. 452 (1976).

[178] Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Masullo, 489 F.2d 217, 223 (2d Cir. 1973) (and cases cited therein). *But see* United States v. Flores-Calvillo, ___ F.2d ___ (9th Cir. 1976) (19 Crim. L. Rep. 2405, Sept. 14, 1976) (defendant who had *invoked* her right to counsel could not waive that right later without the assistance of counsel).

[179] Pierce v. State, 233 Ga. 237, 238-39, 219 S.E.2d 158, 159-60 (1975); People v. Sandoval, 41 Ill. App. 3d 741, 353 N.E.2d 715 (1976); Goldstein v. State, 89 Nev. 327, 516 P.2d 111 (1973); Commonwealth v. Hawkins, 448 Pa. 206, 292 A.2d *302* (1972); Lamb v. Commonwealth, ___ Va. ___, *227* S.E.2d 737 (1976); State v. Gilcrist, 12 Wash. App. 733, 531 P.2d 814 (1973).

[180] *See generally* section XI ***infra.***

[181] *Compare* United States v. Thomas, 474 F.2d 110 (10th Cir.), ***cert.*** *denied*, 412 U.S. 923 (1973), *citing* Disciplinary Rule 7-104 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY *with* State v. Gilcrist, 12 Wash. App. 733, 531 P.2d 814 (1975).

[182] *See* the cases collected at United States v. Masullo, 489 F.2d 217, **223** n.3 (2d Cir. 1973).

XI. THE EFFECTS OF INVOKING *MIRANDA*— COMPLIANCE AND NONCOMPLIANCE

A. INVOKING MIRANDA

As has been previously discussed,[183] the Court in *Miranda* created a framework which prevents a statement from being obtained during a custodial interrogation unless a valid waiver of rights has been obtained from the suspect. Although it is clear from *Miranda* that a nonwaiver is to be considered an affirmative exercise of the *Miranda* rights, the theoretical rule can be difficult to apply to the facts of an individual case, particularly when most courts recognize implied waivers.

The clearest invocation of *Miranda* is a suspect's affirmative refusal to speak, accompanied by a request for a lawyer. In such a case, the police are duty bound to cease interrogation[184] and to obtain counsel.[185] Either a refusal to speak or a request for counsel, unless qualified in some matter, will stop questioning. However, it is possible for a qualified exercise of rights to be made. A suspect may refuse to discuss a specific topic but remain willing to talk about other matters; the suspect may wish counsel but only at a later time; discussion at the moment may be rejected in favor of a later statement. Accordingly, each case must be looked at closely to determine to what extent the *Miranda* rights have actually been exercised. To the extent to which they have actually been invoked, the police must comply and/or cease interrogation.

B. NONCOMPLIANCE WITH MIRANDA

The price of noncompliance with *Miranda* is simple—exclusion of the resulting evidence from trial. Subject to the effects of statutory attempts to overrule *Miranda*,[186] the case requires that the product of a *Miranda* violation and its derivative evidence be excluded from trial.[187] One significant exception to this exclusionary rule exists.

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[183] Section IX *supra*.

[184] The extent to which interrogation may be resumed after the suspect has refused to make a statement is unclear and is discussed in section XI, part C, *infra*.

[185] However, the police may opt simply to discontinue the interrogation. This is not to suggest that the police may arbitrarily refuse to supply counsel, but if counsel is in fact unavailable, the police may choose to notify counsel and discontinue questioning. See section VI, part **A,** *supra*.

[186] *18* U.S.C. § **3501 (1970).** ***See*** *generally* section XII *infra*.

[187] **384** U.S. **436, 479** (1966): "[N]o evidence obtained as a result of interrogation

The Supreme Court has expressly approved the use of evidence obtained in violation of *Miranda* for impeachment purposes.[188]

This limited inroad on the exclusionary rule results from an increasing Supreme Court dissatisfaction with the exclusionary rule generally and *Miranda* specifically. By allowing such evidence to be used for impeachment, the Court has expressly countenanced police violation of *Miranda* (and perhaps more importantly has encouraged it), for now the Court has given an interrogator who has been stymied by a suspect's refusal to talk, a reason to attempt to overcome his assertion of his right to remain silent.[189] Perhaps for this reason, a number of jurisdictions have declined to follow the Supreme Court's lead and have expressly rejected the impeachment exception to the *Miranda* exclusionary rule.[190]

C. MULTIPLE INTERROGATIONS

Multiple interrogations present three significant problems: the degree to which proper warnings and waiver at one interrogation persist and extend to a later interrogation; the extent to which a defective warning or waiver at an interrogation may taint a subsequent interrogation; and whether an individual who exercises his *Miranda* rights at one interrogation may be questoned again at a later time. Each question will be examined separately.

The degree to which proper *Miranda* warnings and waiver may

(in violation of *Miranda*) can be used." Despite some early state decisions to the contrary, *Miranda* appears to have intended to ban derivative evidence (the fruit of the poisonous tree) as well as evidence obtained in direct violation of *Miranda*. *But see* Michigan v. Tucker, **417** U.S. **433, 460–61 (1974)** (White, J. concurring). The ultimate effect of *Mzranda* on derivative evidence is now unclear in view of the Supreme Court's increasingly hostile treatment of *Miranda*. *See* Comment, *The Effects* of *Tucker on the "Fruits" of Illegally Obtained Statements*, **24** CLEV. ST. L. REV. **689** (1975), discussing Michigan v. Tucker, **417** U.S. **433** (1974).

[188] Oregon v. Haas, **420** U.S. 714 **(1975);** Harris v. New York, **401** U.S. **222 (1971).** Note that while statements obtained in violation of *Miranda* may be used for impeachment, the statements must be voluntary in the non-*Miranda* sense. Kidd v. State, ___ Md. ___, ___ A.2d ___, **20** Crim. L. Rep. **2238** (Nov. **3, 1976);** Booker v. State, **326** So. 2d **791, 793** (Miss. **1976);** *cf.* United States v. Diop, ___ F.2d___ (2d Cir. **1976)** (filed **3** Dec. **1976).** The Court may have opened the door for wider use of improperly obtained statements. *See* Greenfield v. State, ___ So. **2d** ___, 20 Crim. L. Rep. **2119** (Fla. Ct. App. **1976)** (invocation of *Miranda* rights used to rebut insanity claim).

[189] Oregon v. Haas, **420** U.S. **714, 726 (1975)** (Brennan, J. dissenting).

[190] United States v. Girard, **23** C.M.A. **263, 49** C.M.R. **438 (1975);** People v. Disbrow, **16** Cal. 3d **101, 113–15, 545** P.2d **272, 280, 127** Cal. Rptr. **360, 368–69 (1976)** (California Constitution construed); State v. Santiago, **53** Hawaii **254, 492** P.2d **657 (1971)** (Hawaii Constitution construed); Commonwealth **v.** Triplett. **462** Pa. **244, 341** A.2d 62, **64 (1975)** (Pennsylvania Constitution construed).

persist and excuse the absence of warnings and waiver (or perhaps more importantly an incomplete or improper waiver) at a subsequent interrogation is unclear and is usually addressed on a case-by-case basis by the courts. If the time period between interrogations is short and the multiple interrogations can be characterized as one continuous interrogation or a single transaction, the lack of warnings at the later interrogation will be harmless.[191] However, what defines a "continuous interrogation," or otherwise justifies waiving warnings at a second or later interrogation, depends solely upon the facts of each case and the approach of the individual court. Because a delay between waiver and interrogation or between successive interrogations may easily taint a statement,[192] warnings should be given and a new waiver obtained at each interrogation to moot possible error and exclusion.

The extent to which an improperly obtained statement may taint further interrogations despite an otherwise proper *Miranda* waiver is a difficult question to determine in the absence of the specific facts of a given case. The law recognizes that any of the many factors [193] that could render a statement involuntary may well have continued effect—enough effect to render a later statement involuntary. The mere knowledge that a statement has already been given

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[191] ***See*** United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974) (the ultimate question is only: "Did the defendant with full knowledge of his legal rights, knowingly and intentionally relinquish them?"); United States v. Schultz, 19 C.M.A. 311, 41 C.M.R. 311 (1970) (7-hour delay did not affect "single continuous interrogation''); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974) (14 hours between waiver and final statement did taint statement); State v. Myers, 345 A.2d 500, 503 (Me. 1975) (17-hour period between warnings and statement did not vitiate warnings when defendant was reminded at the interrogation of the warnings previously given and he acknowledged them); State v. Reha, 86 N.M. 291, 523 P.2d 26 (Ct. App.), ***cert. denied,*** 86 N.M. 281, 523 P.2d 16 (1974) (two sets of warnings were sufficient; third set was unnecessary in view of the short delay); State v. McZorn, 288 N.C. 417, 434–35, 219 S.E.2d 201, 212 (1975) (20-30 minute delay between interrogations did not affect prior warnings).

[192] ***See*** United States v. Weston, 51 C.M.R. 868 (A.F.C.M.R. 1976) (20-day delay and different offenses required new waiver); United States v. Boster, 38 C.M.R. 681 (A.B.R. 1968) (two interrogation sessions found separate and distinct); State v. White, 288 N.C. 44, 52, 215 S.E.2d 557, 562 (1975) (a number of hours' delay between statement required a new warning and waiver when the second interrogation took place at a new location and under different circumstances); Commonwealth v. Wideman, 460 Pa. 699, ___, 334 A.2d 594, 599 (1975) (12-hour delay between initial waiver and confession required a new set of warnings when the interrogation was broken a number of times and the suspect was allowed to sleep for a period).

[193] Incomplete warnings, erroneous warnings, failure to comply with an attempted exercise of the right against self-incrimination or the right to counsel, physical coercion, threats, inducements and psychological coercion, to name the more usual violations.

may be considered a major factor in a suspect's decision to make a subsequent statement.[194]

On the other hand, it is equally apparent that many of the errors that can cause a statement to be inadmissible may either be exceedingly minor in scope and of little continued effect, or may be adequately counterbalanced by rights warnings and circumstances. The courts have generally treated these cases on a case-by-case basis, looking carefully at the unique facts of each to determine the probability that the impropriety of the first interrogation was overcome by procedures used in the later one.[195]

The burden to show voluntariness remains with the prosecution, which must show the later statement to have been obtained in full compliance with *Miranda* and the voluntariness doctrine. The burden may be difficult to meet under these conditions. The courts have apparently treated cases involving only *Miranda* violations at the earlier interrogation somewhat more leniently than cases involving violations of the pre-*Miranda* voluntariness doctrine.[196] In all such cases involving a later custodial interrogation,[197] proper warnings must be given and a proper waiver obtained. If this is done and the prosecution can show that any prior taint has been dissipated [198] by time, special warnings, or circumstances, the statement is apt to be admissible.[199] Statements involving physical coercion, threats or un-

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[194] The suspect may believe that the "cat is out of the bag" and he has nothing to lose by confessing further.

[195] The courts have generally rejected the theory that the "cat is out of the bag" rationale requires suppression of all subsequent statements unless perhaps the suspect is told that his prior statement is inadmissible. **See** Tanner **v.** Vincent, ___ F.2d ___, ___, 19 Crim. L. Rep. 2509 (2d Cir. Aug. 27, 1976) (and cases cited therein). However, the inadmissibility of the first statement is a factor that *must* be considered when weighing the admissibility of the later statement. ***See*** State v. Silver, 286 N.C. 709, 213 S.E.2d 247 (1975).

[196] *See* United States v. Toral, 536 F.2d 893 (9th Cir. 1976) (where first interrogation had little that was inherently coercive and was defective almost exclusively because of the police failure to give warnings, the later statement was untainted). ***See generally*** C. MCCORMICK, EVIDENCE § 157 (2d ed. 1972).

[197] While *Miranda* warnings only apply to custodial interrogation, it would seem only logical that an inadmissible statement could taint a subsequent statement obtained during noncustodial interrogation. However, the balancing test usually applied would likely make it easier for the prosecution to meet its burden in such a case.

[198] An exploitation of the first statement will likely render the second inadmissible. Similarly, a statement by the accused to the effect that "I wouldn't tell you this if I hadn't talked to you yesterday" will probably doom the statement if the prior statement had been inadmissible.

[199] ***See*** Tanner v. Vincent, ___ F.2d ___, 19 Crim. L. Rep. 2509 (2d Cir. 1976); People v. Linwood, 30 Ill. App. 3d 454, 333 N.E.2d 520 (1975); State v. Davis, ___ La. ___, 336 So. 2d 805 (1976); State v. Dakota, 300 Minn. 12, 217 N.W.2d 748

lawful inducement will be more difficult to salvage.[200] While not required,[201] interrogators attempting to repair an improperly obtained statement should not only give the usual warnings but should notify the suspect that the earlier statement should be considered inadmissible at court, in order to moot later litigation.[202]

By far the most difficult question in this area is whether a suspect's exercise of his *Miranda* rights prevents questioning at a later time. Clearly, competing considerations are involved. *Mirarzda* expressly required that questioning must stop as soon as a suspect invokes his rights.[203] To allow repetitive attempts at interrogation can only be regarded as a wearing away of the *Miranda* armor, even if *Miranda* warnings are given during each attempt.

On the other hand, a suspect may desire to change his mind and to make a statement — particularly if made aware of newly discovered evidence. If confession evidence is desirable, and society persists in viewing it as such, society has an interest in balancing the seemingly absolute privilege against self-incrimination with a police right to ask a suspect to reconsider. The law is unsettled.

In 1975, the Supreme Court in deciding *Michigan* v. *Mosley* [204] attempted to resolve the problem but left the area in near hopeless confusion. Richard Mosley was arrested in Detroit in connection with a series of robberies. He was brought to the police department where he was advised of his rights, after which he affirmatively re-

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(1974). *But see* Randall v. Estelle, 492 F.2d 118 (5th Cir. 1974); United States *ex rel.* Stephen J. B. v. Shelly, 430 F.2d 215 (2d Cir. 1970) (holding that under the circumstances the later statement was tainted).

200 Violations of the traditional voluntariness doctrine are deemed more likely to have substantial long term effect than the failure to give the prophylactic *Miranda* warnings. Arguably this is correct *if* one views the station house or custodial interrogation atmosphere as less coercive than intentional affirmative misconduct. Similarly, threats, inducements, and so forth will usually be the results of intentional misconduct, while most *Miranda* violations may be unintentional. Under such circumstances the public policy behind the exclusionary rule should be applied differently, as the probability of deterring police misconduct will differ. For a different justification of different treatment, *see* C. MCCORMICK, EVIDENCE 345 (2d ed. 1972).

201 *See* Tanner v. Vincent, _____ F.2d _____, _____, 19 Crim. L. Rep. 2509 (2d Cir. 1976); State v. Dakota, **300** 1976); State v. Dakota, 300 Minn. 12, 16, 217 N.W. 2d 748, 751 (1974).

202 *See* United States v. Seay, 24 **C.M.A.** 10, 51 C.M.R. 60 (1975) ("In addition to rewarning the accused, the preferable course in seeking an additional statement would include advice that prior illegal admissions or other improperly obtained evidence which incriminated the accused cannot be used against him").

