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1971-1972

HOUSE JUDICIARY COMMITTEE

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HB 174

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MARRIAGE

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No. 1

STATE OF ALASKA

WILLIAM A. EGAN, Governor

DEPARTMENT OF HEALTH AND WELFARE

OFFICE OF THE COMMISSIONER

POUCH H - JUNEAU 99801

MEMORANDUM

TO: The Honorable William Moran
Chairman, House Judiciary Committee

FROM: Frederick McGinnis, Commissioner
Department of Health and Welfare *F. McGinnis*

SUBJECT: House Bill 5

DATE: February 3, 1971

Mr. F. E. Kester, Registrar of Vital Statistics, has raised a significant point in relation to the filing of death certificates should HB 5 (Alaska Probate Code) become law. His specific concerns are outlined in the attached memorandum.

It is requested that Mr. Kester be afforded the opportunity to appear before your Committee in order that he might speak to these concerns.

FM:JFM:smb

cc: Office of the Attorney General
Division of Administrative Services

MEMORANDUM

State of Alaska

RECEIVED
1971

TO: Frederick P. McGinnis, Commissioner
Department of Health and Welfare

Thru: V.L. Iverson, Director,
Division of Administrative Services

Office of the
Comptroller

DATE : February 1, 1971

FROM: F. E. Kester, State Registrar
of Vital Statistics

F. E. Kester

SUBJECT: HB 5, Probate Code

HB 5 revises and codifies the Alaska Probate Code. It is the same bill introduced in 1968 (HB 349) and in 1969 (HB 39). It repeals many existing statutes, among them AS 20.05.130(b), which is quite vital in determination of presumptive death after six years disappearance. We cannot find that this has been adequately replaced in the new proposed code.

The present statute says in part "If a missing person is not heard from for a period of six continuous years, he is presumed to be dead" This combined with AS 09.55.050 gives an authority for filing a certificate of death in these cases. Both the Bureau of Vital Statistics and the Supreme Court (Rule 5, Probate Rules) have implemented this, and the resulting death certificates have proven very useful in the settling of estates and other claims.

There are several references to such presumption of death and missing persons in the proposed code; for example:

AS 13.16.070	page 19
AS 13.16.075	20
AS 13.16.085(3)	21
AS 13.36.010	72
AS 13.36.400(b)	87
AS 13.36.410(3)	87

However, no place states specifically that the court may make a finding of presumptive death; nor does it set a standard such as the six years in the present statute.

Possibly the proposed wording is sufficient. We do not feel that this should be assumed. If it is not sufficient authority, we will again have a group of persons for whom we cannot file a death certificate.

I suggest that we call this to the attention of the House Judiciary Committee to see if they have considered this angle. I would like to discuss this rather involved matter with the Committee.

*The American Assembly
Columbia University*

*The
Ombudsman*

*Report of the
Thirty-second
American Assembly
October 26-29,
1967
Arden House
Harriman
New York*

P R E F A C E

On October 26, 1967, the Thirty-second American Assembly—on *The Ombudsman*—opened at the Hayden House, on the Harri-man (New York) campus of Columbia University. There were 72 participants from the worlds of business, education, communications, labor, and government, and from the clerical, legal and military professions.

For three days, in small discussion groups, they considered in depth various aspects of citizen grievance and redress vis-à-vis government (local, state, and federal); and on the fourth day in plenary session they reviewed and approved the report contained in these pages.

As background for their discussions participants read a volume entitled *Ombudsmen for American Government?* prepared under the editorial supervision of Dr. Stanley V. Anderson of the University of California at Santa Barbara, with chapters and authors as follows:

- Chapter 1 — *The Spread of the Ombudsman Idea*—Donald C. Rowat, Carleton University, Ottawa, Canada.
- Chapter 2 — *Transferring the Ombudsman*—William B. Gwyn, Tulane University.
- Chapter 3 — *State Government and the Ombudsman*—John E. Moore, University of California (Santa Barbara).
- Chapter 4 — *The Ombudsman and Local Government*—William H. Angus and Milton Kaplan, State University of New York at Buffalo.
- Chapter 5 — *Proposals and Politics*—Stanley V. Anderson.
- Appendix — *Annotated Model Ombudsman Statute*—Walter Gellhorn, Columbia University.

Regional Assemblies on *The Ombudsman* making use of the above-named chapters and The American Assembly conference technique, will be held across the nation with the cooperation of other educational institutions.

The report of the Thirty-second American Assembly reflects the views of the participants in their private, not their official, capacities. The American Assembly itself, a non-partisan educational organization, takes no position on matters it presents for public discussion, and The Ford Foundation, which generously provided support for this program, similarly takes no official position on the opinions contained herein.

CLIFFORD C. NELSON
President
The American Assembly

Ombudsmen for American Government? (ed. Stanley V. Anderson) will be published by Prentice-Hall, Inc., Englewood Cliffs, New Jersey, in January 1968.

FINAL REPORT
of the
THIRTY-SECOND AMERICAN ASSEMBLY

At the close of their discussions the participants in the Thirty-second American Assembly on *The Ombudsman* reviewed as a group the following statement. The statement represents general agreement; however no one was asked to sign it, and it should not be assumed that every participant necessarily subscribes to every recommendation.

Millions of Americans view government as distant and unresponsive, if not hostile. Though often the targets of the resentment which ensues, government officials are usually not the cause of remoteness, but sometimes its victims. Dehumanized government derives from the impersonality of modern mass society. Improving the means by which individual citizens can voice dissatisfaction with governmental action or inaction will make for a more democratically effective society.

Many devices—governmental and private, formal and informal—already serve to amplify the voice of the individual in the halls of government. Administrative agencies may provide him internal avenues of appeal. Courts may hear his case. Elected representatives may handle his complaint. Public legal aid may be available. News media or private organizations may take up his cause.

All these means of access to government are useful. We should strive further to improve them. Because these existing devices have important functions to serve other than handling citizens' complaints, there is a need in today's large and complex government for mechanisms devoted solely to receiving, examining, and channeling citizens' complaints, and securing expeditious and impartial redress. We believe that

American utilization of the Ombudsman concept will help to fill that need.

What is an Ombudsman?

The Ombudsman is an independent, high-level officer who receives complaints, who pursues inquiries into the matters involved, and who makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic public reports. His remedial weapons are persuasion, criticism and publicity. He cannot as a matter of law reverse administrative action.

What Does an Ombudsman Do?

When the Ombudsman receives a complaint which seems to him to have validity, he asks the agency for an explanation. If necessary he consults further with the complainant and again with the agency. He reports his findings to those concerned. He may suggest a specific remedy to correct individual injustices and he may suggest an improvement in agency procedure.

After consideration, if he finds a complaint to be unfounded, he may discover that the agency has failed adequately to explain its action to the citizen. In this case he may urge the agency to improve its techniques of communication. In other cases he may report to the complainant why his grievance was unfounded. In addition to handling individual complaints, the Ombudsman may make studies and recommendations for the improvement of administration.

The Ombudsman proceeds without cost to the complainant. He is able to operate informally and expeditiously without formal hearing procedures.

Establishment of an Ombudsman

We recommend that Ombudsman offices be established in American local and state governments. We do not recom-

mend the establishment of a single office of Ombudsman for the entire federal government, but we do recommend that applications of the concept be undertaken at the federal level.

The Ombudsman must be selected in a manner which assures public confidence in his independence, impartiality and professional attainments. He should be given a salary which will reinforce his high status in the community.

The Ombudsman should designate his own subordinates. The Ombudsman's term of office should be sufficiently long to minimize his preoccupation with reappointment and should not be coterminous with that of the selecting authority. Provision for his removal from office for cause should be made in such manner as not to interfere with his independence while in office.

The authority of the Ombudsman should extend to public agencies exclusive of courts, legislatures and chief executives. On the other hand, the experience of California and other states with a commission on judicial qualifications—an ombudsmanlike institution—should be given serious consideration as a means for reducing the abuse of judicial authority.

Since American local governments vary greatly in size, population, and legal structure, no uniform design need be followed and advantages are to be derived from experimentation. Such experimentation should include meaningful accessibility to the Ombudsman by all sectors of society.

How Far Does the Ombudsman Go?

An Ombudsman, concerned with mistaken or imperfect action, is a valuable resource. But an Ombudsman often can not provide all the help a citizen may need when confused by or in conflict with the officials who administer public affairs.

At times the citizen must have recourse to an active advocate who can press a demand on his behalf or plan

a defense against governmental action. This need is for adequate legal services. Then, too, citizens require information about governmental services. This need is more properly provided by easily accessible information and referral agencies.

Of course, neither an Ombudsman nor legal and information services can eliminate profound social and economic injustice, which calls for essentially political solutions.

While the Ombudsman does not make policy, his office has two important indirect effects on policy-making. First, the Ombudsman's findings provide the Legislature and the Executive with additional significant information and advice upon which to base major policy improvements. Secondly, the legislative process is enhanced to the extent that the Ombudsman's existence permits and encourages legislators to give increased attention to lawmaking.

Conclusion

We urge the prompt enactment of laws to create the special office required to handle citizens' complaints--the Ombudsman.

**PARTICIPANTS
THE THIRTY-SECOND
AMERICAN ASSEMBLY**

L. C. ACKERMAN
President
Walker Manufacturing Co.
Racine, Wisconsin

GORDON B. ALEXANDER
Ass't. Secretary of State
Michigan

STANLEY V. ANDERSON
Professor of Political Science
University of California
Santa Barbara

†**WILLIAM H. ANGUS**
Professor of Law
State University of New York
Buffalo

CHARLES S. ASCHER
Professor, Political Science
Brooklyn College
City University of New York

WILLIAM H. BALDWIN
President
The Kresge Foundation
Detroit

†**EDWARD L. BARRITT, Jr.**
Dean, School of Law
University of California

GEORGE A. BELL
Director of Research
The Council of State Governments
Chicago

GENEVIEVE BLATT
Executive Office of the President
Washington, D. C.

DON T. BOWEN
Executive Director
American Society for Public
Administration
Washington, D. C.

WILLIAM BOYD
National Municipal League
New York

VINCENT L. BRODERICK
Phillips, Nizer, Benjamin,
Krim and Ballou
New York

JACK E. BRONSTON
Senator
State of New York

JOHN P. R. BUDLONG
Vice-President
Membership and Publications
American Management Association

EDGAR CAHN
Director
National Complaint Center
Washington, D. C.

GERALD M. CAPIAN
Legal Services Program
Office of Economic Opportunity
Washington, D. C.

MILTON M. CARROW
Chairman
Administrative Law Committee
New York

HODDING CARTER, III
Editor
Delta Democrat Times
Greenville, Miss.

W. E. CHILTON III
Publisher
The Charleston Gazette
West Virginia

ROBERT ROY DANN
National Chairman
Committee on the Ombudsman
Federal Bar Association
New York

KENNETH CUIP DAVIS
John P. Wilson Professor of Law
University of Chicago

ANDREW N. FARLEY
Reed, Smith, Shaw & McClay
Pittsburgh

†Discussion leader.

††Rapporteur.

CHARLES FLEISCHMANN
Cincinnati

BERNARD FRANK
Frank & Frank
Allentown, Pa.

JACK E. FRANKEL
Executive Secretary
Commission on Judicial
Qualifications
State of California
San Francisco

***WALTER GELLHORN**
Betts Professor of Law
Columbia University

MRS. WALTER GELLHORN
New York

BRYGHTE D. GODBOLD
Vice President
Graduate Research Center of
the Southwest
Dallas

JEAN GRAHAM
Democratic National
Committeewoman
Denver

WILLIAM B. GWYN
Professor of Political Science
Tulane University

SIBYL HAMILTON
Member, City Council
Dallas

***RANDY H. HAMILTON**
Executive Director
Institute for Local Self
Government
Berkeley, California

ROBERT B. HAUGEN
Director
Governmental Research Center
University of Vermont

JACK HURLEY
Station WTOP
Washington, D. C.

MILTON KAPLAN
Professor of Law
State University of New York
Buffalo

* Delivered formal address
† Rapporteur

ORIN LEHMAN
Chairman
Colgreen Broadcasting Group
New York

GEORGE A. LeMAISTRE
President
City National Bank
Tuscaloosa, Alabama

ROBERT MASON
Editor
The Virginian-Pilot
Norfolk

NEAL MAXWELL
Exec. Vice President
University of Utah

REV. DONALD M. MEISEL
The First Presbyterian Church
Princeton, N. J.