203 " . . . if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." 384 U.S. 436, 445 (1966). *See also* 384 U.S. at 473–74.

204 423 U.S. 96 (1975), hereinafter cited as *Mosley*.

fused to answer any questions about the robberies. A few hours later, a different detective approached Mosley in his cell, gave proper warnings, and questioned him about a homicide. Mosely admitted participation.

The majority of the Court held that Mosely's *Miranda* rights had not been violated in that the first interrogation had stopped immediately when he refused to answer questions, and the second session pertained to an entirely different offense.[205] The majority appears to have highlighted the fact that while Mosley exercised his privilege against self-incrimination, he did not request counsel.[206]

Justices Brennan and Marshall,[207] dissenting, pointed out that the homicide was in fact connected with the robberies, as Mosley had been arrested only after a "tip" that concerned both offenses, and that not only had the interrogations been connected, but that Mosley's refusal to discuss the robberies should have been construed to have included the homicide. More importantly, the dissenters criticized, properly it would seem, the majority's holcling [208] that so long as a refusal to talk was "scrupulously honored" interrogation could resume at some later time. Not only did such a test seem to further erode *Miranda*,[209] but it created a test without meaning, for no indication of time limit between interrogations appears in the opinion. Justices Brennan and Marshall suggested that subsequent interrogation should be prohibited until counsel was appointed and present or until the accused was arraigned.[210]

Thus, at present the police may attempt to question a suspect who has previously asserted his *right against self-incrimination so* long as they honored the original refusal to talk and so long as some unknown time period existed between the two interrogations. Further, the Court has arguably ruled only on a subsequent interrogation for an offense *unrelated* to the first interrogation, although the Court's ultimate direction appears clear. It is, however, important to note that the majority in *Mosley* highlighted the fact that Mosley had not affirmatively requested counsel, suggesting strongly to the

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[205] It is interesting to note that Mr. Justice White, concurring, stated: " . . . I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant. I think the Court should say so now." **423** U.S. at **168.**
[206] **423** U.S. at **104.**
[207] **423** U.S. at **111.**
[208] *Id.* at **114–15.** For further discussion ***see*** Note, **21** VILL. L. REV. **761** (1975–76).
[209] *Compare Mosley* with *Miranda*, **384** U.S. at **473–74.**
[210] **423** U.S. at **116.**

reader that a request for counsel might block subsequent interrogation until counsel was obtained.[211] Such a rule would find some precedent in the decisions of a number of lower courts.[212]

At present the state of the law may be summarized thusly: It is clearly constitutional to request a statement, after proper warnings and waiver, of a suspect who has previously refused to make a statement about a different offense, if there has been an "appreciable" delay between interrogations and if the circumstances do not seem coercive. It is *probably* proper to attempt a later interrogation involving the same offense that the suspect originally refused to discuss so long as his original refusal to talk was "scrupulously honored." [213] It is also clear that the Court has rejected the notion that *Miranda* expressly forbids renewal of interrogation.[214] All other questions, particularly those cases in which the suspect did in fact request counsel,[215] are left open for later decision.

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[211] Id. at 104, note 10: [Miranda] "directed that 'the interrogation must cease until an attorney is present 'only'[i]f the individual states that he wants an attorney."' However, the Supreme Court in Brewer v. Williams, ___ U.S. ___, 45 U.S.L.W. 4287, 4292 (1977) appears to accept the proposition that a defendant may always waive his right to counsel although it is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' " [citations omitted]. Thus, it seems that a defendant may be questioned a second time even though at the first session he requested counsel. For the second session to yield an admissible statement, however, in the absence of counsel, the accused must intentionally and knowingly give up the right to counsel — arguably from Brewer's context a higher standard than normally used in Miranda cases.

[212] See United States v. Clark, 499 F.2d 802 (4th Cir. 1975).

[213] See State v. Travis, 26 Ariz. App. 24, ___, 545 P.2d 986, 991 (1976); People v. Almond, 67 Mich. App. 713, 717–18, 242 N.W.2d 498, 501 (1976); Commonwealth v. Reiland, ___ Pa. Super. Ct. ___, 359 A.2d 811 (1976); State v. Robbins, 15 Wash. App. 108, 547 P.2d 288 (1976). There are numerous similar cases predating Mosley. ***See*** United States v. Davis, 527 F.2d 1110, 1111 (9th Cir. 1975); State v. O'Neill, 299 Minn. 60, 71, 216 N.W.2d 822, 829 (1974). ***Note*** United States v. Olof, 527 F.2d 752 (9th Cir. 1975) (right to cut off questioning was not "scrupulously honored" and later statement was held inadmissible); Harne v. State, 534 S.W.2d 703 (Tex. Ct. Crim. App. 1976).

[214] Michigan v. Mosley, 423 U.S. 96, 101–04 (1975).

[215] While some courts have held that a request for counsel prevents later interrogation until counsel has been obtained and present, ***see*** United States v. Flores-Cavillo, ___ F.2d___, 19 Crim. L. Rep. 2405 (9th Cir. July 14, 1976); People v. Parnell, 31 Ill. App. 3d 627, 630, 334 N.E.2d 403, 406 (1975), numerous courts have found a request for counsel to be of no particular significance in deterring a later interrogation. See United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976); People v. Morgan, 39 Ill. App. 3d 588, 350 N.E.2d 27 (1976); Commonwealth v. Orton, ___ Mass App. Ct. ___, 355 N.E.2d 925, 927 (1976): Buckingham v. State, ___ Tenn. App. ___, 540 S.W.2d 660 (Ct. Crim. App.), *cert* denied, ___ Tenn. ___, ___ S.W.2d ___ (1976). *See also* Brown v. United States, 359 A.2d 600 (D.C. Ct. App. 1976) (interrogating detective was unaware of suspect's prior request for counsel, statement was admissible). ***See*** also n.210 supra, discussing Brewer v. Williams, ___ U.S. ___ (1977).

XII. OVERRULING *MIRANDA* BY STATUTE

Believing that Miranda was a major impediment to effective law enforcement, police, prosecutors, and much of the nation's more vocal citizenry greeted the decision with outrage that has cooled only slightly with time. The national displeasure resulted in a Congressional attempt to overrule Miranda by statute which President Johnson signed into law as part of the Omnibus Crime Control and Safe Streets Act of 1968.[216] Insofar as Miranda was concerned, the statute attempted to replace the *Miranda* exclusionary rule that required suppression of a statement obtained without proper Miranda warnings and waiver, with a pre-Miranda voluntariness test.[217]

At the time of its enactment, the "Post-Miranda Act" was considered unlikely to affect Miranda directly, as Miranda was considered a decision resulting from constitutional interpretation and beyond statutory control.[218] Accordingly, while other sections of the

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[216] Pub. L. No. 90-351, 82 Stat. 197. The relevant portion of the Act usually termed either the "Post-Miranda Act" or the "Anti-Miranda Act" is 18 U.S.C. § 3501 (1970). *See generally* O. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 139–45, 163–64 (1973); and Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 GEO. L.J. 305 (1974) (hereinafter cited as Gandara). For the legislative history of 18 U.S.C. § 3501 *see* [1968] U.S. CODE CONG. & AD. NEWS 2124-2150.

[217] 18 U.S.C § 3501(b) (1970):

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel. and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

[218] Despite some argument that Congress should have acted to limit the federal courts' jurisdiction to review on appeal, a finding that a confession was voluntary in the § 3501 sense, *see* [1968] U.S. CODE CONG. & AD. NEWS 2139–2150, Congress seems to have abandoned its attempt to expressly limit federal jurisdiction, and there seems to have been significant doubt that the statute could actually affect *Miranda*. *See* Gandara, *supra* note 216, at 311–13; O. STEPHENS, *supra* note 216, at 142–45. Professor Stephens suggests at page 145 that the statutory effort to limit *Miranda* may have been intended to signal the Supreme Court that it had gone too far and should reconsider *Miranda* and its general approach in criminal matters.

statute had effect,[219] the *Miranda* portion tended to be ignored.[220] However, the Supreme Court's clear dislike for *Miranda* has resulted in a significant shift in the potential importance of the statute.

In *Michigan* v. *Tucker*,[221] the Supreme Court apparently found that *Miranda* lacked constitutional dimension and served only as "prophylactic rules.'' [222] While there is surely every reason to believe that the Warren Court had not intended to set the *Miranda* decision in concrete for all time,[223] *Miranda* was clearly a decision of constitutional dimension. With the Court's present view, however, it seems possible that the "Post-Miranda Act" could be found by the Court to have pre-empted the Court's "nonconstitutionally required" *Miranda* framework.

Although the Supreme Court had not had the occasion to construe the legality and effect of the "Post-Miranda Act" by the early part of 1977, some courts had begun to apply it to prevent exclusion of statements that would have been suppressed under *Miranda*.[224] While at present *Miranda* governs, the long term effect of the statutory attempt to overrule it is unknown and cannot be dismissed as clearly ineffective.

XIII. *MIRANDA*'S FUTURE

Miranda has been with us since 1966. Although it seems unlikely that it will ever pass from the legal scene completely, it would take an incurable optimist to predict its continued vitality in even its present form by 1980. The Supreme Court has consistently [225]

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[219] The sections attempting to overrule the Courts' decisions in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), were apparently successful.

[220] ***See*** Gandara, *supra* note 216, at 311-13, indicating that federal law enforcement agents have adhered to *Miranda* and that many of the United States Attorneys did not urge § 3501 on Federal District Courts to save confessions, although the Southern District of New York "had invoked section 3501 in several cases . . . " *Gandara* at 312.

[221] 417 U.S. 433 (1974).

[222] *Id.* at 466.

[223] *Miranda* expressly recognized that other effective techniques might be developed which could replace the warnings. 384 U.S. 436, 467 (1966).

[224] ***See*** United States v. Crocker, 510 F.2d 1129, 1136–1138 (10th Cir. 1975) which states,

> We have held that voluntariness **is** the sole constitutional requisite governing the admission of a confession in evidence. . . . We believe that Michigan v. Tucker . . . , although not involving the provisions of § 3601, *supra*, did, in effect, adopt and uphold the constitutionality of the provisions thereof.

510 F.2d at 1137 (citations omitted).

[225] ***But see*** Doyle v. Ohio, 426 U.S. 610 (1976); and United States v. Hale, 422

undercut its stepchild [226] and has clearly made preparations for its eventual demise. Congress has attempted to overrule it,[227] and many of the subordinate federal and state courts have made a point of distinguishing between statements inadmissible under the voluntariness doctrine and statements obtained "only" in violation of *Miranda*.[228] The outpouring of sentiment that accompanies every case taken by the Supreme Court that might be used as a vehicle to further hasten *Miranda*'s end indicates that much of the nation continues to reject the case.

Perhaps the most interesting thing about the continued resistance to *Miranda* is that there seems little empirical evidence to substantiate the many claims made on behalf of its opponents. While clearly *Miranda* has educated police to a functional knowledge of the fifth amendment privilege [229] and has made a change in interrogation

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U.S. 171 (1975), holding that the silence of a suspect after having received *Miranda* warnings may not be admitted at trial for impeachment purposes. Arguably these cases involve the basic exercise of the self-incrimination privilege rather than *Miranda* itself. To penalize for silence after having warned a suspect of his right to remain silent, would appear destructive of the privilege.

[226] Oregon v. Mathiason, ___ U.S. ___, 45 U.S.L.W. 3500 (1977); Oregon v. Hass, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971). It is interesting to note that Professor Yale Kamisar observed in 1973 that "not only has the Burger Court failed to counter the strong resistance of law enforcement officials and the lower courts to the Warren Court's landmark criminal procedure decisions, such as *Miranda* . . . but has actively encouraged such resistance." Address by Yale Kamisar, the Second Kenneth J. Hodson Lecture in Criminal Law, The Judge Advocate General's School, U.S. Army, Charlottesville, VA (January 25, 1973). In view of the Court's decision in Stone v. Powell, ___ U.S. ___ (1976), limiting federal review via habeas corpus of state fourth amendment violations, it seems likely that it will soon limit review of *Miranda* violations. Although the Court failed to take the opportunity to substantially modify *Miranda* in Brewer v. Williams, ___ U.S. ___, 45 U.S.L.W. 4287 (1977), *Brewer* makes it clear that at least five members of the Court are unhappy with *Miranda* and would modify it given the proper case.

[227] *See* section XII, *supra*.

[228] A number of appellate courts have distinguished between "voluntariness" violations and *Miranda* violations in applying the *Chapman* harmless error rule rather than the "automatic reversal rule" to *Miranda* violations. *See* Smith v. Estelle, 519 F.2d 1267 (5th Cir. 1976) (distinguishes between "coerced" and "unlawful" confessions); Null v. Wainwright, 508 F.2d 340, 343 (5th Cir. 1975) (and cases cited therein); State v. Magby, ___ Ariz. ___, 554 P.2d 1272 (1976); People v. Anthony, 38 Ill. App. 3d 427, 347 N.E.2d 770 (1976); State v. Ayers, 16 Ore. App. 300, 518 P.2d 190 (1974); State v. Persuitti, 133 Vt. 354, 339 A.2d 750 (1975); Scales v. State, 64 Wis. 2d 485, 219 N.W.2d 286 (1975). *See also* Note, *Criminal Law: Applying the Harmless Error Rule to a Confession Obtained in Violation of Miranda — the Oklahoma View*, 28 OKLA. L. REV. 374 (1975); Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967) (suggests that *Miranda* violations could not be harmless).

[229] If, . . . (*Miranda*'s) impact is seen largely in terms of the educational purposes served by many Supreme Court rulings, *Miranda* can be accorded great importance. Regardless of his estimate

procedures, the studies of *Miranda's* actual effects on law enforcement suggest that those effects have been minimal.[230]

Miranda's effects should be analyzed from two perspectives — the degree to which it has hindered law enforcement by preventing confessions or related benefits,[231] and the degree to which it has truly proven to be a protection against the "inherent coercion of the station house." In both cases *Miranda's* actual effects appear to have been minimal. While it has not hurt law enforcement seriously, neither has it particularly improved the lot of the suspect.[232]

Should this be the case, why has *Miranda* encountered so much resistance? While the evidence suggests minimal actual effect, there can be no question that *Miranda* is *perceived* as having reduced the number of statements made and consequently the overall conviction and case clearance rate. Thus, the popular belief does not correspond with the reality. Further, a number of the studies have indicated that while police may know the rules, they are frequently unaware of *Miranda's* policy intent and its background. Thus, lack of education is a significant factor in the opposition to the case.[233] This

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of the decision, each officer whom we interviewed displayed at least rudimentary knowledge of the Fifth Amendment requirements outlined in *Miranda.* Such knowledge, irrespective of competing policy considerations, could be an indispensable prerequisite to the recognition of fundamental rights and the constitutional performance of professional duties in this area.

. O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 200 (1973).

[230] *Id.*, 179–200; Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality,* 64 J. CRIM. L. & CRIMINOLOGY 320 (1973); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda,* 47 DEN. L.J. 1 (1970); Nedalie, Zeitz & Alexander, *Custodial Police Interrogation' in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh — A Statistical Study,* 29 U. PITT. L. REV. 1 (1967); Griffith & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors,* 77 YALE L.J. 300 (1967); Comment, *Interrogation in New Haven: The Impact of Miranda,* 76 YALE L.J. 1641 (1967).

[231] One commentator found that police in one city felt that *Miranda* had adverse effects "in five areas: (1) in the outcome of formal interrogations, (2) in the collateral functions of interrogation [*i.e.*, implication of accomplices, solving other crimes, recovery of stolen property, and clearing suspects], **(3)** in the amount of stolen property recovered, **(4)** in their conviction rate, and **(5)** in their clearance rate." Witt, n.230, *supra* at 322.

[232] *See* Griffith, n.230 *supra.* The problem with *Miranda* as a remedy for psychological coercion is that the warnings, even if properly given, do not appear to act to diminish the underlying compulsion to cooperate and are, therefore, valueless. Equally important is the perception of many familiar with police work that the warnings are given in such a rapid and/or ritualistic fashion, or with use of voice intonations that either threaten or embarrass the suspect, that they are effectively nullified.

[233] On the Thursday following the Supreme Court's decision in Oregon v. Mathiason, n.226 *supra,* the editorial page of the Washington Post carried a stri-

is particularly important, for *Miranda* has become a symbol—an overly simplistic symbol—in the minds of many who view it as a token of "liberal" support for the rights of criminals in preference to support for the forces of law and order needed for the continued survival of society.

Perhaps in reaction, many of those who support the case view it as one of the truly basic guarantees of freedom in contemporary civilization, neglecting to note the probability that it has failed to accomplish its primary purpose. Viewed as a symbol—a symbol that has never been truly comprehended by most of the country—*Miranda*'s problems may be explained, for *Miranda* is a handy tool for police and public who feel abandoned by the judicial process, and who look for simplistic explanations for the crime problem. After all, it is easier to blame the courts for coddling criminals, using *Mirandn* as an example of such anti-social interference, than to come to grips with the incredibily complicated causation underlying the ongoing crime rate. Regardless of the reality, however, and regardless of the reasons, there can be little doubt that *Miranda* lacks the minimum consensus needed for the continued effective survival of a Supreme Court decision.

What then of *Mirnndn?* It seems highly likely that a procedural mechanism similar to 18 U.S.C. § 3501 [234] or to the American Law Institute's Model Code of Pre-Arraignment Procedure [235] will be

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dent editorial criticizing the Court's decision as having further narrowed *Miranda* by having limited it to custodial *interrogations.* Washington Post, Jan. 27, 1977 at ___. If a major newspaper's editorial writers can be so ignorant of the minimum holding of *Miranda,* one can only speculate as to the ignorance of layman and policeman alike.

[234] ***See*** section XII *supra.*

[235] The Model Code, published in 1975, adopts a quasi-Mzranda framework for questioning suspects prior to appearance at the police station, stating that "the officer shall warn such person as promptly as is *reasonable* under the circumstances, and in any case before engaging in any sustained questioning" (of his right to remain silent, and that if he wants a lawyer he will not be questioned until one is later made available), § 120.2(5)(a), emphasis added, and also prior to interrogation after arrival at the station, § 140.8. The Code also includes limitations on the period of questioning (normally a limit of five hours questioning at the police station), §§ 140.8(4) and 130.2; and specifies additional rights such as the right to communicate with "counsel, relatives or friends" by telephone, §§ 110.2(5)(a)(iii); 130.1(5); and 140.8(1). Further, aspects of the voluntariness doctrine are set forth as codal sections: §§ 140.2 (deception may not be used to induce a statement by indicating that a suspect is legally required to make one); 140.3 (abuse, threats, or denial of necessities may not be used to induce a statement); 140.4 (questioning of great length, frequency or persistence may not be used to induce a statement; neither may "any other method which, in light of such person's age, intelligence and mental and physical condition, unfairly undermines his ability to make a

adopted. Under such a mechanism, rights warnings would continue to be required in one form or another, and requested counsel would still have to be supplied, but the result of a good faith mistake or omission would not necessarily be fatal to the resulting evidence's admissibility. In short, the "new" test to be applied for suppression will likely be a variant of the "old" voluntariness test. Should this be the case, *Miranda* will never be overruled; it will simply be emasculated.

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choice whether to make a statement or otherwise cooperate."). Where the Model Code differs radically from *Miranda* is in the result of a violation of its requirements. Unlike the near total *Miranda* exclusion, the Model Code requires suppression only if the violation was either in violation of the Constitution or "substantial." § 150.3(1). "Substantial" violations include those which were "gross, wilful and prejudicial to the accused," § 150.3(2)(a), those "of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement," § 150.3(2)(b), and those in which "the violation created a significant risk that an incriminating statement may have been untrue," § 150.3(2)(c). Section 150.3(3) sets forth criteria to be used in determining whether a violation not covered by § 150.3(2), *supra*, is "substantial.'' The Model Code expressly provides that notwithstanding a violation of its requirements, consultation with counsel between the time of violation and the time of making the statement makes the violation "nonsubstantial." If the primary evidence is to be excluded under the Code, so too will be derivative evidence unless inevitable discovery can be shown and exclusion is not necessary to protect compliance with the Code, § 150.4. For a brief summary of the Model Code *see* Vorenberg, *A.L.I. Approves Model Code of Pre-Arraignment Procedure*, 61 A.B.A.J. 1212 (1975).

MODERNIZING THE LAW OF WAR*

R. R. Baxter**

In these days, curiously little attention is given to the philosophy of war, even in military circles, where one might expect there to be at least some slight interest in the subject. The usual analysis of a state's objectives in war — as distinguished from the objectives of a particular state — goes no further than the unassailable proposition that a state should fight a war in such a way that it will win the war. Only slight reflection on this assertion should persuade one that it gives rise to a number of questions. What should a state engaged in armed conflict with another state actually seek to accomplish? What costs are tolerable in the course of seeking to prevail over the enemy? What sort of conduct, what attitude toward the enemy, is best calculated to bring about success in war? What, indeed, does the word "win" mean? Can a short-term victory be followed by what is properly seen in the long term as a loss of the conflict? One is reminded of the injunction uttered during the Second World War — that we must not win the war but lose the peace.

Victory, it is fairly clear, does not necessarily mean the complete destruction, the decimation, of the enemy. Indeed, the best possible outcome for a state technically at war would be that this state would impose its will upon another state with no loss of life or destruction of property on either side, simply through the threat of overwhelming force. Thus the use of force or the threat of force may look to minimal destruction and casualties for the adversary. Presumably, a state waging war will also, in its own self-interest, seek to minimize the losses to itself. As the result all-out war may not be in the interest of a belligerent, either in so far as it involves excessive destruction of the human and material resources of the enemy or in so far as it may mean full commitment of all of the resources of the belligerent. The limited or economical use of force, involving the minimum use of military resources by a belligerent and minimal destruction of

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**Professor of Law, Harvard University. The writer was a member of the United States Delegation to the first three sessions of the Diplomatic Conference on International Humanitarian Law.

the enemy's people and property, should in most instances be a desirable concommitent of victory or perhaps even an element of the definition of victory itself.

If the all-out use of force is not necessary to victory, it follows that any employment of force in excess of what is actually needed is wasteful and unnecessary. At this point a principle of the proper conduct of warfare meets and merges with one of the principal concepts of the law of war—the prohibition of unnecessary destruction. When that prohibition is seen in human terms, it shows itself as a prohibition on the causing of unnecessary suffering. This basic rule of humanitarianism and governing principle of the use of force in the national interest find expression in the same principle that no more destruction and no more suffering must be inflicted upon the adversary than are necessary to bring the conflict to a successful outcome.

Principles slip easily off the tongue. The difficulty comes in giving expression to them in the form of rules that will govern specific cases. States have attempted to give expression to this basic principle through the humanitarian law of war, evolving in its treaty form from the first Red Cross Convention of 1864.[1] What is necessary in war and what conduct can be prohibited as unnecessarily destructive and unnecessarily productive of human suffering are not easy to define, and reasonable minds may well differ about such questions. It is inevitable that considerations other than those of humanity should intrude themselves into the law-making process. In the course of debate about such matters, a state will naturally pursue its own national advantage. If it is a "have–not" state in the military sense, it may seek to place limits on the arms of the armed forces of "have" states. The "have-not" state will also seek a preferred position for its own personnel and mode of warfare, which the "have" state will naturally resist. Moreover, the very coming together in a conference, like the Diplomatic Conference on International Humanitarian Law, which concluded its endeavors in June of this year, offers an opportunity to seek diplomatic and political advantages through manipulation of the process. Conferences acquire a certain life of their own and become games played for their own sake. Considerations of humanity become caught up in what I have elsewhere described as humanitarian politics.[2]

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[1] Geneva Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field, **Aug. 22, 1864, 22** Stat. **940,** T.S. No. **377.**

[2] Baxter, *Humanitarian Laui or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law,* **16 HARV. INT'L** L.J. 1 (1975).

The four sessions, covering as many years, of the Diplomatic Conference and the two preliminary Conferences of Government Experts convened under the auspices of the International Committee of the Red Cross had as their objective the modernization of the law of war on and affecting land. It dealt with both the law of land warfare and the law of aerial bombardment. One of the most remarkable accomplishments of the Conference was agreement on a number of rules for this aspect of the law of air warfare, which has heretofore been derived by inference from outmoded treaties, such as the Hague Regulations[3] and the Hague Convention of 1907 on Naval Bombardment.[4]

Such is the velocity of change in the nature of war and the manner of waging war that the Geneva Conventions of 1949 had by the 1970s become in need of supplementation and, to a certain degree, of modification. I shall not dwell here on the specific events that precipitated the movement for change. Interest on the part of the human rights constituency within the United Nations, pressure exerted by the United Nations in the form of a threat to move into what had heretofore been the preserve of the International Committee of the Red Cross, and the accumulated concerns of the I.C.R.C. itself all played a part.

At the outset, when the United Nations and the I.C.R.C. were seeking out inadequacies in the existing law and of aspects of warfare that required regulation, it was by no means clear what modernization entailed. There was simply a generalized sense that something ought to be done. Only the I.C.R.C. had some sense of what matters called for attention; the protection of the civilian population from bombardment was perhaps the most important of these concerns. As states began to consider what would be desirable modifications of the law in their own interests, a number of areas of primary concern emerged, such as better implementation of the existing Conventions, the need for legal safeguards in noninternational armed conflicts, and the application of the law of war to "wars of national liberation.'' The I.C.R.C., with the help of government experts, identified what these areas were and then proceeded to draft two Protocols to the Geneva Conventions of 1949;[5] one dealing

[3] Regulations Annexed to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2295 [hereinafter cited as Hague Regulations].

[4] Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542.

[5] Geneva Convention for the Amelioration of the Condition of the Wounded and

with international and the other with noninternational armed conflicts.[6] They could have taken the course of preparing a number of rather short protocols dealing with specific problems that called for new law—a protocol on implementation, a protocol on better medical evacuation from the battlefield—but chose to draft more general instruments that could very well be described as the Fifth and Sixth Geneva Conventions. In preparing well-rounded treaties, the I.C.R.C. was enabled to incorporate a number of new duties and privileges which they in particular wanted to add to the existing Geneva Conventions.

There were several gentlemen's agreements about how the process of modernization was to take place. First, it was agreed *sub silentio* that there would be supplementation but no modification –in the sense of opening up the bodies—of the Geneva Conventions of 1949. Supplementation does involve change, and certainly the extension of both the Protocols *and* the Geneva Conventions of 1949 to wars of national liberation did modify the earlier treaties. It also seemed to be generally understood that there would be no tampering with the general protection of the wounded and sick and of prisoners of war. Finally, the Conference settled into the view, not without some struggle, that it ought not to get into the matter of naval warfare and the protection of civilian persons and property at sea.[7]

One can understand the work of the Conference on International

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Sick in Armed Forces in the Field, Aug. 12, 1949, U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 287 [hereinafter cited as GPW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

[6] 1 International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Basic Texts (1972); International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of Aug. 12, 1949, and Commentary (1973).

[7] Protocol I, art. 49, para. 3 provides:

> The provisions of this Section apply to any land. air or sea warfare which may affect the civilian population. individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (issued as an unnumbered conference document, July 1977) [hereinafter referred to as Protocol I].

Humanitarian Law only in the setting of human rights law and humanitarian law in general. Until comparatively recently, the general perception was that there were two separate bodies of law –human rights law applicable to one's own nationals in time of peace and the law with respect to the protection of war victims, incorporated in the Geneva Conventions of 1949 and other treaties and applicable for the most part to individuals depending in one way or another on the adversary. The two bodies of law went their own ways and were supported by quite separate interest groups.

In the last ten years or so, it has come to be realized that human rights are as much at peril in time of war as they are in time of peace and that the law of human rights and the humanitarian law of war are actually closely related. In addition, the humanitarian law of war, which up till now has been applied to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,"[8] has not been brought to bear on two important forms of contemporary conflict.

With the exception of common Article *3* of the Geneva Conventions of 1949, the Geneva law applies only to conflicts between states. Article *3* contains the short bill of rights for noninternational armed conflicts and was thought to be a radical transformation of the law when it was incorporated in the Conventions in 1949. But since that time, a large number of internal conflicts have reached a scale akin to that of international armed conflicts whether measured in terms of the number of persons involved or the degree and kinds of force employed. Moreover, a number of international armed conflicts have an important noninternational element. The conflict in Vietnam, for example, had both international and noninternational elements, and a strict distinction between the two aspects of the conflict in terms of the law applied proved to be out of the question.

The period since the adoption of the Geneva Conventions of 1949 has also seen the emergence of a new kind of conflict—the war of national liberation.[9] In essence, this is an anticolonial war, which, under the traditional law of war, was governed by whatever law there might be concerning noninternational armed conflicts. When the colony achieved independence, was recognized as a state, and

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[8] Common art. 2 of the Geneva Conventions, *supra* note *5*.

[9] This concept has been dealt with in greater detail in Baxter, *supra* note **2,** and in *The Geneva Conventions of 1949 and Wars of National Liberation,* 57 RIVISTA DI DIRITTO INTERNAZIONALE 193 (1974). The best article on the subject remains, G. Abi-Saab, *Wars of National Liberation and the Laws of War,* **3** ANNALES D'ETUDES INTERNATIONALES 93 (1972).

became a party to the Geneva Conventions, then any conflict with the former colonial power was an international armed conflict governed by the totality of the Geneva Conventions. The case for saying that such an anti-colonial war is from the outset a conflict that should be governed by the whole of the international law of war is that, if a colony or dependent territory is entitled to independence as a matter of international law, the law should treat such a colony or dependent territory as if it were independent and give it all the benefits of the law governing international armed conflicts. Otherwise the colonial power would profit by its own wrong in refusing to recognize the independence of the colony and in refusing to apply to it the law governing conflicts between two independent states. This is a simplified approach to a complex problem, and there are obvious difficulties that lie in the way of applying the whole corpus of the law of war to conflicts of this character. The developing countries, particularly those that had recently secured their independence, regarded the application of the whole of the law of war to wars of national liberation as the most important reform that ought to be made in the humanitarian law of war.