JULIUS C. MICHAELSON
Senator
State of Rhode Island

J. R. MILTON
Lieutenant General U.S.A.F.
The Comptroller of the
Air Force
Washington, D. C.

***JOHN F. MOORE**
Professor of Political Science
University of California
Santa Barbara

M. SCOTT MYERS
Texas Instruments, Inc.
Dallas

LUIS NICO
Assistant Corporation Counsel
City of New York

R. C. NEEDHAM
Vice Admiral, USN
Naval Inspector General
Washington, D. C.

JAMES R. NOLEN
Member, House of Representatives
Commonwealth of Massachusetts

FRANK D. O'CONNOR
President, City Council
New York City

BENJAMIN OLEWINE
Harriman Scholar
Columbia University

REV. JOSEPH M. O'MALLEY
Church of the Risen Christ
Denver

WILLIAM PINCUS
The Ford Foundation
New York

RICHARD PIOUS
Harriman Scholar
Columbia University

NORMAN REDLICH
Executive Assistant Corporation
Counsel
City of New York

***HENRY S. REUSS**
Representative from Wisconsin
Congress of the United States

JOHN ROLLS
Harriman Scholar
Columbia University

HAROLD ROTHWAX
Director
Legal Services Unit
Mobilization for Youth, Inc.
New York

DONALD C. ROWAT
Professor of Political Science
Carleton University
Ottawa

IVAN C. RUFFLEDGE
Dean, College of Law
Ohio State University

ROY SCHOFIELD
Professor of Law
University of Virginia

HAROLD SELDMAN
Assistant Director
Bureau of the Budget
Washington, D. C.

MILTON H. SHAPIRO
Hearing Examiner
Civil Aeronautics Board
Washington, D. C.

HAROLD S. SHEFELMAN
Roberts, Shefelman, Lawrence,
Gay & Moch
Seattle

JOHN SLAWSON
The American Jewish Committee
New York

WILLIAM A. STEIGER
Representative from Wisconsin
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Member, House of Representatives
Commonwealth of Massachusetts

DONALD B. STRAUS
President
American Arbitration Association
New York

MRS. ROBERT J. STUART
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League of Women Voters of the U.S.
Washington, D. C.

***HESSE M. UNRUH**
Speaker of the Assembly
California Legislature

ELWOOD WARDLOW
Managing Editor
Buffalo Evening News

SHONLY E. WELLES
Attorney
Kansas City

CARE A. YOUNGDALE
Major General, U.S.M.C.
Inspector General, Marine Corps
Washington

ARNOLD M. ZACK
Director
Labor Management Institute
New York

*Delivered formal address.
†Discussion leader.

ABOUT THE AMERICAN ASSEMBLY

The American Assembly was established by Dwight D. Eisenhower at Columbia University in 1950. It holds non-partisan meetings and publishes authoritative books to illuminate issues of United States policy.

An affiliate of Columbia, with offices in the Graduate School of Business, the Assembly is a national, educational institution incorporated in the State of New York.

The Assembly seeks to provide information, stimulate discussion, and evoke independent conclusions in matters of vital public interest.

AMERICAN ASSEMBLY SESSIONS

At least two national programs are initiated each year. Authorities are retained to write background papers presenting essential data and defining the main issues in each subject.

About 60 men and women representing a broad range of experience, competence, and American leadership meet for several days to discuss the Assembly topic and consider alternatives for national policy.

All Assemblies follow the same procedure. The background papers are sent to participants in advance of the Assembly. The Assembly meets in small groups for four or five lengthy periods. All groups use the same agenda. At the close of these informal sessions, participants adopt in plenary session a final report of findings and recommendations.

Regional, state, and local Assemblies are held following the national session at Arden House. Assemblies have also been held in England, Switzerland, Malaysia, Canada, the Caribbean, South America, Japan and the Philippines. Over ninety institutions have co-sponsored one or more Assemblies.

ARDEN HOUSE

Home of The American Assembly and scene of the national sessions is Arden House, which was given to Columbia University in 1950 by W. Averell Harriman. E. Roland Harriman joined his brother in contributing toward adaptation of the property for conference purposes. The buildings and surrounding land, known as the Harriman Campus of Columbia University, are 50 miles north of New York City.

Arden House is a distinguished conference center. It is self-supporting and operates throughout the year for use by organizations with educational objectives. The American Assembly is a tenant of this Columbia University facility only during Assembly sessions.

AMERICAN ASSEMBLY BOOKS

The background papers for each Assembly program are published in cloth and paperbound editions for use by individuals, libraries, businesses, public agencies, non-governmental organizations, educational institutions, discussion and service groups. In this way the deliberations of Assembly sessions are continued and extended.

The subjects of Assembly programs to date are:

- 1951 -- United States-Western Europe Relationships
- 1952 -- Inflation
- 1953 -- Economic Security for Americans
- 1954 -- The United States' Role in the United Nations
The Federal Government Service
- 1955 -- United States Agriculture
The Forty-Eight States
- 1956 -- The Representation of the United States Abroad
The United States and the Far East
- 1957 -- International Stability and Progress
Atoms for Power
- 1958 -- The United States and Africa
United States Monetary Policy
- 1959 -- Wages, Prices, Profits, and Productivity
The United States and Latin America
- 1960 -- The Federal Government and Higher Education
The Secretary of State
Goals for Americans

- 1961 — Arms Control: Issues for the Public
- Outer Space: Prospects for Man and Society
- 1962 — Automation and Technological Change
- Cultural Affairs and Foreign Relations
- 1963 — The Population Dilemma
- The United States and the Middle East
- 1964 — The United States and Canada
- The Congress and America's Future
- 1965 — The Courts, the Public, and the Law Explosion
- The United States and Japan
- 1966 — State Legislatures in American Politics
- A World of Nuclear Powers?
- The United States and the Philippines
- Challenges to Collective Bargaining
- 1967 — The United States and Eastern Europe
- Ombudsmen for American Government?
- 1968 — Uses of the Seas
- Law and The Changing Society

The American Assembly

COLUMBIA UNIVERSITY

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------------------	----------

State v. Goodseal

~~Strong and Lundt were the sole owners of both corporations, the payments were made by one corporation and the cross-petition was filed by the other. Strong and Lundt deny personal liability herein and did not join Guardian in its cross-petition. It is their position that they signed for the corporation in a representative capacity. The contract itself would seem to indicate otherwise, but in view of our holding on the plaintiff's action and the position of Strong and Lundt, it is not necessary to discuss or meet that issue.~~

We affirm the judgment of the trial court dismissing both the petition and the cross-petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUDITH WAYNE
GOODSEAL, APPELLANT.

— N. W. 2d —

Filed January 29, 1971. No. 37605.

1. Criminal Law: Constitutional Law: Statutes. The definition of crimes and the penalties for their violation are statutory in this state, and a statute which has the effect of delegating to a private person the punishment to be assessed for a crime is subject to constitutional objection.
2. Criminal Law: Constitutional Law: Self-Defense. The Nebraska Self-Defense Act, section 29-114, R. S. Supp., 1969, is unconstitutional and void in that it delegates to a person asserting self-defense the determination of the amount and extent of the force to be used in defending his person as a legal justification for crime.
3. Constitutional Law: Statutes: Appeal and Error. Where an unconstitutional statute is relied on to sustain the position of one or more of the parties, this court will, in a proper case, notice the plain error in the premise on which the case was trial and declare the unconstitutionality of the act even though that issue was not raised by the parties.
4. Criminal Law: Self-Defense. Killing in self-defense is grounded upon necessity. It exists only in extremity where no other practical means exists to avoid death or great bodily harm apparent to the person resorting to it.
5. ———: ———. In order to excuse or justify a killing in self-

Re HB 40

State v. Goodseal

- defense, the accused must not only have entertained the belief that his life was in danger or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith.
6. ———: ———. Whether or not an accused killed in fear of death or great bodily harm, or whether or not the killing was motivated by anger, punishment, or vengeance is an issue of fact to be determined by the jury.
 7. ———: ———. The bad character of the accused and the fact that she was an acknowledged prostitute does not deprive her of the right of self-defense, but such facts are circumstances to be considered in determining the necessity for and the extent and reasonableness of the force used in connection with the other evidence in the case.
 8. Criminal Law: Trial. It is the province of the jury to determine the circumstances surrounding the crime charged; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
 9. Criminal Law: Trial: Appeal and Error. After a jury has considered the evidence in the light of the rule regarding circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.
 10. Trial: Instructions. It is not error to refuse a tendered instruction where its content is covered by other instructions given by the court.
 11. ———: ———. A party may not properly complain of an instruction given by the court when such instruction is more favorable to him than that to which he was entitled.

Appeal from the district court for Douglas County:
DONALD BRODKFY, Judge. Affirmed.

Paul E. Watts and Michael N. Schirber, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH,
SMITH, McCOWN, and NEWTON, JJ.

CARTER, J.

The defendant, Judith Wayne Goodseal, was charged

in the district court for Douglas County with murder in the second degree for the killing of Dick Edgar Williams on July 8, 1969. The jury returned a verdict of guilty and the trial court imposed a sentence of 10 to 15 years imprisonment at hard labor in the Nebraska Reformatory for Women. The defendant has appealed.

On July 8, 1969, the body of Williams was found on the street edge of the sidewalk in front of a vacant building at 5208 South 28th Street in Omaha. It was later determined that he had been shot five or six times with .32 caliber bullets. That Williams was the victim of a homicide seemed apparent. The defendant admitted shooting the deceased and asserted that it was done in self-defense.

The deceased and Lee Dunbar were employed at a service station in Omaha. After closing the station in the evening of July 7, 1969, deceased suggested that they go out on the town. They went to several bars, purchased and drank some beer, and finally drove to the Eldorado Club at about 1 a.m. Deceased had previously inquired of a taxi driver as to where they might find some women. They parked Dunbar's car near the Eldorado Club where deceased accosted the defendant who was driving a car leased to Larry W. Pullian and after some negotiation offered \$20 for her intimate association. Deceased purported to give defendant two \$10 bills which she soon discovered to be two \$1 bills and returned them to him. She told him to get out of the car and, according to her testimony, he proceeded to force his desires upon her.

The defendant was 24 years of age, was married, and separated from her husband. She had her two small children in her custody. She had been living with Larry W. Pullian, a single man, for about a year. She admitted that she had engaged in prostitution and admitted further that she had negotiated with deceased for such an act with him. Pullian testified that he had a .32 caliber pistol that he had taken as security for a loan. He stated

that he had placed the pistol on the floor of his car under the driver's seat, but had no knowledge as to whether or not it was loaded. Defendant testified that she did not know there was a gun in the car until immediately before the shooting.

Dunbar testified that after deceased entered defendant's car, defendant and deceased drove around the block and Dunbar followed in his car. Defendant parked her car and Dunbar parked his car about 5 to 10 feet behind it. After some delay he approached the car driven by defendant and made some inquiries during the course of which deceased asked him if he had his gun. On signal from the deceased, he answered in the affirmative although he had no gun. Some time later, Dunbar heard five or six pops somewhat similar to exploding firecrackers. He saw defendant drive away and attempted to follow. He saw a man in the back seat but was unable to follow the car. He made an anonymous call to the police and informed them that there had been a shooting in the area. He gave the police the color and license number of the car. The call was verified and answered by the police, but evidence of a shooting was not discovered until the body was later found on the sidewalk in front of 5208 South 28th Street.

Defendant testified that deceased said he did not have \$20. She said he tried to force her to remove her clothing which she resisted. She did not testify to making an outcry or to any attempt to open the car door or to leave the car. He finally spun her around with her legs toward him and was threatening to strike her which he did not do. He partially removed his own clothing. She said that she was afraid of deceased and fearful because she knew the man following them had a gun. As he turned her around in the seat, she said her left hand dropped down and came in contact with a gun. She got the gun in her left hand, pointed it at deceased, and squeezed it until all the bullets in the automatic pistol were fired. Deceased slumped back against the door of

the car. She drove the car back in front of the Eldorado Club, honking the horn to attract the attention of Pullian. As she came in front of the Eldorado Club, Pullian came out and, seeing the deceased in the car and the blood on defendant, signaled her to pull over to the curb. She went on, turned the corner, and stopped. He followed and when he reached the car he opened the front door on the right-hand side and the body fell out on the edge of the sidewalk where it was later found by the police. He then got in the back seat because, as he testified, the front seat was covered with blood.

Defendant and Pullian drove away and went home without reporting the incident to anyone. On arrival at their home, Pullian put the gun away and produced it in court at the trial. He washed the floor mats and upholstery to remove the blood stains. The floor mats and upholstery were still damp and the odor of vinegar was noticeable when the car was searched that afternoon by the police.

We point out that defendant admits shooting the deceased with a .32 caliber automatic pistol which she found under the seat of the car. She claims that she squeezed the trigger of the gun until all its shells were fired into the body of the deceased. She contends that she did the shooting while in fear of the deceased and Dunbar who admittedly had followed the Pullian car and had told the deceased in defendant's presence that he had a gun. The evidence is clear that defendant and Pullian had left the body of deceased on the sidewalk in front of a vacant building at 5208 South 28th Street. They left the scene immediately and did not report the killing of the deceased to anyone. On arriving home, the gun was put away and the floor mats and upholstery washed to remove the blood stains and thereby remove evidence of the killing. There is evidence that would sustain a finding of self-defense. On the other hand, there is evidence that defendant attempted to conceal her participation in the killing, an indication of guilt. It was for

State v. Goodseal

the jury to determine under all the facts and circumstances whether or not defendant purposely and maliciously killed Williams without deliberation and premeditation or whether or not she killed him in self-defense as that defense is defined by the law of this state. The jury resolved these issues against the defendant and thereby found beyond a reasonable doubt that defendant did not kill Williams in self-defense and found also that the evidence shows beyond a reasonable doubt the defendant did kill Williams purposely and maliciously but without deliberation and premeditation.