The situation when the Diplomatic Conference began its deliberations was thus that there were four different types of situations to be taken account of peacetime (to which the law of human rights applies); internal armed conflicts (to which only Article 3 of the Geneva Conventions applied); international or interstate armed conflicts (to which all of the rest of the Geneva Conventions of 1949 applied); and wars of national liberation (which had not previously been dealt with by the humanitarian law of war). The case can be made, in theory at least, that the same body of law should govern the protection of human rights in all four types of situations and that the war-peace distinction reflected an oversimplified and outmoded view of the world. Nevertheless, the situations are different. Even a human rights convention, such as the European Convention, may be suspended in time of war.[10] The guarantee of the basic rights of one's own nationals in time of peace and the safeguarding of enemy personnel in time of war belong to two different spheres of state action and interests. As a matter of history the development of the law of war has taken a quite different path from that newly

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[10] Art. 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 Nov. 1950, in Council of Europe, European Convention on Human Rights: Collected Texts 101 (11th ed. 1976).

laid out for the legal protection of human rights in time of peace. The law of war has developed its own institutions, such as the status of a prisoner of war or the role of the protecting power. And finally, the scale of violence employed in the torture of an individual and in the nuclear bombing of the enemy are so vastly different that they cannot be thought of within the same legal framework.

When the I.C.R.C. began its work on the development of the humanitarian law of war, there were high hopes for a separate new Protocol (or convention) on noninternational armed conflicts. Canada took a particularly helpful initiative in this endeavor[11] and had the support of the United States. The I.C.R.C. and the Nordic Countries[12] advocated making many of the obligations of belligerents the same in both international and noninternational armed conflicts. Draft Protocol 11, prepared by the I.C.R.C and dealing with noninternational armed conflicts, contained 47 articles,[13] and the parties to the conflict, whether the "government" or the "rebels," were put on a basis of equality. This proved to be too much for the majority of the states participating in the Conference. Opposition to the Protocol first took the form of raising the threshold of violence to which the Protocol would apply. Common Article 3 of the Geneva Conventions simply applies to "armed conflict not of an international character," but the new Protocol II was made to apply to

> all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[14]

What was obviously in the minds of the draftsmen was a conflict

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[11] Canadian Draft Protocol to the Geneva Coventions of 1949 Relative to Conflicts Not International in Character, prepared and submitted by the Canadian Experts, Doc. CE/Plen. 2 *bis*, in I.C.R.C., Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1974): Report of the Work of the Conference 57 (1971).

[12] *See, e.g.*, Draft Article submitted by the Norwegian Experts, Doc. CE/Com.II/2, in I.C.R.C. Report, cited *supra* note 11.

[13] I.C.R.C., Draft Additional Protocols to the Geneva Conventions of Aug. 12, 1949, *supra* note 6, at 129.

[14] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts (Protocol II) (issued as an unnumbered conference document, July 1977) [hereinafter cited as Protocol II], art. 1, para. 1.

resembling the Civil War in Spain rather than the civil wars in Nigeria or the Congo. Through this definition two levels of internal armed conflicts were created, even as to parties to both the Conventions of 1949 and Protocol 11—the lower level, governed by Article 3, and the higher level, governed by Protocol 11. Such nice legal distinctions do not make the correct application of the law any easier.

The second limitation on the scope of the Protocol came in the fourth session of the Conference when, at the initiative of Pakistan, the drafting of provisions was changed from the form "The parties to the conflict shall . . ." to statements of the protections which are to be extended to the participants and nonparticipants in the conflict. A number of provisions already adopted were simply dropped, and the simplified Protocol II was adopted in its reduced scale. There was some danger that the Protocol would not have survived at all if this radical surgery had not been employed.

The legal protection of persons affected by noninternational armed conflicts was seen by the developing and newly independent countries forming a majority of the Conference as much less consequential than the protection of belligerents and civilians in wars of national liberation. In this case, the law swung to the opposite extreme. A new article was steamrollered through the first session of the Conference, which provided in its most significant paragraph that:

> The situations referred to [in Article 2 common to the Geneva Conventions of 1949, namely interstate armed conflicts] . . . included armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[15]

By this provision not only Protocol I on International Armed Conflicts itself but also the totality of the Geneva Conventions of 1949 are made applicable to wars of national liberation.

The various types of conflicts which constitute wars of national liberation deserve some further explanation. The conflicts in which peoples fight against "colonial domination" are those in which a colony or dependent territory rebels, as was the case, for example, when the Portugese colonies in Africa rebelled and became inde-

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[15] Protocol I, *supra* note 7, art. 1, para. 4.

pendent. "Alien occupation" may seem an unnecessary provision, because belligerent occupation by one state of the territory of another is already governed by the Hague Regulations of 1907 and by the Geneva Civilians Convention of 1949. Presumably these two words were inserted to catch the votes of the Arab States; the territory under "alien occupation" is that claimed by the Arab States but under Israeli occupation. Hostilities in Rhodesia (Zimbabwe) and South Africa against the dominant white administrations are instances of fight against a "racist regime." The United States was concerned that a provision on wars of national liberation might introduce a subjective and judgmental element into the law of war, which had hitherto rested on a foundation of neutrality and equality of application to all belligerents, without regard to the legality of their resort to hostilities. However, the pressure in favor of the application of the whole of the law of war to wars of national liberation was such that it could not be resisted, and the United States and its NATO allies simply accepted the provision in silence.

One of the procedural complications occasioned by the provision on wars of national liberation was that a national liberation movement or any other entity or authority constituting the moving party in a war of national liberation would not be a party to the Geneva Conventions of 1949 or to Protocol I. To deal with this difficulty, a clause [16] was inserted whereby an "authority representing a people" engaged in a war of national liberation would undertake to apply the Protocol and the Conventions by a unilateral declaration addressed to Switzerland, the depositary of the Protocol. This declaration would bring the Protocol and Conventions into force between the "authority" and the other party to the conflict.

Political forces dominated the consideration of "noninternational armed conflicts" and "wars of national liberation.'' Developing countries, led by those who had experienced civil wars, succeeded in blunting the edge of the movement for a much more ample protection of the victims of civil wars. It was that same bloc of developing countries, supported by the U.S.S.R. and its allies, that succeeded in giving special status to wars of national liberation. The phenomenon of bloc voting by the developing countries is a familiar one. What happened at the Diplomatic Conference on International Humanitarian Law had its parallel in the position taken by that bloc on the question of sea-bed mining at the United Nations Conference on the Law of the Sea.

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[16] Protocol I, art. 96, para. 3.

Reference has been made above to the institutions that have developed within the law of war. One of the most important of these is the protected legal status that flows from a captured person's being held as a prisoner of war. The question of what persons qualify for this protected status has always been at the center of competition between major military powers and states with little military strength at the various conferences that have drawn up treaties relating to prisoners of war. Those states that rely on large bodies of organized military forces demand that prisoner of war status be reserved for those who belong to such forces. Smaller states that rely on citizen armies, guerrilla warfare, and resistance activities seek to have prisoner of war status extended to as many people as possible.

The usual argument that is put forward for confining prisoner of war status upon capture to those who constitute members of regularly constituted armed forces, readily identifiable as such, is that this declaration of belligerent status is essential to the protection of the civilian population. If, the argument goes, a combatant can disguise himself as a civilian and be immune from the use of force against him until he opens fire, this will prejudice the legal protection of all citizens. Unless a clear line can be drawn between combatants, who fight openly, and civilians, who are to be protected, all civilians will be put at peril. No one will be able to tell whether a civilian is a peaceful nonparticipant in the conflict or a disguised combatant. This view is widely held; but, to my knowledge, it has never been determined, through examination of actual practice, whether the theory is correct.

The conditions for qualification for belligerent status and thus for entitlement to PW status were established at the Hague Peace Conferences of 1899 and 1907. There, the contention was between such countries as Germany, a major military power, and states like the Netherlands and Belgium, which would have to rely on popular resistance.[17] Members of armies and those members of militias or volunteer corps that fulfilled the familiar four conditions were "belligerents" to whom "the laws, rights, and duties of war" apply:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

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[17] *See* B. **TUCHMAN,** THE PROUD TOWER **261** (1966).

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.[18]

At the Geneva Conference of 1949, those states that had been occupied by the Axis Powers during World War II and had been defended by resistance forces desired to broaden the definition of prisoners of war. The compromise worked out between the occupying countries and the occupied countries of World War II was a provision in the Prisoners of War Convention of 1949 which included among the persons entitled to prisoner of war treatment "members . . . of other organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied" who met the above four qualifications.[19]

One must doubt whether the extension of prisoner of war treatment to members of resistance movements as defined in Article 4 actually added anything to what was already implicit in the definition in the Hague Regulations of 1907 or whether any persons were given protection under the Prisoners of War Convention who were not already covered by the Geneva Prisoners of War Convention of 1949. Nevertheless, it was thought at the time that there had been an extension of prisoner of war protection to a new category of persons.[20]

Those who advocated making Protocol I and the Geneva Conventions of 1949 applicable to wars of national liberation were not insensible to the fact that the guerilla fighters who carry on wars of national liberation frequently do not meet the qualifications laid down in Article 4 of the Geneva Prisoners of War Convention of 1949. They were therefore ardently in support of a much enlarged definition of prisoners of war, which would include guerrillas who fought stealthily, were not armed, did not necessarily carry arms openly, and could not, because of the nature of their operations, always comply with the law relating to prisoners of war or with other aspects of the law of war. The Chairman of the Working Group in Committee III, Ambassador Aldrich, who headed the

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[18] Hague Regulations, *supra* note 3, art. 1. This definition was incorporated by reference in article 1 of the Geneva Prisoners of War Convention, July 27, 1929, 47 Stat. 2021, T.S. No. 846.

[19] GPW Convention, art. 4, para. A(2).

[20] J. DE PREUX, COMMENTAIRE: LA CONVENTION DE GENÈVE RELATIVE AU TRAITEMENT DES PRISONNIERS DE GUERRE 66 (1958).

United States Delegation, was responsible for trying to work out some sort of provision acceptable to the developing countries, among which Vietnam played a prominent role, and to the Socialist bloc.

A compromise worked out at the third session of the Conference was at the last moment opposed by the U.S.S.R. and its allies. But at the fourth session of 1977, the formula rejected by the Socialist Bloc in 1976 was found acceptable.[21] Under this stipulation, any "combatant" shall be a prisoner of war when he falls into the power of the adverse party. Combatants are required to distinguish themselves from the civilian population when they "engage in an attack or in a military operation preparatory to an attack." The crucial language deserves quotation:

> Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during such military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.**

If a combatant falls into the power of the adversary while failing to meet these requirements he forfeits his right to be a prisoner of war but "he shall, nevertheless, be given protection equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol."[23]

What this means is that the armed combatant who meets the requirements is entitled to the *status* of a prisoner of war, while the combatant who does not meet those requirements gets the *treatment* of a prisoner of war. A technical difference, concedely, but the combatant who does not meet the requirements and is entitled only to the treatment of a prisoner of war may also be tried and punished for not carrying arms openly at the stipulated times, so the actual treatment of the two types of combatant is actually quite different.

What constitutes "deployment" preceding the launching of an attack was the subject of a good deal of dispute at the Conference.[24] A

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[21] Protocol I, *supra* note 7, art. 44.
[22] *Id.*, art. 44, para. 3.
[23] *Id.*, art. 44, para. 4.
[24] *See* Draft Report of Committee 111, Fourth Session, para. 20, Doc. CDDH/III/408 (1977).

prisoner's life may hang on whether he concealed his arms while engaged in a military deployment preceding attack or during the attack itself. In this and other respects, the provision may prove difficult of application, and it will doubtless be one of the points that may give rise to problems when the Protocol is submitted to the Senate. It may be that the subtlety of the provision is the price that had to be paid for avoiding something worse in the form of a provision that would require that all prisoners taken be treated as prisoners of war.

Unfortunately, the draft texts of the I.C.R.C. contained provisions on perfidy and spies, so it became necessary to negotiate out new provisions on these subjects, which might better have been left to the existing law. But combatants in civilian clothes and residents of occupied areas who pass on information about the occupying forces presented new problems, and elaborate provisions were added to deal with these two subjects.[25]

At the third session of the Diplomatic Conference, there was a great deal of righteous indignation about mercenaries. Delegation after delegation said that they are so evil that they should not be treated as prisoners of war or even as combatants — that they should be left to treatment at discretion by the Detaining Power.[26] But how to define the mercenary proved to be too hard a nut to crack until the fourth sesson, when a definition was drawn up[27] that contained three positive elements and three negative ones:

> A mercenary is any person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) does, in fact, take a direct part in the hostilities;
>
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> (e) is not a member of the armed forces of a Party to the conflict; and
>
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

It has been necessary to quote this definition at length in order to

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[25] Protocol I, *supra* note 7, arts. 37 & 46.
[26] *See* Van Deventer, *Mercenaries* at *Geneva,* 70 AM. J. INT'L L. 811 (1976).
[27] Protocol I, *supra* note 7, art. 47.

show how circumscribed it is. The volunteer and the military adviser and the civilian technician have been excluded from the definition. Those left are the hard core of foreign-recruited soldiers who fight for high pay.

The part of Protocol I which breaks the most new ground is that dealing with the protection of the civilian population, particularly in so far as aerial bombardment is concerned. An attempt had been made to draw up rules dealing with aerial bombardment in the Hague Air Warfare Rules of 1923,[28] but these never entered into effect as treaty law. After the Geneva Civilians Convention, which did not deal with this subject, had been drawn up in 1949, the I.C.R.C. turned its attention to the protection of the civilian population from aerial bombardment, whether nuclear or conventional. It prepared draft rules on the protection of the civilian population from aerial bombardment in 1956.[29] States were not at that time ready to do anything about the Rules, and they were left to wither on the vine. The drafting of a Protocol on International Armed Conflicts offered a new opportunity to the I.C.R.C. to seek the inclusion of provisions on the protection of the civilian population from attack, particularly from the air. The increased accuracy of bombs and missiles made possible by the development of technology made the whole idea of legal regulation more plausible than it had been in the past.

The carpet bombardments of World War II were forbidden by a provision that defined as indiscriminate bombardment: "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; . . ."[30] And the rule of proportionality, which was already recognized by the United States to regulate bombardment from the air,[31] found expression in a prohibition of "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[32] The rule of proportionality, requiring a balance of civilian

[28] 17 AM. J. INT'L L. SUPP. 245 (1923), & 32 *id.* Supp. 1 (1938).
[29] I.C.R.C., Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956).
[30] Protocol I, *supra* note 7, art. 51, para. 5(a).
[31] Letter from the General Counsel, Department of Defense, to Senator Edward Kennedy, Sept. 22, 1972, 67 Am. J. Int'l L. 122, 124–125 (1973).
[32] Protocol I, *supra* note 7, art. 51. para. 5(c).

losses against military advantage, has never been easy to apply in particular cases, and here, as in the past, it is little more than a cautionary rule, requiring the commander to stop and think before he orders a bombardment.