The defendant contends the rule as to the weight to be given to the circumstantial evidence supports the assignment of error that the evidence was insufficient to sustain the conviction. The jury was properly instructed on the circumstantial evidence rule by instruction No. 15 and its giving is not assigned as error. The jury considered the circumstantial evidence in the light of this instruction and concluded that the facts and circumstances tend to connect the accused with the crime charged and were of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. After a verdict of guilty in part on circumstantial evidence and on appeal therefrom for insufficiency of the evidence, the verdict may not be set aside as a matter of law for insufficiency of the evidence if the evidence sustains some rational theory of guilt. *State v. Reeder*, 183 Neb. 425, 160 N. W. 2d 753; *State v. Williams*, 183 Neb. 257, 159 N. W. 2d 549; *State v. Ohler*, 178 Neb. 596, 134 N. W. 2d 265. The evidence is sufficient to sustain the finding of the jury.

Defendant assigns as error the trial court's refusal to give her requested instruction applicable to the law of self-defense. The requested instruction is: "Defendant contends that she acted in self-defense. Self-defense is defined as the use of such force by any means necessary to repel an attack as at the time appeared to defendant to be necessary, although she may have been

mistaken as to the extent of the actual danger, if a reasonable person would also have been so mistaken. The defendant was justified in acting upon the facts as they appeared to him and is not to be judged by the facts as they actually were.

"When a person is threatened or attacked in such a manner that it causes him to believe he is in danger of receiving bodily injury, he may use self-defense to defend himself.

"It is necessary for conviction that the state prove beyond a reasonable doubt that the defendant was not acting in self-defense, and there is no burden on the defendant to prove that she was acting in self-defense."

The foregoing requested instruction was given verbatim by the trial court as instruction No. 9, except that the court inserted a paragraph between the second and third paragraphs of the tendered instruction. The inserted paragraph stated: "However, when the person threatened or attacked uses more force than permitted by the above definition of self-defense, she is guilty of unlawful conduct and is criminally responsible therefor." It is the contention of the defendant that it was error for the trial court to give an instruction which requires the jury to weigh the type and degree of force and means used.

The defendant relies upon the defense of self-defense as defined by section 29-114, R. S. Supp., 1969, referred to herein as the Nebraska Self-Defense Act. The requested instruction tendered by the defendant is based upon the Nebraska Self-Defense Act which became effective on June 5, 1969. The State relies solely upon an interpretation of the act. It is readily apparent that the constitutionality of the act is not raised by either the State or the defendant.

The pertinent part of the act provides: "No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or

when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime." § 29-114, R. S. Supp., 1969. The State argues that the language of the statute preserves the concept of the use of reasonable force only in defending one's person or property. On the other hand, the defendant argues that the act provides that a person may use unlimited force in repelling an aggressor and that the common law rule that one may use only reasonable force has been abrogated by the act. It is shown that amendments by the Legislature were twice offered and defeated to change the words "any means necessary" to "any reasonable means necessary." It was clearly the intention of the Legislature to eliminate the word "reasonable" from the common law rule and it would be an act of legislation for this court under such circumstances to place it back in the act by judicial pronouncement. On the other hand, we do not subscribe to defendant's view that the words "by any means necessary" were an opening of the door for the use of extreme and brutal force by an aggressor in every case to protect against minor infringements of personal and property rights. Necessary force does not mean unnecessary force. Nor does "any means necessary" mean "any reasonable means necessary" under the legislative history here shown.

Killing in self-defense is grounded upon necessity. The right exists only in extremity where no other practicable means to avoid the threatened harm is apparent to the person resorting to it. If there is no real or apparent necessity for the killing, the defense fails. In order to be entitled to assert self-defense as an excuse or justification for the killing, the defendant must have been in imminent danger of death or great bodily harm at the time of the commission of the act. In order to justify or excuse a killing in self-defense, the accused must not only have entertained the belief that his life was

LAW OFFICES
BARRY W. JACKSON
527 4TH AVENUE
P. O. BOX 348
FAIRBANKS, ALASKA 99701
907 - 456-7791

*HB-7 and
HB-19*

BARRY W. JACKSON
FREDERIC E. BROWN

March 19, 1971

The Honorable William J. Moran,
Chairman
Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

SUBJECT: Ombudsman

Dear Bill:

As state chairman of the American Bar Association Committee on the Ombudsman I am enclosing for your information a copy of the report of the 32nd American Assembly on the Ombudsman and a brief outline on the Ombudsman prepared by the Ombudsman Committee of the American Bar Association.

As you are a member of the Judiciary Committee I am also enclosing a copy of an article, "The Ombudsman and Human Rights", by Bernard Frank, a reprint from the Administrative Law Review of April, 1970.

Although I understand that at least one key committee chairman is opposed to the enactment of any Ombudsman legislation by this legislature, I hope that our furnishing you with this material may induce legislative leaders to permit both committee and floor action on the Ombudsman bills now before the legislature.

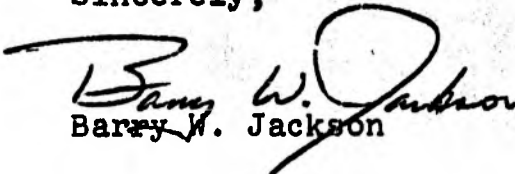
Although Alaska is a small state and aggrieved citizens have much more than the usual opportunity to obtain informal relief through the political process, I still believe that Alaska needs and should have an Ombudsman. Hawaii, a state which also has a small population, has reported outstanding success with their new Ombudsman.

I believe that Alaska should place its Ombudsman, for administrative purposes, under the Legislative Council or, if the Legislative Audit Committee is upgraded, under the aegis of that committee. Indeed, historically, the Ombudsman function developed out of the Legislative Audit role of the Swedish Parliament.

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Even though this session is drawing to a close, I hope that you will be able to act on the Ombudsman bills and, if floor action cannot be completed, that the bills could be assigned to the Legislative Council or to other committees for interim studies.

Sincerely,


Barry W. Jackson

BWJ:pb

Encl. (3)

HB-7 and
HB-17

**AMERICAN BAR ASSOCIATION
ADMINISTRATIVE LAW SECTION
OMBUDSMAN COMMITTEE**

THE OMBUDSMAN

1. Definition

The Ombudsman is an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints.

2. Basic Concept

The Ombudsman system is one of the institutions essential to a society under the Rule of Law, a society in which fundamental rights and human dignities are respected. Human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The Ombudsman system is one of the remedies which seeks to preserve human rights.

3. Reasons for Ombudsman

- (a) The post-World War II growth of the welfare state. Government grew in size and extensive powers were given to agencies. Protection is needed against executive and administrative mistake and abuse of power.
- (b) The activities of public administration have become so comprehensive and the power of the bureaucracy so great that the legal status of the individual needs additional protection.
- (c) Existing mechanism — courts, legislatures, the executive, administrative courts, and administrative agencies — are not sufficient to cope with the grievances of the aggrieved and there is a need for a supplementary institution.
- (d) The presence of the Ombudsman has psychological value. His office gives the citizen confidence that there exists a watchdog for the people who will hold government accountable.
- (e) The legislature traditionally concerned with the observance of laws and rulings by public officials has at the same time extensively delegated powers to the administrative authorities. The Ombudsman can serve to aid the legislature in its function of supervising the executive and administrator.
- (f) The Ombudsman gives the citizen an expert and impartial agent without personal cost to the complainant, without time delay, without the tension of adversary litigation, and without requirement of counsel or the intervention of those highly placed.

4. Types of Action or Inaction Which Give Rise to Complaints

(a) The Ombudsman investigates complaints arising from administrative action or inaction as a result of which any person has been aggrieved. Such types of action or inaction are:

- (1) Injustice.**
- (2) Failure to carry out legislative intent.**
- (3) Unreasonable delay.**
- (4) Administrative error.**
- (5) Abuse of discretion.**
- (6) Lack of courtesy.**
- (7) Simple clerical error.**
- (8) Oppression.**
- (9) Oversight.**
- (10) Negligence.**
- (11) Inadequate investigation.**
- (12) Unfair policy.**
- (13) Partiality.**
- (14) Failure to communicate.**
- (15) Rudeness.**
- (16) Maladministration.**
- (17) Unfairness.**
- (18) Unreasonableness.**
- (19) Arbitrariness.**
- (20) Arrogance.**
- (21) Inefficiency.**
- (22) Violation of law or regulations.**
- (23) Abuse of authority.**
- (24) Discrimination.**
- (25) Disability to act.**
- (26) Errors, mistakes, carelessness.**
- (27) Disagreement with discretionary decisions.**
- (28) Inconsistent with general course of an agency's function.**
- (29) Mistakes in law or arbitrary in ascertainment of facts.**
- (30) Based on irrelevant consideration.**
- (31) Unclear or inadequately explained when reason should have been revealed.**
- (32) Inefficiently performed.**
- (33) All other acts of injustice that frequently the governors inflict upon the governed, intentionally or unintentionally.**

(b) The Ombudsman may also recommend clarification, amendment, or initiation of legislation and administrative rules and regulations.

5. American Bar Association Resolution

The following Resolution dealing with the establishment of an Ombudsman was adopted by the American Bar Association at the Midyear Meeting of the House of Delegates in 1969:

Be it Resolved, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act of failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the federal government, the Administrative Conference should (a) experiment by constituting itself an ombudsman for limited areas of federal activity, and (b) encourage and study experimentation by particular agencies with the ombudsman idea.

4. That establishment of a federal government-wide ombudsman system, whether or not designed to assist congressmen in handling constituents' complaints about administration, should await findings based upon the experimentation recommended.

Be it Further Resolved, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

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2. Ombudsman-Citizen Defender, Bibliography prepared by Charles L. Smith for the Friends Committee on Legislation of California, 2160 Lake Street, San Francisco, California.

7. Ombudsman Committee

American Bar Association
Administrative Law Section

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Washington, D. C.

Ombudsman Committee
Chairman, Bernard Frank
832 Hamilton Street
Allentown, Pennsylvania

Co-Chairman, Benny L. Kass
Washington, D. C.

For further information with respect to the Ombudsman, write to Chairman, Bernard Frank.

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JUDICIAL REVIEW: Alvinus B. McCabe, *Chairman*, World Center Building, 16th & K Streets, N.W., Washington, D.C., 20006; Kenneth Culp Davis, *Council Director*, University of Chicago Law School, Chicago, Illinois 60637

An effort is made to survey the current status of the ombudsman throughout the world. The author is deputy chairman of the Federal Bar Association's Committee on the Ombudsman.—The Editors.

THE OMBUDSMAN AND HUMAN RIGHTS

BY
BERNARD FRANK*

The Geneva Conference on World Peace Through Law in 1967 recommended that the World Peace Through Law Center "disseminate widely information about the role which an ombudsman can perform in protecting citizens against violation of their rights by administrative authorities; and seek to assist financially or otherwise projects designed to encourage research on the establishment of ombudsmen."¹ It is, therefore, appropriate to discuss at this Bangkok World Conference on World Peace Through Law the subject, "Man, Rights and Law (Ombudsman)."

WHAT IS AN OMBUDSMAN?

The "Ombudsman" is an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints. To this definition must be added the basic concept that the Ombudsman system is one of the institutions essential to a society under the Rule of Law, a society in which fundamental rights and human dignities are respected. Therefore, our frame of reference when we discuss the Ombudsman is concern with the preservation of human rights.

EXISTING NATIONAL OMBUDSMAN INSTITUTIONS

Today there are national Ombudsman officials in Sweden, Finland, Denmark, Norway, New Zealand, Guyana, Tanzania, Great Britain, and Northern Ireland. Space limitations will permit only a mini-analysis of the institution in each country.² This work paper has excluded consideration of Military Ombudsmen in Norway and West Germany.

*Deputy Chairman, Federal Bar Association Committee on Ombudsman; Member, American Bar Association Committee on Ombudsman.

¹World Peace Through Law Center, Programs for Progress Toward Peace Through Law, Future Work Program, Topic 11, Human Rights, 28-29.

²Publications of particular relevance are GILLHORN, OMBUDSMEN AND OTHERS (1966); ROWAT, ed., THE OMBUDSMAN, (2d ed. 1968); THE OMBUDSMAN OR CITIZEN'S DEFENDER:

A. Sweden.³

In 1968, the offices of the Justitieombudsman (created in 1809) and the Militieombudsman (concerned with military affairs since 1915) were combined into one institution with three separate Ombudsmen each known as Justitieombudsman: Alfred Bexelius, handling social and institutional welfare; Hugo Henkow, who is in charge of military and taxation matters, shares the task of controlling the courts, the prosecutors, and the police, with Ulf Lundvik, who also supervises sheriffs, local government, and the rest of civil administration.⁴ The Ombudsmen with a common staff do not operate as a committee, each working separately and deciding his own cases.⁵ The following selected characteristics of the office are noted: *Principal duties*-to supervise observance of laws by courts, public officials, and military officers; *Jurisdiction*-includes all officials (except members of the Cabinet, and the Chancellor of Justice), judges (with some limitations where members of the Supreme Court of Justice and the Supreme Administrative Court are concerned), municipal boards and officials (except elected members of municipal councils), clergymen of the State Lutheran Church, and military officers and officials; *Complaints*-may be made by anyone in writing or investigation may be initiated by Ombudsman, who also has discretion to decide which complaints shall be investigated; *Investigations*- has power to investigate with access to files and minutes of courts and agencies, and call upon officials for assistance; *Remedies*-may prosecute or commence disciplinary proceeding but the most frequent device used is a letter of admonition or reminder; has no power to change a decision of a court or an administrative agency; *Defects in laws*-may call attention to defects in laws and suggest amendments or

A MODERN INSTITUTION, *Annals*, Vol. 377 (May 1968); ANDERSON, ed., *OMBUDSMEN FOR AMERICAN GOVERNMENT; Remedies Against the Abuse of Administrative Authority—Selected Studies*, United Nations, 1964, ST/TAO/HR/19; *Ombudsman, Hearing Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 89th Cong., 2d Sess., pursuant to Senate Resolution 190 (1966)*.

³Effective Realization of Civil and Political Rights at the National Level—Selected Studies, United Nations, 1968, BEXELIUS, *The Ombudsman*, 27; Bexelius, *The Swedish Ombudsman*, 17 *U. Toronto L.J.* 170 (1967); Jagerskiold, *The Swedish Ombudsman*, 109 *U. PA. L. REV.* 1077 (1961); *The Swedish Parliamentary Ombudsmen, Annual Report for 1968, Summary in English*; GELLIHORN, *supra* note 2, 194; WENNERGREN, *The Rise and Growth of Swedish Institutions for Defending the Citizen Against Official Wrongs*, *Annals*, *supra* note 2, 1; Bexelius, *The Origin, Nature, and Functions of the Civil and Military Ombudsmen in Sweden*, *Annals*, *supra* note 2, 10.

⁴*Ombudsman Annual Report for 1968*, *supra* note 3, 1-2.

⁵Letter from Alfred Bexelius to Bernard Frank, April 8, 1969.

ask an administrative agency to change a practice; *Inspection*-may make inspections of courts, police, prosecutors, agencies, and institutions; *Discretionary decisions*-may review but does so only in exceptional cases; *Exhaustion of other remedies*-not required; *Parliament*-annual reports are made to Parliament; each year administration is examined by a committee of Parliament; *Election*-elected by 48 electors of the Riksdag for a term of four years or term of Parliament and may be reelected; *Case load*-in 1968, received 2120 complaints and originated 494 on their own initiative; about 80% of the cases are unfounded or without evidence.

B. Finland.⁶

Risto Leskinen, the Finnish Parliamentary Commissioner (an office created in 1919) has functions which are to a great extent comparable with the Chancellor of Justice appointed by the President. Most of the selected characteristics of the Swedish Ombudsman are applicable and separate comment need be made only with respect to the following: *Principal duties*-to see that "laws, decrees and official regulations are observed by judges and other officials."; *Jurisdiction*-public administration, including judges, members of the Cabinet, local officials, military officers, and ecclesiastical organizations or organs functioning with the responsibility of public officials;⁷ *Discretionary decision*-may be reviewed if the official exceeds his discretionary power, raising a question of legality; *Reopening cases*-can request the Supreme Court or the Supreme Administrative Court to annul prior decisions and reconsider a case if there "has been a fault in the procedure, if the evidence was based on perjury or false documents," if there is "new relevant evidence or if the application of the law has been evidently erroneous";⁸ *Election*-elected by Parliament for a term of four years and may be reappointed; *Case load*-in 1967, received 1294 complaints, took up 136 on his own initiative, and the Chancellor of Justice referred 136.⁹

C. Denmark.¹⁰

The Parliamentary Commissioner for Civil and Military Government

⁶LESKINEN, THE POSITION AND FUNCTIONS OF THE FINNISH PARLIAMENTARY OMBUDSMAN (1965); GELI Horn, *supra* note 2, 48; KASTARI, The Chancellor of Justice and the Ombudsman, ROWAT, *supra* note 2, 58; HIDEN, Finland's Defenders of the Law, *Annals*, *supra* note 2, 31.

⁷Letter from Mikael Hiden, Secretary, Eduskunnan oikeusasiamies, to Bernard Frank, April 1, 1969.

⁸Hiden, *supra* note 7.

⁹Hiden, *supra* note 7.

¹⁰HURWITZ, The Ombudsman, The Danish Institute for Information (1968);

has been held by its only incumbent, Professor Stephan Hurwitz, since 1955. The office differs appreciably from Sweden's, as is apparent from the following selected characteristics: *Principal duties*-to keep "himself informed as to whether any person within his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties";¹¹ *Jurisdiction*-all Ministers, civil servants, and all other persons acting in central government service (except judges) including military administration, local government (with some limitation), and civil servants of the Lutheran Church (except in matters which involve tenets or preachings); *Complaints*-as far as possible in writing with name and address and with a one year statute of limitations; has discretion to decide which complaints he shall investigate; *Investigation*-can investigate with all government (state and local) officials required to give information and supply documents and records (subject to limitations regarding state secrets and rules in the Administration of Justice Act); *Remedies*-cannot prosecute but does give his views, has no power to change an administrative decision; *Defects in laws*-may call attention to defects in existing legislation or administrative regulations; *Inspections*-may inspect any state agency (subject to limitations set forth in Administration of Justice Act) and may inspect premises of local government in connection with a case involving local government; *Discretionary decisions*-criticizes such decisions when supported by experts and "when as far as can be ascertained, there exists reliable documentary evidence of an arbitrary or unreasonable decision";¹² *Exhaustion of other remedies*-except in cases where the Ombudsman has acted on own initiative, complaints against decisions which may be set aside by a higher administrative authority may not be brought before him until the higher authority has given its decision; the Ombudsman has pointed out that this restriction applies only to "decisions" and not to mistakes made in the treatment of cases by subordinate authorities or the conduct of the officials concerned;¹³ *Civil servants*-a civil servant has the right when complained against to have his case removed to disciplinary investigation by the agency concerned; *Election*-elected after every general Parliamentary election for term of Parliament and may be

CHRISTENSEN, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100 (1961); GILLHORN, *supra* note 2, 5; ABRAHAM, *The Danish Ombudsman*, *Annals*, *supra* note 2, 55; PEDERSEN, *Denmark's Ombudsmand*, ROWAT, *supra* note 2, 75.

¹¹Article 3, *Directives for the Parliamentary Commissioner for Civil and Military Administration*, HURWITZ, *supra* note 10, 45.

¹²HURWITZ, *supra* note 10, 9.

¹³HURWITZ, *supra* note 10, 13.

re-elected; *Parliament*-annual reports and special communications to Parliament are made through a Parliamentary Committee; *Case load*-about 1000 cases a year with only 10% to 15% found justified.

*D. Norway.*¹⁴

In 1962, the Ombudsman for Public Administration was established, an office held by Andreas Schei. Norway was influenced by both the Swedish and the Danish systems but more particularly by Denmark, as is indicated by the following selected characteristics: *Principal duties*-to "endeavour to ensure that the public administration does not commit any injustice against any citizen and that civil servants and others in the service of the administration do not commit errors or neglect their duties";¹⁵ *Jurisdiction*-covers government administrative organs, Cabinet Ministers as heads of ministries, civil servants, and others in the service of the government, as well as local government (since January 1, 1969), but excludes Cabinet decisions, the courts, the Auditor of Public Accounts, and matters which come within the province of the Military Ombudsman; *Complaints*-must be in writing and signed (but with a one year statute of limitations) from someone personally wronged; has discretion to dismiss a complaint obviously unfounded; since the Ombudsman can investigate on own initiative, can take up cases which lack the necessary personal interest or which are stale;¹⁶ *Investigation*-has power to investigate, with the right to obtain information from all officials and with access to documents and records (but not internal work papers); *Remedies*-only sanction is to express an opinion with no power to compel compliance or to change or make an administrative decision; *Defects in laws*-may call attention to defects in acts, administrative regulations, or administrative practices; *Inspections*-no general inspection duties but may visit or inspect agencies in course of an investigation; *Discretionary decisions*-can review and give opinion concerning discretionary decisions which are "manifestly unreasonable or otherwise contrary to proper administrative practices"; *Exhaustion of remedies*-administrative remedies must be exhausted unless there is a particular reason for the Ombudsman to handle without delay; *Election*-selected by Parliament after each general election for four years or until the next general election; *Parliament*-barred from dealing with a

¹⁴THUNE, The Norwegian Ombudsmen for Civil and Military Affairs, *Annals*, supra note 2, 41; OS, The Ombudsman for Civil Affairs, *ROWAT*, supra note 2, 95; WALNUN, The Norwegian Ombudsman, article, No. 21, published by the Royal Ministry of Foreign Affairs, Oslo, Norway (1967); GILLHORN, supra note 2, 154.

¹⁵Rules for the Storting's Ombudsman for the Administration, issued 1968, Sec. 1.

¹⁶Walnun, supra note 14, 1.

complaint if subject is one under consideration by Parliament or the Standing Committee on Parliamentary Control; Ombudsman makes annual and special reports; can be referred cases from Parliament; *Case load*-about 1000 complaints annually; about 15% are justified.

*E. New Zealand.*¹⁷

Sir Guy Powles is the Parliamentary Commissioner, an office created in 1962. New Zealand was influenced by the Danish system but the first country outside of Scandinavia to transplant the Ombudsman did so with striking variations, again illustrated by selected characteristics: *Principal function*- "to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any person of the Departments or organizations named in Parts I and II of the Schedule to this Act, or by any officer, employee, or member thereof in the exercise of any power or function conferred on him by any enactment";¹⁸ *Jurisdiction*-limited to government departments and other organizations enumerated in a Schedule to the Act; has no direct power over Ministers but can investigate a recommendation to a Minister and may apply to the Supreme Court for a declaratory order where a question arises as to jurisdiction; noteworthy among omissions are the local government, administrative tribunals, and the courts; in 1968, the Ombudsman obtained jurisdiction over Education and Hospital boards; jurisdiction is limited with respect to members of the Armed Forces; the powers conferred on the Commissioner may be exercised notwithstanding any provision in any enactment as to finality of an administrative act or that there shall be no right of appeal or that no proceeding or decision shall be challenged, reviewed, quashed or questioned; *Complaints*-must be written; requires payment of two dollars (which can be waived); has discretion not to investigate including where complainant had knowledge of matter for more than twelve months before complaint received by Commissioner or does not have sufficient personal interest in the subject matter; can investigate on his own motion; *Investigation*-has the power to investigate (must be in private) and to obtain information from such

¹⁷NORTHEY, *New Zealand's Parliamentary Commissioner*, ROWAT, *supra* note 2, 127; SAWER, *The Ombudsman and Related Institutions in Australia and New Zealand*, *Annals*, *supra* note 2, 62; GELLHORN, *supra* note 2, 91; Powles, *Address*, *Canadian Bar Association* (1964), reprinted in U.S. Senate Document, *supra* note 2, 207.

¹⁸Parliamentary Commissioner (Ombudsman) Act 1962, Section 11 (1). A 1968 Amendment 11 (2) relates to Part III of the Schedule adding Specified Local Organizations.

persons as he thinks fit; has the power to require production of documents or papers and to compel attendance of officials and complainants to be examined on oath, subject to the right of the Attorney General to certify that certain limited matters should not be disclosed; *Remedies*-limited to reporting his opinion and recommendations to the department and the Minister concerned and if no action is taken which he considers adequate may report to the Prime Minister and Parliament; the grounds on which he may make a report and recommendation are broad: contrary to law; unreasonable, unjust, oppressive, or improperly discriminatory in accordance with a rule of law, statute, or practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; based wholly or partially on mistake of law or fact; or was wrong; *Defects in laws*-in any case, can call attention to altering of practices or reconsideration of law; *Inspections*-during investigations can make on site inspection; *Discretionary decisions*-can investigate where discretionary power has been exercised for an improper purpose or on irrelevant grounds or with irrelevant considerations or where reason should have been given for decision; *Exhaustion of remedies*-cannot investigate an administrative act which could be appealed on its merits to any court or administrative tribunal; *Parliament*-makes annual and interim reports to Parliament; any Committee of the House of Representatives may refer to him for investigation and report petitions; *Election*-appointed on recommendation of House of Representatives by Governor General for three or four year term (depending on session at which recommendation is made) and may be reappointed; *Case load* in the year ending March 31, 1968, received 631 complaints, handled a total of 555 cases, found 56 justified, and issued formal recommendations in six cases.¹⁹

F. Guyana.²⁰

The 1966 Constitution of Guyana established the office of Ombudsman, a position held by Gordon S. Gillette. The Guyana Ombudsman is generally based on the New Zealand system, but again in the process of transplantation variations were made, as indicated in the following selected characteristics: *Principal Function*-to investigate any administrative action taken on or after May 26, 1966, by any department of government, other authorities, or by Ministers, officers or

¹⁹Report of the New Zealand Ombudsman, 31 March 1968, 5-6.