Certain types of installations were placed under a legal protection that they had not theretofore enjoyed. Works and installations containing dangerous forces, namely dikes, dams, and nuclear electrical generating stations, are not to be made the object of attack,[33] and objects indispensable to the survival of the civilian population, such as foodstuffs and drinking water supplies, must not be attacked.[34] This cursory description does not do justice to the detail of these provisions and to the qualifications that are placed on these new obligations. It is obvious that the Air Force as well as the Army will have to consider whether it will be possible to carry on its activities within the confines of these new provisions.

The Draft Rules framed by the I.C.R.C. in 1956 foundered in part because they purported to apply to the use of nuclear weapons. This mistake was not repeated in the 1974-1977 Conference. The United States[35] and other countries made it clear that the new provisions applied only to conventional arms and not to nuclear weapons, and the I.C.R.C. itself now proceeded on these assumptions from the outset. The new Protocol I thus places no restraints whatsoever on use of nuclear weapons.

These restrictions on the *use* of weapons could be agreed upon, but the effort to prohibit various specific forms of weapons ended in failure. It seemed at one time that some provisions prohibiting the employment of some specific forms of conventional weapons might be drafted at the Conference on Humanitarian Law, whether as part of the two Protocols or as a separate protocol.[36] The campaign for the prohibition of certain types of weapons was led by Sweden and received the support of a number of medium military powers, such as Mexico, Yugoslavia, Norway, Egypt, and Switzerland. The U.S.S.R. and its allies were hostile to the idea, and the United States was skeptical about the whole enterprise, although it appears that this country might have been prepared to accept some limitations on the use of weapons.

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[33] *Id.*, art. 56.
[34] Id., art. 54.
[35] Final statement by Ambassador Aldrich, Geneva, to Secretary of State, No. 4637 (June 10, 1977).
[36] *See* R. Baxter, *Conventional Weapons Under Legal Prohibitions*, 1 INTERNATIONAL SECURITY 42 (1977).

In the early stages of the Conference and at the Conferences of Government Experts, those who were calling for provisions on weapons attempted to define such weapons according to their characteristics — as causing "unnecessary suffering," as being "indiscriminate" in their effects, or as killing "treacherously."[37] The prohibition of weapons causing "unnecessary suffering" is already articulated in the Hague Regulations.[38] Unfortunately the authentic French text—"maux superflus," which is more correctly translated as "excessive harm" — had for the life of the Hague Regulations been inaccurately translated into English as "unnecessary suffering.'' The distinction between a weapon causing "necessary suffering'' and one causing "unnecessary suffering'' is a fundamentally sound one. It is a wasteful use of force to add to human suffering without any corresponding military advantage.

When it proved too difficult to apply the criteria mentioned to review of the characteristics of weapons, the focus of attention became various specific types of weapons which, in the view of the group led by Sweden, ought to fall under legal prohibition. These were identified as

— Incendiary weapons
— Time delay weapons
— Blast and fragmentation weapons
— Small calibre projectiles
— Potential weapons developments

It became obvious early in the sessions at Geneva that there was much to be learned about the characteristics of these weapons, their military utility, and their effects on the human body. Napalm, for example, can cause painful and disfiguring wounds on those who survive, but the weapon is military useful and discriminating. If high explosives were to be substituted for napalm, it is possible that even more casualties, including those amongst civilians, would be caused because of the less discriminating character of the weapon. In order to find out the facts about these various weapons, the I.C.R.C. and the Conference convened a number of meetings of

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[37] On the difficulty of applying these criteria, *see* R. Baxter, *Criteria of the Prohibition of Weapons in International Law,* in FESTSCHRIFT FUR ULRICH SCHENUNER **41** (1973). The subject of prohibition of conventional and nuclear weapons is dealt with comprehensively in Respect for Human Rights in Armed Conflicts; Existing rules of international law concerning the prohibition or restriction of use of specific weapons; Survey prepared by the Secretariat, U.N. Doc. A/9215 (Vols. I and II) **(1973).**

[38] Hague Regulations, *supra* note 3, art. 23(e).

government experts, which met between sessions of the conference. These meetings performed a valuable educational function, leading states to see the complexity of the problem and to realize that, even for smaller military powers, various of these weapons had their utility. The indifference or open hostility of those states which possess the most advanced military technology, including the Soviet Bloc and the majority of the members of NATO, made it seem that any provisions that might be drafted would not be accepted by those very states whose weapons were to be brought under control. A treaty binding the "have-nots)' but not the "haves" would be futile.

And so the whole campaign ran down. Protocol I contains a prohibition on methods and means of warfare "of a nature to cause superfluous injury or unnecessary suffering,"[39] but no articles were adopted on specific weapons, such as napalm or small-calibre fragmentation bombs. The Conference contented itself with adopting a resolution recommending that a Conference of Governments should be convened not later than 1979 to reach agreements on prohibition or restrictions on the use of specific conventional weapons.[40] More will be heard of this subject in the coming months and years, but one phase of the weapons campaign is over and done with.

Two matters of particular concern to the United States deserve mention, even though they are not of great theoretical interest. The United States Delegation had proposed to the Conferences of Government Experts that there should be better implementation of the existing law and improved provisions made for the wounded and sick, particularly by way of aerial evacuation from the battlefield. Most of the proposals for better implementation fell by the wayside. Inability to give effect to the Protecting Power system in almost all of the conflicts following World War II led the United States to propose a strengthening of the procedure for the appointment of a Protecting Power.[41] Under the article adopted,[42] the belligerents would exchange lists of acceptable Protecting Powers in the hope that they might hit upon a state acceptable to both parties to the conflict. The parties to the Protocol will also have undertaken an

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[39] Protocol I, *supra* note 7, art. 35, para. 2.
[40] Res. 22(IV), Resolution on Follow-up Regarding Prohibition or Restriction of Use of Certain Conventional Weapons, adopted by the Conference at its 57th plenary meeting, June 9, 1977.
[41] Doc. CE/Com.IV/2 (1971), in I.C.R.C., Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May-12 June 1971), Report of the Work of the Conference 115 (1971).
[42] Protocol I, *supra* note 7, art. 5, para. 3.

obligation to accept the services of the I.C.R.C. as a substitute for the Protecting Power when no such Power can be agreed upon.[43] This new arrangement, which called for some change in what had previously been the attitude of the I.C.R.C. toward its humanitarian functions, promises well for the future.

The provisions in Protocol I on the wounded and sick consist in large measure of perfecting changes in the Geneva Wounded and Sick Convention of 1949. They purport to supplement the earlier treaty but in effect they modify it—in a helpful way, it must be added. In particular greater freedom and protection are now given to medical aircraft,[44] and the United States Delegation had good reason to be pleased with the outcome of the negotiations on this subject.

The two new Protocols will now have to be submitted to the Senate for its advice and consent prior to ratification. This procedure will probably move quickly, and before long the two new Protocols will be in force for the United States. There will be a major task of military educaton to be performed.

The coming into force of the new Protocols will offer an excellent opportunity to revise the structure of United States manuals on the law of war. In the first place, it is highly desirable to have a uniform manual for all three armed services, instead of the present three, partially outmoded, manuals.[45] The contents of each service's manual may differ, but the legal rights and duties applying to all three services should be spelled out in an absolutely uniform way. The Army version of the manual should contain, for example, exactly the same text of the repression of breaches of the law of war and on the protection of civilians as the Navy and Air Force manuals. Because the Army has responsibility for prisoners of war, its version of the manual should have detailed provisions on that subject, while the other two services would have only abridged treatments of the subject. In the second place, there is probably a need for manuals on different levels—one for the basic education of soldiers, a middle level manual for officers, and a large legal treatise for lawyers. This is a counsel of perfection, but there is no reason why the armed

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[43] *Id.*, art. 5, **para.** 4.
[44] *Id.*, arts 24–31.
[45] U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, LAW OF LAND WARFARE (1956); OFFICE OF CHIEF OF NAVAL OPERATIONS, U.S. DEP'T OF NAVY, NWIP 10–2, LAW OF NAVAL WARFARE (1955); and U.S. DEP'T OF AIR FORCE, PAMPHLET NO. 110–31, INTERNATIONAL LAW-THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976).

forces, with their great human resources, should not set their sights high and try to do the right thing.

The educational problem will be compounded by the fact that the Protocols will add 83 articles to the corpus of Geneva law and that these new instruments do in fact modify the Conventions of 1949. Add to this the intricacy and delicate balance of some of the new articles, and one can see how difficult the educational task will be. It will not be enough to give members of the armed forces little standardized programs of instruction from canned lectures. What would do most for raising the level of understanding of the law of war in the armed forces would be the establishment of requisite levels of proficiency for personnel of different ranks and functions. It is not how much instruction a person has had that counts, but the knowledge that he actually possesses. The armed forces should establish what knowledge various classes of personnel need and see to it that the appropriate level is reached by each member of the armed forces.

I return to my point of departure. It is essential that members of the armed forces, particularly the officer corps, should have an awareness of the objects of the use of force and sensitivity to ethical, moral, and legal considerations in the conduct of warfare. The best vehicle that we have now for the promotion of this understanding is the law of war itself.

BOOKS REVIEWED & BRIEFLY NOTED*

They Call it Justice by Luther C. West. New York: The Viking Press, 1977, pp. xii, 302. $12.95.

Reviewed by *Brian R. Price***

In *They Call It Justice* [1] Luther West chronicles the horrors of command influence in courts-martial. He intersperses personal experiences with historio-legal accounts of how the court-martial system has developed, and how military commanders persist in their efforts to control every aspect of the court-martial process. To accept unquestioningly the assumptions, propositions and examples delineated by the author requires endorsement of his conclusion: Congress must drastically revise the system of military justice to prevent commanders from violating the most fundamental rights of soldiers subject to their authority.[2] West's assumptions, propositions and examples cannot be accepted so blithely.

West recounts his tale in a manner strikingly similar to the method he used to defend a client in one of his early cases.[3] There, West discovered that the rule of law adopted by most state courts supported his theory of the case. However, he discovered no military cases on point and found that the state rule probably did not apply in federal cases. Nonetheless, as an advocate, West urged his theory of the facts and the state law on the court. He did not point out the weakness of his argument and left that distinction to be ferreted out by the trial (prosecuting) counsel.[4] Fortunately for West's

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*The opinions and statements in these reviews are the personal opinions of the individual reviewers and do not necessarily represent the views of the Department of the Army, The Judge Advocate General's School or any other governmental agency.

**Member of the Virginia and Pennsylvania Bars. Mr. Price, formerly editor of the *Military Law Review,* is associated with Antheil, Link and Pelletier. P.C., in Doylestown, Pennsylvania.

[1] L. WEST, THEY CALL IT JUSTICE (1977) [hereinafter cited as WEST].

[2] *Id.* at 285–87.

[3] *See id.* at 1–4.

[4] *Cf.* ABA COMM. ON PROFESSIONAL ETHICS. OPINIONS. No. 146 (1935) (A lawyer should disclose to the court a decision directly adverse 'to his client's case that is unknown to his adversary). A later opinion of the American Bar Association amplified upon Opinion 146 and concluded that:

> The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge prop-

client, the trial counsel had not researched the question and did not intuitively recognize the flaw in the argument. On the strength of West's theory and argument, his client was acquitted. When the verdict came in West was exhilarated, feeling that "there is no greater moment in the practice of law."'[5]

West has written this book with the same philosophy that motivated his argument to the court: "Let those who disagree with my position expose my argument's faults." This philosophy, to some degree,[6] underlies the adversary judicial process where the disputants are presumed to be equally apprised of the facts and the law. However, this theory will not justify such a treatment in a mass market publication where few readers have any conception of why a separate system of military jurisprudence exists or of how the court-martial process operates.

West's book may be divided into two parts. The first **107** pages are a recapitulation of a 1970 law review article' enlivened by summaries of court-martial cases in which the author participated as military defense counsel. The remainder of the book contains lengthy summaries of cases which West either observed or in which he was involved after his retirement from the military, and a conclusion which roundly condemns the military criminal law process and makes recommendations for ameliorative change.

Although the case summaries make interesting reading, there are

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> erly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 280 (1949). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(B)(1) (1975). The conduct of Army judge advocates must comply with the Code of Professional Responsibility. Army Reg. No. 27–10, Legal Services — Military Justice, para. 4-4 (C14, 31 'Oct. 1974). Commentators have stated that the ABA Canons of Professional Ethics were similarly binding on military lawyers practicing before courts-martial. B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL § 158, at 162 (1957); Chadwick, *The Canons, the Code, and Counsel: The Ethics of Advocates before Courts-Martial,* 38 MIL. L. REV. 1, 9 (1967) (applicability of Canons "not a new innovation . . . brought about by the adoption of the [UCMJ] in 1950."). However, the 1951 Manual for Courts-Martial, which prescribed "modes of proof, in cases before courts-martial," Act of May 5, 1950, ch. 169, art. 36(a), 64 Stat. 107, made no specific mention of the Canons in its rules of conduct for counsel. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 42*b*. Moreover, this paragraph only prohibited counsel from knowingly "cit[ing] as authority a decision that has been reversed. . . ." *Id.* (emphasis added).

[5] WEST at 4.

[6] *See* note 4 *supra.*

[7] West, *A History of Command Influence on the Military Judicial System,* 18 U.C.L.A.L. REV. 1, 1–156 (1970) [hereinafter cited as West].

three troubling aspects to this book. First, West assumes, and lets his readers assume, that if the system of military law is different from its civilian counterpart it is somehow inferior. Second, to illustrate his points, West utilizes language and examples which are inflamatory, intemperate and misleading. Third, West fails to include any analysis whatsoever of current trends in military law which, if included, would undercut his theory that the system suffers from total command domination and condones consistent violations of servicemembers' fundamental rights.

The first problem with West's book is evident from its first sentence: "Military justice provides for the discipline of the armed forces." [8] Nowhere does the author make any serious attempt to describe what "discipline" is or how discipline and the court-martial process interact with each other.[9] These questions are difficult ones to be sure,[10] but they lie at the heart of any system of military justice. West's principal thesis, that discipline requires the commander to have unfettered control of the military criminal law process, ignores the recognized need for fairness in that process.[11]

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[8] WEST, introduction at i.

[9] *See id.* at 15–18 for a description of the military justice system which simultaneously defines the system as corrupt and attacks it for being so.

[10] The first of many difficulties is determining what discipline is. West defines discipline as the absolute certainty that disobedience to orders will be swiftly and severely punished. WEST at 16. Military authorities have defined the concept of discipline differently:

> To the military man discipline connotes something vastly different [than punishment]. It means an attitude of respect for authority developed by precept and by training. Discipline [is] a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task. . . .

COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER, AND DISCIPLINE IN THE ARMY, REPORT *TO* HONORABLE WILBER M. BRUCKER 11 (1960) [hereinafter cited as POWELL REPORT]. *See also* COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, REPORT TO GENERAL WILLIAM C. WESTMORELAND 7 (1961) (reaffirming support for quoted proposition).