²⁰Report of the British Guiana Commission of Inquiry, Racial Problems in the Public Service, International Commission of Jurists (1965); The Constitution of Guiana and Related Constitutional Instruments (May 1966); Guyana Act No. 17 of 1967, Ombudsman Act, 1967; 1968 Report of the Guyana Ombudsman.

members of such a department or authority (but excluding courts); *Jurisdiction*-a First Schedule to the Constitution sets forth action and matters not subject to investigation; *Complaints*-must be in writing and allege that the complainant has sustained injustice in consequence of a fault in administration; has discretion not to investigate including where complainant had knowledge of action for more than twelve months before complaint received by Ombudsman; may investigate on own initiative; a Minister or a member of the National Assembly may request an investigation by the Ombudsman; *Investigation*-must be in private; may obtain information from such persons as he thinks fit; can require the production of documents or papers and to compel attendance of witnesses to be examined under oath; *Remedies*-recommendations only and if, within a reasonable time, no satisfactory action has been taken, may report the matter to the National Assembly; *Inspection*-for purposes of investigation, has power to inspect after prior notice, subject to certain limitations; *Exhaustion of Remedies*-cannot investigate any action if there is remedy in court or right of appeal to a tribunal but has discretion to investigate if satisfied that in the particular circumstances not reasonable to expect the complainant to take or to have taken such proceedings and is not precluded from investigation because the complainant may apply to the High Court for redress under the Constitution for contravention of provisions for the protection of fundamental rights and freedoms; *National Assembly*-annual report to National Assembly; *Election*-appointed for a four year term by the Governor General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition; *Case load*-in 1968, received 192 cases and handled four from the previous year. Seventeen cases were found to be justified.²¹

G. *The United Republic of Tanzania.*²²

The Interim Constitution and Act 25 of 1966 provides for a Permanent Commission of Enquiry in the one party state of Tanzania. The present Commissioners are E.A.M. Mang'anya, Chairman, Sheikh Mohamed Ramiya, and K.M. Kikwete. There are many variations from

²¹1968 Report of the Guyana Ombudsman, *supra* note 20, 3-5; letter from Gordon S. Gillette to Bernard Frank, April 14, 1969.

²²Annual Report of the Permanent Commission of Enquiry, June 1966--June 1967, Dar Es Salaam (1968); Account of the Origin, Practice and Procedure of the Permanent Commission of Enquiry in Tanzania, *The Tanzania Standard*, Dar Es Salaam, May 15, 1968, p. 4, and May 16, 1968, p. 4 and 7; Mang'anya, 'Watch-Dog' Guards the Rights of All Tanzanians, *The Tanzania Standard*, Dec. 6, 1968, p. XII; and *The Nationalist*, Dar Es Salaam, July 17, 1969 and July 18, 1969.

the other Ombudsman systems as indicated in the following selected characteristics: *Principal Functions*-“to enquire into the conduct of any person to whom this section applies in the exercise of his office or authority, or in abuse thereof”.²³ The Commission deals with “arbitrary decisions or arrests, omissions, improper use of discretionary powers, decisions made with bad or malicious motive, a decision that has been influenced by irrelevant considerations, unnecessary and unexplained delays, obviously wrong decisions, misapplications and misinterpretations of laws, by laws, and regulations”;²⁴ *Jurisdiction*-central and local government officials, party office holders, local government authorities, and, in addition, commissions, corporate bodies, public authorities or boards listed in a First Schedule to the Act 25 of 1966; excluded are decisions made by the courts or tribunals in exercise of their judicial functions; included are administrative decisions made by members of the judiciary, the administration (including Ministers and the Second Vice President but excluding the President and the First Vice President), party officials and scheduled organization officials; *Complaints*-may be made orally or in writing or the Commission may investigate on its own initiative; in all instances, the President can direct that there be no investigation; the President may also request investigation; the Commission has discretion not to investigate including if case is too old; *Investigation*-conducted in private; the Commission has the power to examine anybody who can give testimony or produce documents, subject to the right of the President to limit the production of information or documents which might prejudice security, defense, or Cabinet deliberations; *Remedies*-the Commission can express an opinion only and, make a report to the President; *Exhaustion of remedies*-the Commission will decline a case if under the law or existing administrative practice there is an adequate remedy or right of appeal which has not been exhausted; *Defects in laws*-not within the jurisdiction of the Commission; *Commission action*-when a Commissioner does not agree with his fellow Commissioners on any report to the President, the report contains a statement of the disagreement; *Finality*-except on ground of lack of jurisdiction, no action of the Commission can be challenged, quashed, or questioned; *Election*-members are appointed by the President to serve for two years with a right of reappointment for another two years; *Reports*-annual reports are made to the President who places them before the National Assembly; *Case Load*-in the year ending June 30, 1968, the Commission dealt with 443 left over from the

²³Interim Constitution of Tanzania, Sec. 67 (1).

²⁴Mang'anya, supra note 22, XIII.

previous year, received 783 cases, completed 585, and found 114 justified.

H. Great Britain.²³

The British Parliamentary Commissioner Act 1967 created the office of Parliamentary Commissioner for Administration which is held by Sir Edmund Compton. The Act is a blend of the Scandinavian Ombudsman, New Zealand Ombudsman, and the British Comptroller and Auditor-General systems, with the following selected characteristics: *Principal function*-to receive complaints through members of the House of Commons from persons who claim to have sustained injustice in consequence of maladministration as the result of action by a government department or other authority; *Jurisdiction*-limited to departments and authorities listed in a Schedule Two and covering roughly the central government excluding local government, nationalized industries and independent boards. A Schedule Three sets forth types of action by the central government which are excluded; *Complaints*-must be in writing and must come only through a M.P.; has discretion not to investigate; unless special circumstances exist will not investigate a complaint which was made later than twelve months from day on which complainant first had notice of the matters alleged in complaint; has no power to initiate investigation on own motion; *Investigation*-may obtain information from such persons and in such manner and make such inquiries as he thinks fit; can compel furnishing of information and production of documents; has access to all departmental documents including internal papers and records (except proceedings of the Cabinet); *Remedies*-reports results of investigation only with no power to prosecute or invoke sanctions; *Discretionary decisions*-cannot question discretionary decision taken without maladministration but in 1968 accepted a recommendation of the Select Committee on the Parliamentary Commissioner for Administration that if he found a decision which judged by its effect on an aggrieved person appeared to him to be thoroughly bad in quality, he might infer there had been an element of maladministration in the decision;²⁴ *Exhaustion of Remedies*-

²³Frank, *The British Parliamentary Commissioner for Administration—The Ombudsman*, 28 *F&D. B.J.* 1 (1968); Friedmann, *Commons, Complaints, and the Ombudsman*, 21 *Parliamentary Affairs* 38, 1967-68; Friedmann, *The British Ombudsman: Evaluation of the Institution After Its First Year of Operation*, a paper read at the Canadian Political Science Ass'n (1968); Garner, *The British Ombudsman*, 18 *U. TORONTO L.J.* 158 (1968); Wade, *The British Ombudsman*, 20 *AD. L. REV.* 409 (April 1968).

²⁴Second Report from the Select Committee on the British Parliamentary Commissioner for Administration, Session 1967-68, VI-VIII.

will normally not investigate a case where the complainant has or had a remedy by way of appeal to a tribunal or by way of proceeding in a court of law but has discretion to act if satisfied there are special circumstances which prevent or prevented the complainant from seeking such a remedy; *Reports*-special interim and annual reports to Parliament which are received and acted upon by the Select Committee on the Parliamentary Commissioner for Administration; *Election*-appointed by the Crown and holds office during good behavior or until year of service in which he attains age 65; *Case load*-from April 1, 1967, to December 31, 1967, received 1069 complaints of which he completed 849 and found maladministration in 19 cases;²⁷ during the calendar year of 1968 he received 1120 complaints and had a carryover of 220 from 1967, making a total of 1340 cases of which he completed 1181, finding maladministration in 38 cases.²⁸

1. Northern Ireland.

The Parliamentary Commissioner Act (Northern Ireland) 1969, virtually identical with the British Parliamentary Commissioner Act 1967, came into operation on July 1, 1969 by an Order in Council of the Governor. The designation of Sir Edmund Compton, British Parliamentary Commissioner for Administration, to serve as Northern Ireland Parliamentary Commissioner for Administration, had earlier been announced by the then Prime Minister, Captain O'Neill. Sir Edmund Compton assumed office on July 1, 1969, and presented his first report to the Parliament of Northern Ireland on September 30, 1969. He revealed that for the three-month period he had received eight complaints from six of the 56 members of the House of Commons, which he noted was in recess. He promised not to be an absentee Ombudsman.^{29, 1}

THE OMBUDSMAN SYSTEM—ITS PRINCIPAL ELEMENTS

Since the Ombudsman is easily adaptable to the differing needs of various countries, each nation has made its Ombudsman to its own fashion. However, an analysis reveals a number of principal elements common to the institution. The Ombudsman:

1. Is an arm of the legislature, except in Tanzania.

²⁷Fourth Report of the British Parliamentary Commissioner for Administration, Session 1967-1968, Annual Report for 1967, 3-5.

²⁸Second Report of the British Parliamentary Commissioner for Administration, Session 1968-1969, Annual Report for 1968, 3-5.

^{29, 1}First Report of the Northern Ireland Parliamentary Commissioner for Administration, p. 3-4 (1969).

2. Is generally independent even of the legislature although there may be controls over finances and staff and examination by a legislative committee.
3. Is a figure of prestige and influence based upon his independence, objectivity, competence, and fairness.
4. Receives complaints of abuse by government departments or agencies from the public or acts on his own initiative, except in Great Britain where complaints are channeled through the M. P.
5. Conducts an impartial investigation, calls upon all persons for information, requires the production of documents, and has access to governmental records, subject in some countries to specific limitations.
6. Uses fast, inexpensive, and informal procedures.
7. Has no power to give orders or impose sanctions, except in Sweden and Finland. The Ombudsman has no right to quash or reverse a decision or order of any official and can only report or recommend or suggest. But, even in Sweden and Finland, the most potent weapon of the Ombudsman is an expression of his opinion.
8. Issues annual and in some countries more frequent reports of the results of his investigations.
9. Gives reasons for dismissal of a complaint if a complaint is unfounded or beyond his jurisdiction.
10. Has the power to inspect agencies, institutions or departments either as a general power or as a power in connection with investigation of a complaint.
11. Is easily accessible: The complaint procedures are without cost to the complainant, do not require counsel, and once filed the Ombudsman is the moving party.
12. Generally may suggest changes or improvements in administrative procedures or changes in legislation.

WHY THE OMBUDSMAN?

The roll call of grievances against abuses of government grows larger each day. Complaints arise out of acts or the failure to act of officials and range from simple clerical errors to oppression and include oversight, negligence, inadequate investigation, unfair policy, delay, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, improper motivation, violation of laws or regulations, abuse of authority, discrimination, disability to act, errors, mistakes, carelessness, and all of the other acts of injustice that frequently the governors inflict upon the governed, intentionally or unintentionally.

Why was it determined that a political institution founded in 1809 in

Sweden, not adopted next until 1919 in Finland, and today existing in seven other countries, three Canadian provinces and two states in the United States would help to adjust complaints of citizens? There are many reasons and the most pertinent are summarized below:

1. The post World War II growth of the Welfare State resulted in the proliferation of administrative agencies. As the State assumed a multitude of functions in welfare, education, medical care, social security and housing, government grew in size and extensive powers were given to agencies. The growth of the Welfare State made necessary new protection against executive and administrative mistake and abuse of power.

2. The traditional concern for the guaranty of the legal rights of the individual has become even greater in modern society. The activities of public administration have become so comprehensive and the power of the bureaucracy so great that the legal status of the individual needs additional protection.

3. The legislature traditionally concerned with the observance of laws and rulings by public officials has at the same time extensively delegated powers to the administrative authorities. The Ombudsman can serve to aid the legislature in its function of supervising the executive and administrator.

4. The presence of the Ombudsman has psychological value. His office gives the citizen confidence that there exists a watchdog for the people who will hold government accountable.

5. The Ombudsman can best be engrafted upon the political and legal systems of a country.²⁹

6. Existing mechanisms for adjusting grievances are inadequate.

(a) The legislator (if he investigates complaints) is taken away from his main function of studying and passing legislation. His role in adjusting complaints is frequently limited because of lack of sufficient funds and staff and inability to have direct access to files and information. He must of necessity rely in most cases upon a reply from the agency or department he is investigating. Party consideration may affect his role in handling grievances.