The second question is how the court-martial system relates to discipline. West presupposes that command domination of the system is necessary. Although military commanders acknowledge that the court-martial system fulfills a role in the disciplinary process, they abjure the notion that command domination of the system is required: "A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline." Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971). Such views merit at least notice, if not comment, in a book such as West's.

[11] " 'All correction must be fair; both officers and soldiers must believe that it is fair.' " POWELL REPORT, *supra* note 10, at 11; "An effective system of military justice . . . must prevent abuses of punitive powers, and it should promote the

Related to this problem is West's failure to acknowledge that it is the Constitution which provides that the military criminal law system may be different from the system which applies to civilians.[12] He quickly dismisses the historical origins of courts-martial[13] and condemns contemporary military courts because they do not mirror contemporary civilian practice. This is a defect worth mentioning, not discussing. If West advocates a court-martial system which is more "just" than its predecessors, the argument should be joined not on the issue of historical practice, but on the question of whether such a system will fulfill the legitimate needs of that part of Government which provides for our national defense. In any such argument it would be folly to ignore or dismiss out of hand what has been found sufficient in earlier times.

The second problem with this book stems from West's hostile disdain for the military justice system and those who operate it. This attitude breeds a lack of objectivity which undercuts the value of the book. Having seen enlisted service in the Navy during the Second World War, West claims that even as he entered the Army as a military lawyer he "held a resentment against the officer corps generally." [14] This belief only solidified during his early years in the Army, and after having received efficiency reports which in his opinion severely damaged prospects for advancement in the Army, West determined to "use whatever intelligence and expertise [he] had . . . to expose every dishonest judge advocate or military commander under whom [he] served." [15] This could easily have turned into a full time task inasmuch as West viewed most judge advocates as "poor lawyers without integrity"; [16] military commanders rated no higher on his spectrum of moral and professional values.[17]

While on active duty defending accused soliders before courts-martial, West continually raised the issue of command influence. If the cases detailed in his book are a representative sample, he used

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confidence of military personnel and the general public in its overall fairness." Westmoreland, *supra* note 10, at 8.

[12] *See* U.S. CONST. art. I, § 8, cls. 10, 11, 14 & 16 (vesting in Congress assorted powers over military personnel); *id.* amend. V (excepting military cases from the indictment or presentment requirement).

[13] West at **22–24.**

[14] *Id.* at **5.**

[15] *Id.* at **74.**

[16] *Id.* at 73.

[17] Military commanders' "ethical motivation is command oriented, and their integrity is indistinguishable from the principles of loyalty and obedience. They respond to the dictates of their superior without regard for ethics, logic, common sense, intelligence, morality, or the rule of law." *Id.* at 283.

this tactic with considerable success. In attacking the system he perceived as basically dishonest, West became a partisan advocate against the "system'! and lost sight of his responsibilities as legal advisor to his commander. West was on one occasion responsible for reviewing the notes of a conference of senior commanders which would later be distributed to every officer in the command. West not only consciously refused to delete material which he knew might prejudice the rights of any individuals tried on certain charges, but acquainted a defense counsel with the offending language and with his failure to delete it. His express hope was that the prosecution against one particular soldier would be dismissed.[18] During his only assignment as a staff judge advocate, West determined that he would recommend that his commander exercise his post-trial elemency powers every time a soldier was convicted by a general court-martial.[19] In the first of these instances, West confused his personal philosophy with his legal responsibility and in so doing compromised the ethical values he insisted others uphold. Moreover, in both these actions West lost sight of the fact that certain classes of crimes and criminals deserve severe punishment.

The singleness of purpose exhibited in these actions is reflected throughout this book. Casting off the semblance of objectivity with which his law review article was written, West moves from reasoned criticism to statements which slyly establish assertions as facts and give West a ground upon which to condemn the same facts as perceived evils. Two examples will suffice. In the introduction to his book, West reflects on the extent of the commander's control over the military justice system. In the opening page of his law review article West had stated:

> If the commander concerned is fair, he will permit his courts to judge cases on their individual merit. If the commander concerned is not "fair," he may usurp the functions of the courts, and influence them to render verdicts or sentences designed to effect his own wishes, regardless of the merits of the individual case.[20]

Including this thought in his book, West used an almost verbatim quotation of the above language. However, there is one major difference. Rather than using the words "fair" and "not 'fair,'" West substituted the words "honest" and "dishonest."[21] Whether this transformation is the result of a hardening of his views in the last

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[18] *Id.* at 118–19.
[19] *Id.* at 108–09.
[20] West, *supra* note 7, at 2.
[21] West introduction at i-ii.

seven years or a return to original language that a law review editor had softened is impossible to discern. In either event, the author's language clearly reveals his perspective.

More disturbing by far is another "adjustment" to the text of West's original article. While changing the words "fair" and "not 'fair'" to "honest" and "dishonest" may accurately reflect West's judgment of commanders who are involved with the court-martial system, the following example suggests that West intentionally attempts to mislead the readers of his book. During 1917, a number of black soldiers stole 50,000 rounds of ammunition, marched into Houston, Texas and killed nearly **20** people before being subdued by federal troops. Sixty-five soldiers were promptly tried for mutiny and murder. Fifty-five of their number were convicted, and thirteen were sentenced to be executed. Recounting the swiftness of the process in his book, West states: **"Two** days after the completion of the trial, and some four months *before* their records of trial were received in Washington, D.C., for 'appellate' review, the thirteen blacks sentenced to die were executed." [22] The natural implication of this passage is that thirteen individuals were executed before their convictions and sentences had undergone the required appellate review. What goes unstated is the grudging acknowledgment from West's law review article [23] that under the 1916 Articles of War, a commanding general of a territorial department could, in time of war, "carry into execution death sentences involving convictions of murder" and mutiny.[24] This example of omitting important qualifying material typifies West's style, and calls into question many of the synopses of cases for which there is no readily available independent record from which the complete, unbiased story can be extracted.

While the problems of temperament and tone provide a significant ground upon which to criticize West's book, another more important defect calls the value of the entire book into question. West's substantial research efforts were conducted prior to the publication of his law review article in 1970. At that time, Mr. Justice Douglas' caustic characterizations in *O'Callahan v. Parker* [25] reflected the

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[22] *Id.* at 31 (emphasis in original).
[23] West, *supra* note *7,* at 27 n.23.
[24] 1916 Articles of War, art. 48(d) (Act of Aug. 29, 1966, ch. 418, 39 Stat. 658).
[25] [Clourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.

A civilian trial, in other words, is held in an atmosphere conducive to the protection of indi-

Supreme Court's latest expression of the quality of the military justice system. Moreover, at that time the United States Court of Military Appeals had not yet embarked on its aggressive revision of once-entrenched principles of military law. However, since 1970 both the Supreme Court and the Court of Military Appeals have decided cases which have changed the nature of the military legal system from what it appeared to be at that time. Future judicial decisions may be expected to transform the system further. None of these changes is considered, much less mentioned, in West's book. For any book which attempts to describe the military justice system, this omission, whether conscious or unintentional, is an inexcusable weakness.

The irony of this situation is especially apparent to anyone who has followed the course of the military criminal law system over the past seven years. In a passage which is substantially similar to one in his earlier article, West comments that:

> For years, in both the United States and England, military justice was tolerated on the convenient basis that it pertained to a "separate society," to a second-class citizenry. By their act of voluntary enlistment soldiers had contracted away their right to fair trials and civil liberties. . . .[26]

Use of nearly identical language in both 1970 and 1977 suggests either that the author intends to convey significantly different meanings by use of identical words, or that the author has chosen to overlook major developments in the law. In 1970, the Supreme Court had only recently decided the landmark case of *O'Callahan v. Parker* which restricted the jurisdiction of courts-martial to offenses which were service connected. No longer could military courts assert jurisdiction over offenses allegedly committed by servicemembers merely because the accused was a member of the armed forces. The Court determined that the offense had to be related in some way to the accused's military status.[27] The Court's basis for this holding was that when a court-martial tries a servicemember, that individual is deprived of certain constitutional rights to which

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vidual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.

As recently stated: "None of the travesties of justice perpetrated under the UCMJ is really very surprising. for military law has always been and continues to be primarily an instrument of discipline. not justice."

395 U.S. 258, 265–66 (1969) (citation omitted).

[26] West at 22. Compare id. *with* West, *supra* note 7, at 5.

[27] 395 U.S. at 272.

he would have been entitled had he been tried in a civilian federal court.[28] Thus in 1970 it may well have appeared that the Supreme Court objected to the "separateness" of military law.[29]

However, in 1974 the Court decided *Parker* v. *Levy* [30] in which it upheld the conviction of an army captain who had been charged with violations of Articles 90(2), 133 and 134 of the Uniform Code of Military Justice. Perhaps more significant than the Court's decision upholding the constitutionality of Articles 133 and 134, and the validity of Captain Levy's conviction, were the *manner* in which it did so and the *tone* with which it announced its decision. Of most importance to this analysis is the fact that the Court expressly acknowledged that the military is of necessity a "specialized society separate from civilian society,'' a fact which justifies the existence of different rules and standards for criminal prosecutions than those which apply to civilians. [31]

In light of the Court's use of language so nearly identical to that utilized by West, his inclusion of this passage in his book reflects either an unthinking transposition of language or a conscious refusal to consider recent information. Although there is evidence which suggests that West merely brushed off his earlier work for publication in book form,[32] it is equally probable that the author intentionally omitted any consideration of recent legal developments because those developments would undercut his stinging indictment of the military system of criminal justice. Moreover, any conclusions concerning the current state of the military law cannot be made with the same tone of moral certainty that West is fond of utlizing because the sytem is undergoing major transformations.

The changes the United States Court of Military Appeals has made in military law during the last two years are too extensive to

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[28] *Id.* at **273.**

[29] Indeed, West prefaced his law review article with an extensive quotation from *O'Callahan* which commented adversely on the aspects of a military proceeding which differed from the civilian practice.

[30] 417 U.S. 733 (1974).

[31]
> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society . . . .
>
> The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at **743, 758.**

[32] Aside from organizational and textual similarities, there is at least one **error** which has been carried over. Delmar Karlen is denominated Delmar "Karen." WEST at 24; West, supra note 7, at 7 n.16.

document in detail here. Rather than restate what has been stated better and at greater length elsewhere,[33] I will mention only those transformations which affect the timeliness of West's book. Most importantly, the Court of Military Appeals is in the process of "reevaluating the balance between 'justice' and 'discipline' in the military justice system."[34] In this process, the court is expanding the powers of legally trained individuals who are outside the chain of command and restricting the ability of commanders to insert themselves in the judicial process. Recent cases render many of West's statements inaccurate reflections of the current state of the law.

West cites several examples where commanders "reversed" a court's finding[35] and claims that commanders may urge the President to promulgate rules of evidence and procedure which will bind military courts,[36] but he fails to note a 1976 case, *United States v. Ware*.[37] In *Ware*, the military trial judge dismissed a larceny charge because the Government had not brought the accused to trial in a timely manner. The Government then appealed this ruling to the commander who had convened the court-martial. The commander, relying on provisions of the UCMJ[38] and the Manual for Courts-Martial,[39] *reversed* the judge's ruling and directed that the trial proceed.[40] The military judge, having determined that he was bound by the provision in the Manual for Courts-Martial, acceded to the commander's decision and proceeded with the trial.

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[33] *See* Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 43–163 (1977), for an incisive and comprehensive analysis of the court's activities in the last two years.

[34] *Id.* at 32.

[35] WEST at 24–26. At issue in the cases cited by West was the commander's authority to return to the court a case in order that the court might reverse its finding of not guilty or increase the severity of the sentence to a more "appropriate" level. These procedures are no longer permitted. UNIFORM CODE OF MILITARY JUSTICE art. 62, 10 U.S.C. § 862 (1970) [hereinafter cited as U.C.M.J.].

[36] WEST at 27.

[37] 24 C.M.A. 102, 51 C.M.R. 276 (1976).

[38] If a specification before a cnurt-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty. the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action. U.C.M.J. art. 62(a).

[39] In returning the record of proceedings to the court, the convening authority will include a statement of his reasons for disagreeing, together with instructions to reconvene and reconsider the rulingwith respect to the matter in disagreement . . . . To the extent that the matter in disagreement relates solely to a question of law, as, for example, whether the charges allege an offense cognizable by a court-martial, the military judge or the president of a special court-martial without a military judge will accede to the view of the convening authority. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, para. 67f [hereinafter cited as MCM].

[40] 24 C.M.A. at 103, 61 C.M.R. at 276.

When the Court of Military Appeals considered the convicted sailor's appeal, it held that the convening authority could not overrule the trial judge. The basis for the decision was that the Manual provision was inconsistent with the provision of the UCMJ upon which it was based and therefore invalid.[41] Thus in one case the court restricted the Commander-in-Chief s ability to allocate to commanders responsibilities over the trial process. These developments significantly alter the commander's role and hint of even greater changes if the court begins to invalidate provisions of the Manual for Courts-Martial; [42] yet nowhere does West mention these events or their ramifications.

West also scores the Court of Military Appeals' failure to utilize its extraordinary writ powers to remove command influence from the military justice system.[43] This criticism again exhibits the author's failure to take account of relatively recent developments. Although the precise basis, nature and extent of the court's power to .order extraordinary relief have been the subjects of comment,[44] the court has begun to use whatever powers it has with increasing boldness. In *Halfacre* v. *Chambers*,[45] a case of extraordinary importance, the court stayed proceedings in a court-martial and ordered the commander who had convened the court-martial to transport an accused and his counsel from Tokyo, Japan, to Karachi, Pakistan, so they could gather evidence vital to the accused's defense.[46] Moreover, in two other cases the court has hinted that it may use its authority to correct alleged injustices in the administrative discharge system,[47] another object of West's criticism.[48]

There are other examples of West's technique of offering the historical practice as the present rule of military law, and other issues which evince the Court of Military Appeals' willingness to readjust

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[41] The court held that the MCM's requirement that the military judge "accede" to the convening authority was inconsistent with the UCMJ's requirement that he "reconsider" the ruling. *Id.* at **104–06, 51** C.M.R. at **277–79.**

[42] *See* Cooke, *supra* note **31,** at **88–90, 116–20.**

[43] WEST at **85.**

[44] *See* Wacker, *The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals,* 10 HARV. C.R.-C.L. L. REV. **33 (1975).**

[45] Misc. Docket No. **76–29** (C.M.A. July **13, 1976).** The facts pertaining to this order have been extracted from the Army Times.

[46] *See also* McPhail v. United States, **24** C.M.A. **344, 52** C.M.R. **15** (1976) (court exercised extraordinary writ power in a case over which it would have had no power to consider in its ordinary course of appellate review).

[47] Harms v. United States Military Academy, Misc. Docket No. **76–58** (C.M.A. Sept. **10, 1976);** United States v. Thomas, **24** C.M.A. **228, 51** C.M.R. 607 **(1976).**

[48] WEST at **140.**

the roles of those who operate the military criminal law system. Of course, had West accurately reflected the present state of the law and the trends which seem to be developing in the Court of Military Appeals, he would have undercut his thesis that the court-martial system is an unchanging institution dedicated to the preservation of command influence and the repression of solders' rights.