(b) The courts everywhere play a major role in the correction of abuses by government. But litigation is expensive, tension creating, protracted and slow moving and, in many cases, the citizen bears with injustice because he cannot afford or does not wish litigation. Courts may be precluded from hearing appeals either by law or by technicalities

²⁹Seminar on the Effective Realization of Civil and Political Rights at the National Level, Kingston, Jamaica, April 25-May 8, 1967, p. 55, paragraph 258, United Nations, 1967, ST/TAO/HR/29.

of form, time, standing, jurisdiction, nature and extent of interest, the character of the administrative act, and the wording of statutes. Review of administrative acts may be limited by such questions as to whether the agency acted within its powers, was the ruling supported by substantial evidence or was the action reasonable and not arbitrary. Courts cannot conduct informal investigations and are limited by rules for the production of evidence. Courts are limited to basically adversary party proceedings.

(c) Administrative courts even using procedures as informal as possible still follow court-like adversary procedure. Legal representation is the normal rule. Such courts frequently move slowly and there is great delay in ensuring the execution of the judgment when delivered. Grievances must concern an administrative decision and must be brought before local courts or regional courts initially, even in France, except in certain cases.

(d) The executive may frequently handle grievances but is in essence investigating himself and in great part relying on the reply from the agency or official against whom the complaint was made. Party affiliation of the person making the complaint may be important. Executive complaint agencies lack the essential characteristic of independence from the executive.

(e) Administrative agencies may have within their structure channels for complaint but such a system lacks impartiality. The appeal system, if one exists, is expensive and time consuming.

7. The Ombudsman gives the citizen an expert and impartial agent without personal cost to the complainant, without time delay, without the tension of adversary litigation, and without requirement of counsel or the intervention of those highly placed.

OBJECTIONS TO THE ADOPTION OF THE OMBUDSMAN SYSTEM

No study of the Ombudsman would be complete without a list of objections that have been stated against the Ombudsman:

1. The Ombudsman can work only in small countries with homogeneous populations.
2. Concentration on the adjustment of grievances of individuals bogs down the processes of government and places undue emphasis on relatively minor matters.
3. Legislators who receive complaints are already performing the functions of Ombudsmen. The relatively large number of legislators is more effective to bridge the gap between the citizenry and government than a single Ombudsman or even several.

4. Courts, administrative courts and tribunals are adequate and, where required, reforms can be made to make them more responsive.
5. Too much power is placed in a single individual. There is little or no review of the Ombudsman's actions.
6. The executive grievance handling machinery is adequate and, if not, can easily be corrected or adjusted.
7. The Ombudsman causes the civil servant to be cautious and timid. Emphasis may be on keeping records rather than action.
8. The Ombudsman system simply creates another bureaucratic institution with more red tape.
9. The Ombudsman is a generalist who attempts to do more than he is qualified to do.
10. The Ombudsman will not obtain the support and assistance of administrators whose support he needs to function successfully.
11. The system impedes progress toward strengthening existing institutions.
12. Administrators and legislators are inclined to treat his general proposals for reform as impractical.
13. After a while the Ombudsman becomes government-minded.
14. The system interferes with the doctrine of ministerial responsibility.
15. The Ombudsman's accomplishments are exaggerated. He does not really do an effective job.
16. The institution cannot successfully be transplanted from the Scandinavian countries.
17. In a large country, the Ombudsman could not handle the vast number of complaints without an equally vast bureaucratic organization.
18. The Ombudsman may cause officials who believe they are correct to agree with him not because his judgment is valid but because of his status and prestige. This does not make for good government.
19. The Ombudsman attempts to apply a rule of conscience as opposed to the rule of law.²⁰
20. The Ombudsman tends to create the illusion that all is well with government.
21. The Ombudsman is part of the "Establishment."
22. The office of Ombudsman ignores the desirability of participation by the people themselves in the processes of revision and reform.²¹
23. The Ombudsman after all deals only with relatively little matters.
24. Most complaints are unfounded and the system encourages filing of such complaints.

²⁰Maclod, *The Ombudsman*, AD. L. REV. Vol. 19, 93, 95 (1966).

²¹Rosenblum, *Controlling the Bureaucracy of the Antipoverty Program*, Vol. 31, *Law and Contemporary Problems*, 187, 195, Duke University School of Law (1966).

25. The office is adaptable only to parliamentary countries.
26. The Ombudsman works best in a society that doesn't need him.
27. The Ombudsman stays away from the pertinent social problems and keeps to the safe subjects.

GROWTH OF THE OMBUDSMAN SYSTEM

Interest in the Ombudsman has grown in recent years. It has been discussed at numerous seminars and conferences by two major groupings:

1. The regional seminars sponsored by the United Nations Division of Human Rights on the general topic of judicial and other remedies against the abuse of administrative authority in Ceylon (1959), Buenos Aires (1959), and Stockholm (1962). In April-May, 1967, the United Nations Division of Human Rights in co-operation with Jamaica organized a Seminar on the Effective Realization of Civil and Political Rights at the National Level which endorsed the Ombudsman system.³²
2. The conferences and congresses of the International Commission of Jurists, including: the South-East Asian and Pacific Conference in Bangkok (1965),³³ the Colloquium on the Rule of Law at Colombo (January, 1966),³⁴ and the Conference on the Individual and the State held at Strasbourg (October, 1968).³⁵

A survey of developments throughout the world shows that the Ombudsman has been placed on the world agenda for most serious consideration.

A. Canada.

Proposals have been put forward on the Federal level and on the province level.³⁶ Three of the ten provinces have Ombudsmen: W.T. Ross Flemington, New Brunswick, since October 11, 1967; George B. McClellan, Alberta, since September 1967; and Louis Marceau, Quebec,

³²Seminar on the Effective Realization of Civil and Political Rights at the National Level, *supra* note 29; see also 9 *Journal of the International Commission of Jurists*, 90-91 (June 1968).

³³The Dynamic Aspects of the Rule of Law in the Modern Age, Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok (1965), 184.

³⁴Working Papers, Ceylon Colloquium on the Rule of Law, Colombo, Ceylon, Jan. 10-16, 1966, International Commission of Jurists (Ceylon Section).

³⁵European Conference of Jurists on the Individual and the State, "The Essential Legal Elements to Ensure the Protection of the Individual," Strasbourg, 26-27 Oct. 1968, Conclusion 17; 36 *Bulletin of the International Commission of Jurists*, 7-8 (Dec. 1968).

³⁶ROWAT, *supra* note 2, Preface x-xii; and ANDERSON, CANADIAN OMBUDSMAN PROPOSALS (1966).

since May 1, 1969. The Manitoba Legislature enacted an Ombudsman Bill on September 30, 1969.

B. Ghana.

The new Constitution of Ghana adopted in 1969 contains provisions requiring the establishment of the Ombudsman system by Parliament.

C. Great Britain.

Prime Minister Wilson announced in Parliament on July 22, 1969 that an Ombudsman system would be established to investigate complaints of maladministration by local government. It would be separate from the Parliamentary Commissioner for Administration system but the scope and relationship to local government would be similar to the scope of the Parliamentary Commissioner for Administration in central government affairs. In addition, the Prime Minister approved in principle a Health Commissioner to look into complaints against the National Health Service.³⁷

D. Greece.

In June 1968, the Greek Government announced it would appoint an Ombudsman answerable personally to the Prime Minister and later to Parliament.³⁸ In July 1969, the Greek Government announced the appointment of Maj. Gen. Spyridon Vellianitis as an Administration Commissioner, or Ombudsman, to keep an eye on the Administration to see that it is "honest, just and fair," according to the decree creating the position. The Commissioner is empowered to investigate any state employe's behavior "as regards the discharge of his duties and his demeanor in society, as related to morals, dignity and honesty."³⁹ Necessary legislation is pending.⁴⁰

E. Hong Kong.

On June 23, 1969, a question was put in the British House of Lords to the Minister of State, Foreign and Commonwealth Office, concerning the appointment of an Ombudsman for consultation with the underprivileged Chinese. The reply was made that very careful consideration had been given by the Minister of State and the Governor of Hong Kong to the matter of the Ombudsman and that both regarded the City District Officer scheme as "perhaps the first step in such a system."⁴¹

³⁷The Times (London), July 23, 1969.

³⁸The Times (London), June 13, 1968, p. 6.

³⁹New York Times, July 3, 1969, p. 6.

⁴⁰Letter from S. Vellianitis to Bernard Frank, Oct. 29, 1969.

⁴¹732 HANSARD, HOUSE OF LORDS, 1 and 2 (1969).

Under date of July 12, 1969, the Hong Kong Branch of Justice (the British Section of the International Commission of Jurists) issued a report urging the appointment of an Ombudsman, pointing out that the "system has a strong backing in Chinese History and its introduction can well be explained in terms of the Censorial System of Ancient China."

F. Indonesia.

In October 1967, six associations—the Indonesian Judges Association, the Indonesian Jurists Association, the Association of Prosecutors, the Association of Scholars of Political Science, the Indonesian Bar Association, and the League of Human Rights, formed the Pengabdian Hukum to handle "complaints by individuals of treatment by public authorities as well as by society itself." The institution is entirely private and consists of a joint secretariat, the executive of which is manned by six members each appointed by the respective organization. During its first year from October 1967 through December 1968, it handled 202 complaints, settling 154.⁴³

G. India.

Establishment of a two tier system of Ombudsmen has been proposed by the Government: the Lok Pal would be appointed by the President after consultation with the Chief Justice and the Leader of the Opposition, and the Lokayuktas by the President after consultation with the Lok Pal. Jurisdiction would cover complaints of injustice due to maladministration or complaints alleging corruption based on actions of all central government public servants including Ministers and Secretaries.⁴⁴

H. Ireland.

A Commission has issued a report recommending a major reorganization of the public services in Ireland. Included is a proposal for the creation of an Ombudsman.⁴⁵

I. Israel.

The State Controller without express legal authority deemed himself the institution to handle complaints because he had "also to examine whether the inspected bodies have operated efficiently, economically, and in a morally irreproachable manner."⁴⁶ In 1966, the Knesset formed a

⁴³Paper, Abdulkadir Besar, Bangkok World Peace Through Law Conference (1969).

⁴⁴Weekly India News, May 24, 1968, p. 4.

⁴⁵The Times (London), Sept. 24, 1969, p. 3.

⁴⁶The State Comptroller of Israel and His Office at Work, Jerusalem (1963), p. 9.

committee to look into the handling of public complaints and to determine whether to set up an Ombudsman as a separate institution or whether to delegate this task to the State Controller by statutorily broadening his power. In November 1968, the Committee reported that the office of Ombudsman be created to be operated by the State Controller through a special division of his office; a recommendation was adopted by the Cabinet on December 15, 1968. A draft law is in preparation.

The City of Jerusalem has had an Ombudsman, Shelomo Kaddar, since July 1967. From July 1967 to March 1968 inclusive, he handled 532 complaints and found 262 justified.⁴⁶ Tel Aviv similarly has an Ombudsman.

J. Jamaica.

The Jamaican Section of Justice has issued a report recommending the establishment of the Ombudsman system in Jamaica.

K. Malaysia.

On the invitation of the Government of Malaysia, the New Zealand Ombudsman, Sir Guy Powles, spent nearly four weeks in Malaysia in February—March, 1968, and completed and delivered a report to the Malaysian Government on the desirability and practicability of setting up an Ombudsman system in that Country. However, the Malaysian Government has apparently concluded the adoption of the Ombudsman system would not be expected to produce better results than that already achieved by the Anti-Corruption Agency set up in 1958 as a unit of the Prime Minister's Department. This Agency was reorganized in 1967 and was set up with headquarters in Kuala Lumpur and a branch office in every state capital effective October 1967. The director is senior member of the Legal Service and the staff of the Agency is drawn from the Legal Service, the Administrative Service and the police. The Agency has two functions: research and prevention of corruption and the investigation and prosecution of all cases of corruption under the criminal laws.⁴⁷

L. Mauritius.

The Mauritius Constitution provides for an Ombudsman. The Legislative Assembly enacted supplementary provisions for the proper functioning of the Office of Ombudsman on May 13, 1969 (Ombudsman Act, 1969).

⁴⁶The Ombudsman of Jerusalem, Shelomo Kaddar, *Public Administration in Israel and Abroad 1968*, Jerusalem (1969), p. 176.

⁴⁷Report of the New Zealand Ombudsman, 1968, p. 10; and letter from M. Ben Haron, First Secretary, Embassy of Malaysia, Washington, D.C., to Bernard Frank, July 9, 1969.

M. The Netherlands.

In June 1969, the Dutch Government submitted to Parliament a proposal that an Ombudsman be appointed by Parliament. The jurisdiction of the Ombudsman would be restricted to complaints about the administration of the Central Government and would exclude complaints about generally binding regulations and about matters of general government policy. Complaints would be referred to the Ombudsman by the Committees for Petitions in both Chambers of Parliament. Complaints received directly by the Ombudsman would be dealt with after authorization by the Committee for Petitions of the Second Chamber.⁴⁸

N. Northern Ireland.

Legislation was introduced in the House of Commons on September 30, 1969, to appoint a Commissioner for Complaints to investigate complaints from persons who claim to have sustained injustice in consequence of maladministration in connection with action taken by local and public bodies outside the sphere of central government.⁴⁹

O. Singapore.

A special Constitution Commission recommended an Ombudsman but the Government has put aside the recommendations for five years.⁵⁰ Complaints of corruption or uncivil behavior by Government employees may be referred to the Anti-Corruption Bureau whose officials are answerable only to the Attorney General.

P. The United States.

Interest in the United States in the Ombudsman has become widespread. Federal legislation was proposed in the last Congress by Senator Edward Long for a Federal Administrative Ombudsman, a District of Columbia Ombudsman, and a Missouri Ombudsman. Congressman Henry Reuss has introduced in the 91st Congress his three-times-before-introduced bill for a Congressional Ombudsman handling complaints only through Congress. Legislation has been introduced in most of the

⁴⁸Letter from H.E. Th. L. Mathon, First Secretary, Royal Netherlands Embassy, Washington, D.C. to Bernard Frank, July 11, 1969; and letter from P.J.P. Verloop, Secretary, Netherlands Section of the International Commission of Jurists, to Bernard Frank, Sept. 2, 1969.

⁴⁹The Times (London), Oct. 2, 1969, p. 2; and letter from K.P. Bloomfield to Bernard Frank, Nov. 17, 1969.

⁵⁰Letter from Hing Yong Cheng to Bernard Frank, March 29, 1969; Republic of Singapore, Report of the Constitutional Commission, p. 18-22 (1966).

states and passed in two. In Hawaii, Herman S. Doi took office on July 1, 1969, as Ombudsman under Act 306 passed in 1967. During his first three months in office he received 218 complaints, 153 of which were received by telephone.⁵¹ The Nebraska Act creating the office of Public Counsel was approved on July 29, 1969. In Oregon, Marko L. Haggard was appointed by the Governor to fill the post of Ombudsman created by executive action on July 1, 1969. The American Assembly of Columbia University devoted its October 1967 Conference to the Ombudsman and in its final report recommended state and local Ombudsmen with experimentation on a Federal level, essentially the same conclusion reached by the American Bar Association in January 1968. The National Conference of Commissioners on Uniform State Laws is preparing to start work on a uniform Ombudsman law. The National Commission on Violence and Law Enforcement in its report issued on November 1, 1969, recommended independent citizens' grievance agencies on a state and local level and that consideration be given to a federal citizens' grievance agency to act on complaints against federal employees and departments.

Proposals have been made for Ombudsmen in New York City, Newark, Philadelphia, Minneapolis, and other cities. Citizens' complaint offices exist in a number of local communities including Nassau County, New York, and Buffalo where the Citizens' Administrative Services is a project of the University of Buffalo Law School. In the United States there are proposals for college and university, consumer, airport, corporation, union, department store, newspaper, TV and radio station Ombudsmen. The most noteworthy of these are the "action line" activities of the press, radio, and TV and the emergence of Ombudsmen on at least three dozen or so campuses.

CONSIDERATION OF SEVERAL SPECIAL PROBLEMS WITH RESPECT TO THE OMBUDSMAN

A study of the Ombudsman brings to mind several special problems for brief discussion:

A. Should the Ombudsman be a Commission or Board?

It should be noted that the national Ombudsman is a single individual except in Tanzania where there is a Commission of three and in Sweden where there are three Ombudsmen. It was concluded at the Ceylon Colloquium on the Rule of Law that whether there should be one

⁵¹Herman S. Doi, speech delivered in Oct. 1969.

Ombudsman or several depends on the constitutional structure of the country concerned and the size and distribution of the population.²⁶ The real problem is not the number but whether the Ombudsmen are part of a committee operating on majority vote or individuals operating independently in a geographic or subject area. The Ombudsman generally everywhere relies on his power to persuade—he has no power to compel compliance (except in Sweden and Finland). A two-to-one recommendation by a commission signals some doubt as to whether or not there was abuse of a citizen. Government will not easily be persuaded to comply where even the Ombudsmen disagree.

B. Is the Ombudsman a Device in Bridging the Gap Between Government and Youth?

Recently a study for the United Nations stated that student demonstrations in more than 50 countries during 1968 represented only a warning of bigger and bolder protests to be expected from youth in the future. Young people are concerned with bureaucratization, bigness, and dehumanization of society (concerns shared equally by adults, of course). A lack of responsiveness by government to their demands is felt by the young who conclude that direct action is necessary. The question may be asked whether the Ombudsman would bridge the gap between the "Establishment" and youth? Certainly, the Ombudsman—considered by some as part of the "Establishment"—would not be of any help with those who have as a goal the destruction of present society's institutions. But to those youth still "with us," the Ombudsman with his informal, easily accessible, inexpensive, machinery in the handling of complaints may be a "bridging the gap" factor if the Ombudsman can convince the youth he is independent and will listen and give redress to legitimate complaints. On the other side of the coin is the inability of the Ombudsman to enforce his decisions which may render him an ineffective institution in handling problems of frustrated and impatient youth in dealings with bureaucracy. Perhaps the only answer is to experiment because not to have tried may be a greater fault.

C. Can the Ombudsman System Help the Poor?

The problem of poverty has become one of the greatest problems of modern society, even in the affluent countries, and the greatest problem of poverty has been the inability of the law to earn the respect of the poor because, as has been stated by a United States Federal Judge, "Rather than helping the poor surmount their poverty, the law has all

²⁶26 Bulletin of the International Commission of Jurists, 8 (June 1966).

too frequently served to perpetuate and even exacerbate their despair and helplessness."³³

The National Commission on the Causes and Prevention of Violence in recommending independent citizens' grievance agencies said it supported this recommendation upon "evidence that the poor experience special frustrations in their relationship with the government and that these frustrations breed disrespect for law."

To the extent that the use of other existing remedies to handle complaints of the aggrieved requires financial resources and sophistication, the Ombudsman system with its lack of cost and easy access is of help. But is this sufficient? Can an institution which can recommend only be effective when complaints run contrary to public attitudes or to the views of a bureaucracy intent on its own conception of handling the problems of the poor? Can an institution which may only persuade, not compel, be effective if its enters into cases involving intense social problems, frequently with political overtones? It has been said that "Ombudsmanship promises the poor a good deal more than it can deliver."³⁴ Briefly stated objections which are said to impair its utility are: that he is part of the "Establishment," ignores the participation of the poor in the process of revision and reform, that an Ombudsman will fail because his recommendations would run counter to public attitudes towards the rights of the poor, that selection of cases of a nonpolitical nature would eliminate from scrutiny most administrative injustices perpetrated upon the poor, that injustices are so great that an Ombudsman system would be overwhelmed; and that only basic reform will achieve justice for the poor.³⁵ Yet even critics conclude that the fact that "the Ombudsman alone cannot cope with all the problems of the administrative state is hardly an adequate reason for arguing against its establishment as a supplement to other devices."³⁶

Society is today threatened by its failure in the past to have recognized fully that poverty is inconsistent with democracy. Society has, therefore, nothing to lose and may gain if it experiments with the adoption of the Ombudsman system.

D. Can the Ombudsman Help in Aiding Minorities Against Discrimination?

The reports of the Scandinavian Ombudsmen and the British Parliamentary Commissioner do not indicate any special and pressing

³³Wright, *The Courts Have Failed the Poor*, *The N.Y. Time Magazine*, March 9, 1969, p. 26.

³⁴Cloward, *An Ombudsman for Whom?*, 12 *Social Work*, p. 117, 118 (April 1967).

³⁵Rosenblum, *supra* note 31; Cloward & Elman, *Poverty, Injustice, and the Welfare State*, *The Nation*, Feb. 28, 1966 and March 7, 1966.

³⁶Rosenblum, *supra* note 31, 194.

concern with the treatment of minorities. The New Zealand Ombudsman in his report for the year ended March 31, 1968, indicates that out of 555 cases, 8 involve Maori affairs, of which 2 were not justified, 1 discontinued, 1 declined, 3 withdrawn, and 1 under investigation. The Tanzania Commission Chairman has stated that very few non-Africans (Asians and Europeans) have lodged complaints to the Commission and queries as to the reason for this, speculating one reason is that the non-African communities are suspicious of the Commission and another reason is that these people do not like to jeopardize their stay in Tanzania.⁴⁷ In Guyana, the racial imbalance with resulting racial discrimination resulted in the recommendation for an Ombudsman by the International Commission of Jurists. In the 1967 report, the Ombudsman stated that he received 161 complaints of which only one alleged racial discrimination and that one was unjustified.⁴⁸ Mauritius, with a multi-racial population, has provided in its Constitution for an Ombudsman and it was thought that the system would be valuable in protecting minorities against discrimination, but as yet no Ombudsman has been named. In Northern Ireland, where there is great religious antagonism between the Catholic and Protestant population, Sir Edmund Compton, the British Parliamentary Commissioner, has also taken office as the Northern Ireland Parliamentary Commissioner. It has been suggested that "given the religious antagonism in Ulster, the only way of choosing an acceptable neutral was to bring in someone from outside."⁴⁹

We conclude that the Ombudsman has not developed an effective record of protecting minorities because in homogeneous populated countries no serious problem has evolved and in the heterogeneous populated countries the Ombudsman appears not to have been utilized. Nevertheless, there is a belief in some countries that the system will help to relieve tension where there is serious possibility of conflict between people.

As before, we wonder at the efficacy of an institution to help with intense problems where it can recommend only. The fight against discrimination requires more—anti-discrimination legislation and anti-discrimination agencies—with the Ombudsman as a supplement. As before we conclude that experimentation with the Ombudsman system is required before a definitive answer can be given.

⁴⁷ Mang'anya, *supra* note 22, p. XIV.

⁴⁸ 1967 Report of the Guyana Ombudsman, *supra* note 20, 5.

⁴⁹ Letter from Rudolf Klein, Chief Leader Writer, Observer, London, to Bernard Frank, March 31, 1969.

*E. Can the Ombudsman Work Only in Small Developed Countries With Homogeneous and Stable Populations?**

One of the most frequent criticisms of the Ombudsman system is that it will work only in a small country with a stable and homogeneous population. Today there are Ombudsmen in small countries with homogeneous populations (the Scandinavian countries and New Zealand), with multi-racial populations (Guyana and Tanzania), and with a mixed religious population (Northern Ireland). Great Britain is the first populous country to establish the system. But to say that because the system evolved in small developed countries with homogeneous and stable populations it cannot be properly transplanted is (as has been said frequently by others) to "stand logic on its head." A more pertinent question is why such countries required an Ombudsman? And from this question deduce that big or small countries, developing or developed, homogeneous or mixed, require an external supervisor to supplement existing institutions. Nevertheless, the problems of the reluctance of minorities to use the Ombudsman because of lack of confidence or the possibility of the receipt of an overwhelming number of complaints with the necessity of greater bureaucratization of the office, must not be overlooked.

EVALUATION

Evaluation of the Ombudsman system based upon its operation in nine countries is not premature.

Existing mechanism—courts, legislatures, the executive, administrative courts, and administrative agencies—are not sufficient to cope with the grievances of the aggrieved and there is a need for a supplementary institution. The Ombudsman system provides an informal, independent, and impartial public official who, with relative speed and without cost to the complainant, investigates, with access to governmental records, and recommends relief when the complaint is justified. The system can be transplanted and since its form is not rigidly fixed can be varied to suit the characteristics and needs of each country.

The Ombudsman cannot accomplish all of the promises of some of his most enthusiastic proponents. He is not a super-administrator and does not make policy. He cannot remake society or cure its problems. The Ombudsman generally can recommend only and whether this is a

*CHENG, *Emergence and Spread of the Ombudsman Institution*, *Annals*, supra note 2, 20, 26-29; CALDEN, *Ombudsmen for Under-Developed Countries*, *Public Administration in Israel and Abroad* 1967, 100, Jerusalem (1968).

virtue or defect cannot be conclusively determined at this early date in the life span of the system. But a tentative conclusion would lean toward the deficit side of the ledger. He can only supplement existing institutions which must be strengthened and made more responsive to the grievances of the citizens. But he does serve a steam valve function, permitting the release of frustration by the mere fact of complaint.

Officials also are the beneficiaries of the Ombudsman system. Unjustified complaints against them are determined to be such by an impartial adjudicator. Civil servants have also utilized the machinery for their own complaints, an interesting by-product of the system. In addition, officials are oftentimes influenced by the mere fact of the existence of the Ombudsman and make an effort to anticipate him and make changes earlier rather than later. A result which may weaken the effectiveness of officials is the willingness to agree with the Ombudsman on occasion even though they believe him to be wrong because they do not wish to tilt with the Ombudsman because of his status and prestige.

The Ombudsman does not appear to be flooded with complaints in any country which means not that grievances are non-existent but that many aggrieved are not aware of the Ombudsman or do not know how to invoke his aid or do not care to.