The three major defects described above make this book a substantial disappointment and undermine its utility as anything other than a sensationalized reminiscence. The most disconcerting result of West's approach is that it will immediately alienate those who could profit most from reading an objective analysis of command influence, those military personnel who administer the court-martial process. These individuals can justly dismiss this book with the shorthand phrases which obviate the need for any analysis. West's failure to consider seriously the tension between justice and discipline merely shows that "West doesn't understand the system," and therefore is to be disregarded. The author's technique of coloring his presentation with moral condemnations and depreciating the book's factual reliability by misleading statements justifies the charge of bias and the conclusion that the presentation is an unfair, inaccurate picture of the system. Finally, West's failure to consider current trends allows readers to dismiss the book as irrelevant because "things aren't like that any more."

The sad result is that books of this nature not only leave their readers unchanged but also that they do not even challenge their assumptions. Moreover, such books convince their audience that their perceptions were and have always been correct. Had West truly desired to write a useful book he could have considered the problems of command influence which exist today.

West has noted one of these issues, but fails to consider the problem seriously. This concern, institutional command influence, is inherent in any organizational structure where an individual's career prospects may be affected by an individual whose aims, goals and duties conflict with what he perceives to be his duty. For example, where senior staff judge advocates and commanders must rate the "efficiency" of a defense counsel who strives to obtain acquittals for those against whom the commander has referred charges on the advice of the staff judge advocate,[49] is there not a fundamental con-

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[49] Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate or legal officer for consideration and advice. The convening authority may not refer a charge to a general court-martial for trial unless he has found that

flict? Is this conflict not exacerbated by higher JAGC retention rates which make defense counsel more concerned about career prospects than individuals who plan to serve for only two, three or four years? The creation of an independent defense corps, a reality in the Air Force and an anticipated development in the Army, should certainly have been discussed as an alternative to this problem.

A related issue is that of institutional control over the judiciary. A recent case has disclosed the Court of Military Appeals' concern over and displeasure with actions of The Judge Advocate General of the Air Force which appeared to impinge upon the independence of a trial judge.[50] This problem, too, is worthy of discussion. Likewise, there are other issues of command use and abuse of the military justice system that deserve close scrutiny.[51]

Luther West has not provided a discussion that advances our knowledge of the military justice system or gives us a rational basis upon which to argue for improvements of that system. His account can only mislead those with no knowledge of the court-martial system, and perpetuate the self satisfaction of those who know enough about the system to recognize the book's shortcomings. In both these respects Mr. West has poorly served his readers, and has done his topic a severe injustice.

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the charge alleges an **offense. . . and** is **warranted** by **evidence indicated** in **the report** of **inves**tigation.

U.C.M.J. art. **34.**

[50] United States v. Ledbetter, **25** C.M.A. Adv. Sh. **51, 54** C.M.R. Adv. Sh. **51 (1976).**

[51] **See,** *e.g.*, United States v. Heard, 3 M.J. **14, 22** (C.M.A. **1977)** (the accused's commander placed Heard in confinement "because he was such a pain in the neck around the squadron and required so much additional attention . . . . ").

Superior Orders in National and International Law by L. C. Green. Leyden: A. W. Sijthoff, 1976, pp. xix, **374.** $26.00.

Reviewed by *James* **A.** *Burger* *

The problem of using superior orders as a defense to war crimes charges seems to be perennial. Every time a state decides to prosecute a member of the military for what could be considered a war crime, it can be expected that the soldier charged will raise in his defense that he was merely fulfilling his duty. He will probably try to bring in evidence that he was ordered to carry out the action which is the basis for the charge against him. This question was not disposed of at Nuremberg after World War II, nor will it have been settled by the discussion of the subject arising out of the My Lai trials. Even if it is accepted that the law cannot allow superior orders to justify the commission of a crime, when do we require that a soldier must disobey an order? When should he be required to know that the things he is ordered to do are criminal? The standards are not so simple. Now that the publicity of My Lai has died down, it is helpful to look again at the problem of superior orders, and especially to see how it was analyzed by writers from other states who stood outside the controversy which took place in the United States.

L. C. Green's book, *Superior Orders in National and International Law*,[1] is a significant contribution to our knowledge of how this problem is treated in different states. Professor Green, who teaches at the University of Alberta in Canada, was commissioned during the Vietnam era by the Canadian Department of Justice, and at the request of the Canadian Judge Advocate General's Corps, to undertake a survey of the defense of superior orders under national and international law. In doing so, he examined the positions of **25** to **30** different states. The present book grew out of his report. The Canadians looked at the problem the United States was having with the *Calley* case and they asked themselves: "What if this should happen to us? How would we treat the defense of superior orders if it was raised in one of our own courts?" To answer this question they asked Professor Green to look at what other countries would do — ranging from the United States, which was at the time struggling with the problem, to countries sharing their common law history; and further to countries outside this history, from those on the European Continent to the Latin American states, the Soviet

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* Major, JAGC, U.S. Army. Chief, International Law Division, The Judge Advocate General's School, U.S. Army.

[1] L. GREEN, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW (1976).

Union, and China. The result was a comprehensive analysis stretching across national borders and giving the reader a glimpse into the universality of the problem.

Let us pause for a moment to examine the United States Army's policy on superior orders. Paragraph **509** of FM **27–10,** ***The Law*** of *Land Warfare*,[2] lists superior orders as "not available" as a defense to war crimes charges. The Manual states that the fact that the law of war has been violated pursuant to an order of a superior authority does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of the accused individual. There is one exception, and that is ". . . unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." [3] And it is in this exception that the problem begins. What standard is to be applied in determining whether a soldier should know that an order is unlawful? Professor Green discusses the rule as applied in the United States, and he cites the instructions of Judge Kennedy to the Court in the *Calley* trial as the standard to be applied. Judge Kennedy said that the standard is that of "a man of ordinary sense and understanding . . . under the circumstances." [4] You take a man of ordinary sense and understanding. You place him in the same situation found by the soldier charged at the time of the alleged crime, with the background of the training he has received and the stress placed upon him by combat, and you ask how he should be expected to react. How well does Professor Green find that this guideline compares with what is done in other countries?

Professor Green pays a great deal of attention, of course, to British common law countries. He points out that there is no penal code in the United Kingdom, and that the British position can only be ascertained by reference to the common law. It is perhaps for this reason that he concentrates on the defense of duress, which tends to be confusing for the American reader since we would consider this a separate defense. I am sure that Professor Green would also so consider it, but he never really makes this clear. Nevertheless, he points out that a soldier may be under duress when he is ordered to commit a crime. He cites a case in which the accused took part in an I.R.A. expedition, the purpose of which was to shoot

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[2] U.S. DEP'T OF ARMY, FIELD MANUAL 27–10, LAW OF LAND WARFARE 182 (1956).
[3] *Id.*
[4] United States v. Calley, 46 C.M.R. 1131, 1183 (1973).

a police officer.[5] There was evidence to the effect that the accused was in fear of his life. The Court at first held that the defense of duress was not open to anyone charged with murder. But the House of Lords ruled on appeal that it was, and ordered a new trial. The Court then stated:

> In this case we are concerned . . . with duress in the form of threats . . . to kill the person threatened . . . (It) is proper that any rational system of law should take into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions be tested. If then somebody is really threatened with death or serious injury unless he does what he is told to do, is the law to pay no heed to the miserable plight of such a person? [6]

It appears that in England duress can be pleaded in any case even though the most heinous crime is involved.

Turning to the question of superior orders itself, Professor Green cites the *British Manual of Military Law*,[7] which states that a superior does not have the right to give an illegal order. By way of explanation, the *Manual* comments that if an order is not "manifestly illegal" the person who obeys it will not incur criminal responsibility, especially if he had little opportunity to consider the order before carrying it out.[8] It goes on to state that the "better view" is that an order to do an act or omission which is illegal can never be an excuse, whether or not it is manifestly illegal.[9]

Green comments that a soldier should not be expected to obey all orders, as this would undermine military discipline itself. What if he was ordered to shoot his commanding officer or kill unarmed civilians? There is great hardship in the soldier's position. He may be shot for obeying an order or shot for refusing. Professor Green links this with the defense of duress. What can we expect of a soldier under these circumstances? The British position seems to be that there may be a defense of superior orders, but that it is limited to those cases where a soldier honestly believes that he is carrying out legal orders, and that the order is not so "manifestly illegal" that he must or ought to have known of its illegality.[10] It sounds very much like the reasonable man test in the United States.

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[5] D.P.P., Northern Ireland v. Lynch, **2** W.L.R. 641 (1975)(cited at Green, *supra* note **1,** at 20).
[6] *Id.* at **644, GREEN,** *supra* note 1, at **21.**
[7] **MANUAL** OF **MILITARY** LAW, part 1, at **296** (1972).
[8] *Id.* at 156.
[9] *Id.*
10 The British test seems to be derived from an often cited South African case dating back to **1900.** The accused was charged with murder, and he was defending

What about other countries without the same roots in the common law? Professor Green devotes much of his discussion, undoubtedly due to the availability of materials, to the noncommon law countries of Western Europe. A basic difference here is that these countries derive their criminal law from comprehensive penal codes. These codes, as in France, generally require that orders be obeyed. But they are interpreted as applying only to legal orders. For example, the Conseil D'Etat in France has held that there is a duty of disobedience, "*Le devoir de desobeissance.*" The Prosecutor of the Court stated, "When the order is tainted by a serious and manifest illegality, then it is a duty which is imposed and not a simple option which is offered to the subordinate." [11]

In the Federal Republic of Germany, the duty to disobey is even more clearly stated. It has been codified because of Germany's experience in World War 11. In the *Soldatengesetx* (Soldier's Act), it is stated that it is not deemed disobedience to ignore an order which violates human dignity, or to ignore an order which is not given for service purposes.[12] Also, if a soldier obeys an order to commit a crime, he will be guilty if he realizes it is a crime or if it was so manifest from the circumstances that he should have known.[13] Similarities are clearly apparent between the common law and the continental systems.

However, Professor Green's discussion of countries outside of the Western orbit of influence is less satisfying. Of course, the materials available for research are more sparse. This becomes clear in his discussion of the Soviet Union. The Soviet disciplinary code states, "The order of the commander shall be law for the subordinate (and), an order must be executed without reservation, exactly and properly.'' [14]

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himself on the basis that the killing was done on the express order of an officer in time of war. The Court in that case stated:

> It is monstrous to suppose that a soldier would be protected where the order is grossly illegal. [But that he] is responsible if he obeys an order that is not strictly legal is an extreme proposition which the Court cannot accept. [E]specially in time of war immediate obedience . . . is required. [I] think it is a safe rule to lay down that if a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.

R. v. Smith, 17 S.C. 561, 567–8 (Cape of Good Hope), cited at GREEN, *supra* note 1, at **34.**

[11] Comment by Chavanon, Prosecutor to the Conseil (L. Green, trans), *supra* note 1, at 192.

[12] GREEN, *supra* note 1, at 176 (citation omitted).

[13] *Id.*

[14] Article **6** of the Disciplinary Code, GREEN, *supra* note 1, at 195. (citation omitted).

There is discussion of this rule by commentators to the effect that it is limited by the fact that soldiers can be held responsible if they obey a criminal order. However, Professor Green cites a case involving the failure of a factory worker to obey economic regulations for the rule that the standard in the Soviet Union is purely subjective.[15] He says that Soviet soldiers would not be punished if they did not realize that what they were doing was a crime even if they should have realized it under the circumstances. He says that in a hierarchical society like the Soviet Union much more stress is placed on the obedience of rules, and less is required of the citizen to question these rules. This may be true, but there is little to indicate what the Soviet position actually is. We know that military commands are to be obeyed. We know also that a person can be punished for obeying a criminal order. But, we do not know when a soldier can refuse to obey an order. Whether the standard does not exist or is merely undiscovered by the Western writer, we cannot tell from Professor Green's book. The same is true for his discussion of the People's Republic of China, but to an even greater degree.

Professor Green provides a better discussion of Latin America and some of the Third World Countries. His conclusion is after examining **25** to **30** different countries, that all require that, to bear criminal responsibility, the accused must have acted on his own volition and intuition. He says that most systems acknowledge the defense of duress. The duress must be actual and immediate. It is possible that physical force must be threatened, to raise the defense. The defense is often not available for the gravest cases such as murder or treason. For soldiers the problem is acute, and it is discussed in terms of superior orders. They are expected to obey orders but not when "manifestly" illegal. But what can be expected of the individual soldier? When is he to know that something is criminal even though it is ordered? Professor Green finds the test to be highly subjective, perhaps too much so. He even goes into Australian cases and discusses what is required of a "reasonable tribal Aboriginal." A primitive tribesman might be carried away with himself under the circumstances and lose his self control as measured by Western standards. Professor Green decides that the standards in all countries are similar even though they may not be so clearly defined everywhere. It comes down to deciding what can reasonably be expected of a soldier under the circumstances in question.

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[15] *Zhukov* case, GREEN, *supra* note 1, at 192 (citation omitted).

Against this discussion of national law, Professor Green counterposes the requirements under international law. He notes that international rules are usually referred to only in regard to enemy personnel. One tries one's own personnel under one's own criminal law, Only when necessary to acquire jurisdiction over citizens of a foreign country must one resort to international law. Under international law it is clear that superior orders is not a defense. Yet Professor Green finds that there still must be intent to do wrong, and that the prohibition of citing superior orders as a defense seems again to apply only where the criminal acts ordered are manifestly illegal. There is great similarity between the rules on the national level, and the rules on the international level. Perhaps the only difference is that on the international level there is stress on a prohibition against allowing superior orders as a defense, and on the national level the stress is on limiting the circumstances when such a defense might be raised.

Where does all this lead? Professor Green makes a suggestion that we might replace the term "manifest illegality'' with "obvious illegality.'' Then it would be more understandable to the layman. This is a helpful comment, but it really does not mean very much. It does not change the standard. Professor Green makes a more concrete suggestion when he draws up a six-point statement which he offers as a basis for regulations in military manuals. One of the points clearly states that an obviously illegal order shall not be obeyed. Another states that, in assessing whether the order obviously involves the commission of a criminal act, a tribunal shall examine whether the order would be obviously illegal to other persons under the same circumstances and with the same background as the accused. This seems obvious itself, but it is not what is now in most military manuals. Even the United States and British manuals do not discuss with any clarity how a soldier should determine what is required of him under circumstances when he is faced with what might be an illegal order. The United States has corrected this in the training programs which it inaugurated during the Vietnam War and which are in effect today. Other countries apparently do not discuss it at all, as indicated by Professor Green's book. The soldier is told he must obey orders, but the fact that he might have to disobey is left unmentioned even though disobedience might be required by the law of that particular country. The answer is that military codes, manuals and training programs need to cover the subject in much greater detail. Without guidance, the perplexed soldier can never be justly condemned for obeying whatever the order might be.

The Influence of Law on Sea Power, by D. P. O'Connell. Maryland: Naval Institute Press, 1975, pp. xv, **204.**

Reviewed by *Van M. Davidson, Jr.**

> A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.
>
> Sir Walter Scott

The Influence of Law on Sea Power is a compact, first-class work. The author, Professor D. P. O'Connell, is uniquely qualified to analyze the influence of law on sea power. His experiences as an international lawyer, historian, and wartime naval officer bring a broad understanding of naval affairs and policy to bear on his subject. That so much of value can be found in the book to interest naval historians, law of the sea specialists, military officers, and statesmen makes the work a remarkable achievement.

To what extent does law influence the use of sea power? Professor O'Connell's approach to this question is classically Clausewitzian.[1] First, historical facts are established for a given example. Secondly, the interaction of legal principles are discussed in relation to these facts, and lastly, principles are evolved to illustrate his thesis. This time-honored method has produced a work of enduring value.

The author's thesis is that the law will often have a decided impact in determining victors from losers during periods of international coercion, ranging from low level naval confrontations between nation states to high intensity naval warfare. The law will influence not only the military aspects of the confrontation but, of predominate and paramount importance, the political aspects as well. International law will influence naval policies during a conflict's evolution to full scale naval war. Only when the ultimate point of warfare for national survival is reached does the law cease to have the influence it has on conflicts at the lower end of the scale. Because full-scale nuclear war between the superpowers is not advantageous to either side, the likelihood of reaching that level of naval warfare is remote. Thus, there is need for western military officers and statemen to understand international law and its evolutionary history well enough to put an opponent at a military and political disadvantage.

The author begins by focusing on past examples of the law's influ-

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*Captain, JAGC, U.S. Army. Student, 26th Advanced Course, Judge Advocate General's School, U.S. Army.

[1] C. VON CLAUSEWITZ, ON WAR 12 (M. Howard & P. Paret trans. & eds.) (introductory essay by Paret).

ence on sea power. Historically, the law was ((made to serve the purposes of sea power and so has become a weapon in the naval armory.'' [2] At a time when England did not have sufficient naval resources, she relied upon the Anglo-Dutch fisheries negotiations from 1610–1613, and the formal structure the law gave that diplomacy, to seek a solution by other than military means.[3] It was the "naval stalemate which issued from the Anglo-Dutch wars . . . that ended the theory of sovereignty of the seas and established the psychological paramountcy of the freedom of the seas, simply because naval domination of the oceans by one power was shown to be impractical." [4] Other historical examples follow, from the Wars of Spanish Succession, the Napoleonic Wars, the Crimean War, and World Wars I and II, all of which support the author's thesis, " . . . that [the law] was just as effective as some other weapons in naval armory. . . ." [5]

A chapter is devoted to a case study of the "Battle of the River Plate," more commonly remembered as the episode that resulted in the scuttling of the German pocket battleship "Graf Spee" on 17 December 1938 off Montevideo, Uruguay. Extensive primary sources were used, such as War Cabinet minutes and foreign office notes and memoranda of Germany and England, to explore fully the political character of the engagement. As

> . . . the situation . . . developed, it is possible to find five questions **of** law, more or less important in the diplomatic handling of the matter, and in the purely tactical decisions that had to be taken, whether in the admiralty, **or** on the bridge of the "Ajax" (a British cruiser), or in the British embassy in Montevideo. Correct judgments respecting these legal elements contributed to a successful outcome, which was the immediate supremacy of British sea power in the South Atlantic, and in the larger term forcing Germany away from surface operations in order to disrupt British sea routes to unrestricted submarine warfare, which raised another set of issues [6]

This chapter clearly establishes that the law is a powerful weapon.

Other chapters are devoted to the force of law in sea power; the theory of graduated force, self-defense and weapon capability; legal restraints on weapon systems; rules concerning access routes; self-defense operations on the high seas, territorial seas, and the sea bed; the rights of neutrals; and rules of engagement and the suitabil-

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[2] D. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 16 **(1975).**
[3] *Id.*
[4] *Id.* at 17.
[5] *Id.* at **26.**
[6] *Id.* at 28.

ity of naval units for law-based sea power. Especially worthy of note in these chapters is the author's discussion of the legal ramifications of employing modern naval weapons systems. His demonstrated technical mastery of naval armaments is unusual and strengthens his thesis.

Throughout the book historical examples from the Vietnam War are found. Of particular interest is the discussion of the mining of Haiphong Harbor in North Vietnam in 1972. In 1967, the Director of the International Law Division of the U.S. Navy wrote that "in the absence of a declared war, the blockade of Haiphong by means of methods which included mining would be of doubtful legality." [7] But in 1972 " . . . mining as a strategic device of self-defense had become stronger in the altered situation (that being the North Vietnamese invasion of 1972)." [8] War never was declared by the United States, so accepting the U.S. Navy's position of 1967 leaves us with the question of the blockade's legality. The Chinese and Soviet response in 1972 to the legality of the mining is interesting. They made no special point about international law as it affects minelaying! [9] One can only speculate about the possibilities had mining been utilized in 1968, especially in view of the now recognized strategic pressure the mining put on the North Vietnamese.[10]

While this book is a marvelous achievement of relating history to law, it is not without some faults. The author's use of qualifying dependant clauses and run-on sentences weaken his style. An example is a sentence of more than 110 words. It is barely intelligible without repeated rereading. Footnotes are used infrequently, and the few that are used are not helpful or particularly informative. More extensive footnoting located at the bottom of each page would be helpful. There is not a single chart, map, or illustration found in the book.

The Influence of Law on Sea Power has unquestionable relevance to an understanding of present conditions. Professor O'Connell's message is of great importance in an era of ever expanding Soviet naval potentialities, and the Soviet's historically consistent attempts to secure influence in land areas adjacent to heavily traveled sea lanes, such as Vietnam, Chile, Cuba, Portugal, Angola and Korea.

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[7] *Id.* at **94.**
[8] *Id.* at 95.
[9] *Id.*
[10] *See* W. THOMPSON & D. **FRIZZELL,** THE **LESSONS** OF VIETNAM (1977), at **97-105,** for Sir Robert Thompson's interesting analysis of the conduct of the Vietnam War focusing on the rear bases and sanctuaries.

For the U.S. Army JAG officer, this book should be required reading for a very important reason that is related to the quotation by Sir Walter Scott at the beginning of this review. As a result of the 1973 Arab-Israeli War, the U.S. Army is now preparing for the next war in the expectation that it will be short and of high intensity. The U.S. Army line officer is being trained to be a narrow, technically oriented professional. Political-military topics are being deleted from U.S. Army service school curricula.[11] In five short years, the lessons of the integral relationship between politics and war, exemplified by the Vietnam experience, have been institutionally forgotten.[12]

Unless this educational posture is changed, the only staff officer with some exposure to the political consequences of international law and the military arts will be the military lawyer. Failure of the military lawyer to achieve the "architectural" status described by Sir Walter Scott means that American servicemen may again die needlessly in battle. When the drums begin to roll, their officers must not be narrowly trained "mechanics)' who are out-thought by an enemy having a better understanding of the relationship of military operations to politics.

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[11] *See* Bradford & Brown, ***Implications of the Modern Battlefield, 57*** MIL. REV. 3 (July 1977), where it is stated, **"A** shift away from higher level and political-military subjects is well underway. We are becoming more narrowly professional in our approach. ***This is long overdue."*** (Emphasis added.) It is interesting to note that both authors are colonels who served in Vietnam.

[12] THOMPSON & FRIZZELL, note 10 ***supra*** at 107-123. ***See*** also OBERDORFER, ***Tet*** (1971); COLLINS, GRAND STRATEGY, PRINCIPLES AND PRACTICES (1973), ch. 29, "The Vietnam War: **A** case study in Grand Strategy"; and FANNING, BETRAYAL IN VIETNAM (1976).

Byrne, Edward M., *Military Law,* 2d ed. Annapolis, Md.: Naval Institute Press, 1976. Pp. xxv, 745. $19.50

Reviewed by *David* **A.** *Schlueter.**

If you have ever longed to lay your hands on a comprehensive yet manageable hornbook on military law, then this book may satiate your longings. It is no secret that American legal commentators and publishers will spend limitless resources and ingenuity to place the law, any law, in a nutshell, or if you will, in one volume that can be carried under one's arm. *Military Law* is no exception.

Works such as Winthrop's treatise[1] doubtless provide an incentive to aspiring writers. But times have changed and military law is no longer the rather tame animal of Winthrop's day. To mold today's military cases, statutes, regulations, and policies into a manageable resource tool is no easy task. Nonetheless, Commander Byrne, with the assistance of seven contributing and technical editors, has produced a "comprehensive, introductory military law text and [a] practical, easy-to-use handbook-deskbook" to be used by "all service personnel including commanding officers, executive officers, legal officers, staff judge advocates, military lawyers, military investigators, law enforcement personnel, summary court-martial officers, Article **32** investigating officers, legal clerks, court reporters, and trial and defense counsel." In addition, "the broad range of the book also makes it extremely useful for civilian and military readers who are not attorneys and civilian lawyers who desire a basic reference work on military justice." And last, but not least, it is designed as a basic text for "any student of military law." That is quite a bill of fare—in anyone's book.

How does the work measure up? The material is organized into fifteen chapters. Each chapter in turn contains text material, discussion cases and self-quizzes. The last two hundred of the work's six hundred pages are Appendices consisting of forms, checklists, and guides.

In organization the work suffers from minor deficiencies. For example, short discussions of pleadings are buried throughout the book, and the highly popular and important subject of personal jurisdiction over servicemembers is located in the chapter on convening authorities.

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*Captain, JAGC, U.S. Army. Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army.

[1] W. WINTHROP, MILITARY **LAW AND** PRECEDENTS (1889).

Substantively, the strength of the work rests in the self-quizzes and their solutions. It is there that the reader sees the day-to-day practical issues and applications of the law. The textual material, because of the large intended audience and the perspectives of the four services, is too broad; in many cases the material only whets the reader's appetite. The discussion cases are interesting but in many instances are out-of-date and provide only historical perspective. The problem with any law book, of course, is that it is often out-of-date before it hits the newsstands. *Military Law* again is no exception. Unfortunately, military jurisprudence has in the last three years gone through some obvious, and sometimes excruciating growing pains. The numerous "style" cases and the trends of the "new" Court of Military Appeals are not reflected. Further, the lack of footnotes leaves the reader on his own to decide whether the text is editorial comment or the black letter law. Some sections are weakened because they are liberal duplications of existing legal references published by the various armed services. Instead of innovative and tantalizing perspectives on important legal problems, the reader is sometimes left with images of DA Pams dancing in his head.

Despite its shortcomings, the book obviously represents a yeoman's effort to draw together the innumerable facets of military justice of the various services. Although the effort may fall short of meeting all needs of the intended audience, it does provide a wide-ranging introduction to military law.

© Copyright: How to Register Your Copyright & Introduction to New & Historical Copyright Laic, new edition, Walter E. Hurst, ed. by Sharon Marshall, illus. by Don Rico. Hollywood, CA: Seven Arts, 1977, pp. 260, $10.00.

Reviewed by Brian R. Price

Attorney Walter E. Hurst has taken advantage of one provision of the copyright law to produce the major portion of his book *© Copyright.* This statutory provision states that "No copyright shall subsist in the original text of any work which is in the public domain, . . . or in any publication of the United States Government. . . ." [1] In practical effect, this section of the statute allows anyone to reprint works which were published without the required statutory notice of copyright, works for which copyright protection has expired by the lapse of time, or government publications without securing the consent of or compensating the author. Material of this type constitutes at least 175 of *© Copyright*'s 260 pages. Had the author waited until 1978 to publish his book, he would at least have been required to explicitly note which pages were extracted from noncopyrightable government publications. [2]

The original material included in Hurst's book provides a practically oriented guide to obtaining copyright protection. The information is presented in a by-the-numbers fashion, and alerts the author to potential hazards to his successful economic exploitation of his work. The book will be valuable to the individual who has limited access to other material on copyright law and desires to register his own copyright. Whether an attorney will be willing to pay ten dollars for a book which merely consolidates much of the material in his library is a determination he must make himself.

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[1] 17 U.S.C. § 8 (1970).

[2] Act of Oct. 19, 1976, Pub. L. No. 94-553, § 403, 90 Stat. **2541** [to be codified at 17 U.S.C. § 403).

BOOKS RECEIVED*

1. Binkin, Martin & Bach, Shirley J., *Women and the Military*. Washington, D.C.: The Brookings Institution, 1977. Pp. 134. Cost: $7.95 cloth; $2.95 paper.

2. Chalidze, Valery, *Criminal Russia*. New York, N.Y.: Random House, Inc., 1977. Pp. 240. Cost: $10.00

3. Feld, Maury D., *The Structure of Violence: Armed Forces as Social Systems*. Beverly Hills, CA: Sage Publications, Inc., 1977. Pp. 204. Cost: $12.50.

4. Green, L.C., *Superior Orders in National and International Law*. The Netherlands: A. W. Sijthoff Intl. Publishing Co., 1976. Pp. 394. Cost: $25.75 cloth.

5. Haiken, Marvin (ed.), Huffcut, W. Harwood (coordinating ed.), *Basic Techniques of Public Contracts Practice*. Berkeley, CA: California Continuing Education of the Bar, 1977. Pp. 507.

6. Hurst, Walter E. and Hale, William Storm, *Your Introduction to Music/Record Copyright, Contracts and other Business + Law*. Hollywood, CA: Seven Arts Press, Inc., 1976. Pp. 143. Cost: $10.00 paperback.

7. Krendel, Ezra S. & Samoff, Bernard L. (eds.), *Unionizing the Armed Forces*. Philadelphia, PA: University of Pennsylvania Press, Inc., 1977. Pp. 198. Cost: $10.00.

8. Landsman, Stephan; McWherter, Donald; & Pfeffer, Alan, *What To Do Until The Lawyer Comes*. New York, N.Y.: Doubleday & Co., 1977. Pp. 280. Cost $2.95 paperback.

9. Matte, Nicholas Mateesco & DeSaussure, Hamilton (eds.), *Legal Implications of Remote Sensing from Outer Space*. The Netherlands: A. W. Sijthoff Intl. Publishing Co., 1976. Pp. 230. cost: $19.00.

10. Perry, Ronald W., *Racial Discrimination and Military Justice*. New York, N.Y: Praeger Publishers, 1977. Pp. 88, bibliography 12.

11. Quinlan, Joseph & Julia, with Battelle, Phyllis, *Karen Ann: The Quinlans Tell Their Story*. New York, N.Y.: Doubleday & Co., 1977. Pp. 343. Cost: $10.00.

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*Mention of the work in this section does not preclude later review in the *Military Law Review*.

ANNUAL INDEX

VOLUMES 75–78

References are to volume numbers and pages of the *Military Law Review*, DA Pam 27–100–75 through 27–100–78. Previous indices are published in Volumes 40, 54, 58, 62, 66, *70* and 74.

SUBJECT INDEX

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BERNARD W. ROGERS
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Chief of Staff

Official:

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The Adjutant General

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ARNG & USAR: None.