CONCLUSION

The Ombudsman, with his limitations and weaknesses, is on the world agenda for serious consideration. The growing list of countries, provinces, states, and local governments adopting the system indicates its great appeal. We believe this to be because it has long been evident that human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The Ombudsman system is one of the remedies which seeks to preserve human rights.

PUBLIC INFORMATION: Jack L. Labr, *Chairman*, 1100 Federal Bar Building, 1815 H Street, N.W., Washington, D.C. 20006; Theodore Sky, *Council Director*, 4110 Ingomar Street, N.W., Washington, D.C. 20015

UNIFORM RULES OF PRACTICE AND PROCEDURE: Lee Loevinger, *Chairman*, 815 Connecticut Avenue, N.W., Washington, D. C. 20006; Robert S. Moss, *Vice-Chairman*, 1815 H Street, N.W., Washington, D. C. 20006; Cornelius H. Kennedy, *Council Director*, 888 17th Street, N.W., Washington, D. C. 20006

SPECIAL COMMITTEES

AGRICULTURE: Stuart H. Russell, *Chairman*, First National Building, Oklahoma City, Oklahoma 73102; Charles W. Bucy, *Vice-Chairman*, Department of Agriculture, Washington, D. C. 20250; Theodore Sky, *Council Director*, 4110 Ingomar Street, N.W., Washington, D. C. 20015

AVIATION AND SPACE: John E. Stephen, *Chairman*, 1000 Connecticut Avenue, N.W., Washington, D. C. 20036; Sidney F. Davis, *Vice-Chairman*, Delta Air Lines, Inc., Atlanta Airport, Atlanta, Georgia 30320; Harry J. Breithaupt, Jr., *Council Director*, 1920 L Street, N.W., Washington, D. C. 20036

CIVIL SERVICE LAW: George P. Morse, *Chairman*, 9402 Stateside Court, Silver Spring, Maryland 20903; Samuel C. Barzilleri, *Vice-Chairman*, 888 17th Street, N.W., Washington, D. C. 20006; Theodore Sky, *Council Director*, 4110 Ingomar Street, N.W., Washington, D. C. 20015

COMMUNICATIONS: Lewis H. Ulman, *Chairman*, 195 Broadway, New York, New York 10007; Stanley S. Harris, *Vice-Chairman*, 815 Connecticut Avenue, N.W., Washington, D. C. 20006; Cornelius H. Kennedy, *Council Director*, 888 17th Street, N.W., Washington, D. C. 20006

CONSUMERS' COUNCIL: Joel Elihu Hoffman, *Chairman*, 1324 19th Street, N.W., Washington, D. C. 20036; John E. Stephen, *Vice-Chairman*, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036; John Ormasa, *Vice-Chairman*, P. O. Box 54790, Terminal Annex, Los Angeles, California 90054; Phineas Stevens, *Vice-Chairman*, Suite 700, Petroleum Building, P. O. Box 22567, Jackson, Mississippi 39205; L. Vastine Stabler, Jr., *Vice-Chairman*, University of Alabama Law School, University, Alabama 35486; John L. FitzGerald, *Vice-Chairman*, Boston College Law School, Brighton, Massachusetts 02135; Lewis H. Ulman, *Secretary*, 195 Broadway, New York, New York 10007; John T. Miller, Jr., *Council Director*, 1001 Connecticut Avenue, N.W., Washington, D.C. 20036

CUSTOMS: Alfred R. McCauley, *Chairman*, 1516 Grace Church Road, Silver Spring, Maryland 20910; Lawrence R. Walters, *Vice-Chairman*, 1819 H Street, N.W. Washington, D. C. 20006; Winaton Mills Fisk, *Council Director*, Claremont Men's College, Fitzer Hall, Claremont, California 91711

DEFENSE MOBILIZATION: Damon R. Capps, *Chairman*, 1600 Esperson Bldg., 804 Travis St. Houston, Texas 77002; Walter Gellhorn, *Council Director*, Columbia University, 435 West 116th Street, New York, New York 10027

EQUAL EMPLOYMENT OPPORTUNITY: Robert T. Thompson, *Chairman*, The Daniel Building, Greenville, South Carolina 29602; John T. Miller, Jr., *Council Director*, 301 Connecticut Avenue, N.W.; Washington, D. C. 20036

FEDERAL REGISTER: David C. Eberhart, *Chairman*, General Services Administration, National Archives and Record Service, Washington, D. C. 20408; Frank U. Fletcher, *Vice-Chairman*, Suite 400, 1225 Connecticut Avenue, N.W., Washington, D. C. 20036; Willard W. Catchell, *Vice-Chairman*; 4409 Windom Place, N.W., Washington, D. C. 20016; Marion E. Harrison, *Council Director*; 1750 Pennsylvania Avenue, N.W., Washington, D. C. 20006

FINANCIAL GRANTS BY GOVERNMENT IN THE ACADEMIC COMMUNITY: Victor G. Rosenblum, *Chairman*, Reed College, Portland, Oregon 97202; Kenneth Culp Davis, *Council Director*, University of Chicago Law School, Chicago, Illinois 60637

FOOD AND DRUGS: Charles W. Whitmore, *Chairman*, 802 Court Street, Lynchburg, Virginia 24504; William R. Pendergraft, *Vice-Chairman*, 1815 H Street, N.W., Washington, D. C. 20006; Daniel Marcus, *Vice-Chairman*, 900 17th Street, N.W., Washington, D. C. 20006; Theodore Sky, *Council Director*, 4110 Ingomar Street, N.W., Washington, D. C. 20015

FOREIGN AFFAIRS: Thomas Hale Boggs, Jr., *Chairman*, 1200 17th Street, N.W., Washington, D. C. 20036; Allyn C. Donaldson, *Vice-Chairman*, 2105 South Joyce Street, Arlington, Virginia 22202; William H. Allen, *Council Director*, 888 16th Street, N.W., Washington, D. C. 20006

GAS, ELECTRIC AND NUCLEAR POWER: John Ormasa, *Chairman*, P. O. Box 54790, Terminal Annex, Los Angeles, California 90054; Sidney G. Kingsley, *Vice-Chairman*, 1600 Connecticut Avenue, N.W., Washington, D. C. 20006; John T. Miller, Jr., *Council Director*, 1001 Connecticut Avenue, N.W., Washington, D. C. 20036

HEALTH, EDUCATION AND WELFARE: Sidney Edehman, *Chairman*, 12919 Cristfield Road, Silver Spring, Maryland 20906; Ralph J. Savarese, *Vice-Chairman*, 216 Rosedale Avenue, Wayne, Pennsylvania 19087; Marion E. Harrison, *Council Director*, 1750 Pennsylvania Avenue, N.W., Washington, D. C. 20006

HOUSING AND URBAN DEVELOPMENT: Vernon C. Mayfield, *Co-Chairman*, 3521 Park Ridge Boulevard, Fort Worth, Texas 76109; James S. Hostetler, *Co-Chairman*, 1700 Pennsylvania Avenue, N.W., Washington, D. C. 20006; Walter Gellhorn, *Council Director*, Columbia University, 435 West 116th Street, New York, New York 10027

IMMIGRATION AND NATIONALITY: Jack Wasserman, *Chairman*, Warner Building, Washington, D. C. 20004; Charles Gordon, *Vice-Chairman*, 119 D Street, N.E. Washington, D. C. 20536; William H. Allen, *Council Director*, 888 16th Street, N.W., Washington, D. C. 20006

INDIAN AFFAIRS: Donald H. Green, *Chairman*, 1320 19th Street, N.W., Washington, D. C. 20036; Jerry C. Sitaua, *Vice-Chairman*, 1616 H Street, N.W., National George Building, Washington, D. C. 20006; Frank M. Worencraft, *Council Director*, 1600 Esperson Building, 804 Travis Street, Houston, Texas 77002

INTERSTATE COMMERCE COMMISSION: Phineas Stevens, *Chairman*, Suite 700 Petroleum Building, P. O. Box 22567, Jackson, Mississippi 39205; Eugene T. Liljeft, *Vice-Chairman*, 11th Floor, 1660 L Street, N.W., Washington, D. C. 20009; David H. Adair, *Vice-Chairman*, Hearing Examiner, Interstate Commerce Commission, Washington, D. C. 20423; Harry J. Breithaupt, Jr., *Council Director*, 1920 L Street, N.W., Washington, D. C. 20036

LABOR: William W. Watson, *Chairman*, 1710 H Street, N.W., Washington, D. C. 20006; Fletcher C. Allen, *Vice-Chairman*, 217 East Collier Street, P. O. Box 2240, Greenville, South Carolina 29602; Frank M. Worencraft, *Council Director*, 1600 Esperson Building, 804 Travis Street, Houston, Texas 77002

MARITIME: Robert T. Baaschels, *Chairman*, Walker Building, 731 15th Street, N.W., Washington, D. C. 20005; Harold F. Mesinow, *Vice-Chairman*, 1001 Connecticut Avenue, N.W., Washington, D. C. 20036; Charles W. Whitmore, *Council Director*, 802 Court St., Lynchburg, Virginia 24501

MILITARY SERVICE LAW: Walter H. Alford, *Chairman*, 805 Baker Building, Columbia, South Carolina 29201; Ford W. Hall, *Vice-Chairman*, 308 S. Akard Street, Dallas, Texas 75202; William H. Allen, *Council Director*, 888 16th Street, N.W., Washington, D. C. 20006

OMBUDESMAN: Gerald L. Shalton, *Chairman*, 160 North LaSalle, Suite 2070, Chicago, Illinois 60601; Benny I. Kas, *Vice-Chairman*, 1211 Connecticut Avenue, N.W., Suite 305, Washington, D. C. 20036; Cornelius H. Kennedy, *Council Director*, 888 17th Street, N.W., Washington, D.C. 20006

PATENTS: Warley L. Perrott, *Chairman*, Johnston Building, Charlotte, North Carolina 28202; Frank M. Worencraft, *Council Director*, 1600 Esperson Building, 804 Travis Street, Houston, Texas 77002

POSTAL MATTERS: Timothy J. May, *Chairman*, 1200 17th Street, N.W., Washington, D. C. 20036; Lawrence Speiser, *Vice-Chairman*, Suite 501, 1424 16th Street, Washington, D. C. 20016; Marion E. Harrison, *Council Director*, 1750 Pennsylvania Avenue, N.W., Washington, D. C. 20006

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SECURITIES: Marie A. White, *Chairman*, 1000 Federal Bar Bldg., 1019 H St., N.W., Washington, D. C. 20006; Willis B. Snell, *Council Director*, Farragut Bldg., 900 17th St., Washington, D. C. 20006

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VETERANS: Horace Korngas, *Chairman*, 1776 K Street, N.W., Washington, D. C. 20006; Cornelius B. Kennedy, *Council Director*, 888 17th Street, N.W., Washington, D. C. 20006

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Charles W. Whitmore, *Council Director*, 802 Court St., Lynchburg, Virginia 21501

Legislative Activity:

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National Institute Planning:

Willis B. Snell, *Chairman*, Farragut Building, 900 17th Street, N.W., Washington, D.C. 20006

Franklin M. Schultz, *Advisor*, 888 17th Street, N.W., Washington, D. C. 20006

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Sidney Edelman, 12919 Cristfield Road, Silver Spring, Maryland 20906

Ashley Ford, Department of Housing and Urban Development, Washington, D.C.

Charles Effinger Smoot, United Virginia Bank, First & Citizens National, Alexandria, Virginia 22313

Nominating:

Chasman Hanes, *Chairman*, 710 Ring Building, Washington, D.C. 20036

C. Roger Nelson, *Vice-Chairman*, Suite 800, 888 17th St., Washington, D.C. 20006

Charles A. Ahlard, *Vice-Chairman*, U.S. Information Agency, 1750 Pennsylvania Ave., N.W., Washington, D. C. 20006

State v. Goodseal

in danger or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith. 40 Am. Jur. 2d, Homicide, §§ 151 to 159, pp. 439 to 447. Ordinarily a woman is justified in taking human life in protecting her chastity where she has been placed in fear for her life or great bodily harm. Here the defendant was admittedly engaged in prostitution and had negotiated with the deceased to engage in an act of prostitution with him for the sum of \$20. It was for the jury to determine whether or not she killed in fear of death or of suffering great bodily harm, or on the other hand, whether or not the killing was motivated by anger, punishment, or vengeance. The character of the defendant and the fact of her engaging in prostitution did not deprive her of the right of self-defense, but they were circumstances to be considered by the jury, along with all other facts and circumstances shown by the evidence in determining the necessity for and the extent of the force used. The jury and not this court was charged with the duty of deciding these issues of fact.

Common law crimes are unknown to the law of this state. The definition of crimes and the punishment to be assessed for their violation are fixed by statute. If section 29-114, R. S. Supp., 1969, means, as the defendant contends, that any person who finds it necessary in his own judgment to protect his person or property from another, no matter how great or trivial the invasion of his rights may be, to use force to the fullest extent, even beyond all reason, the punishment of the aggressor is placed with the person claiming self-defense and not with the state. Without fixing the amount of force that may properly be exercised in resorting to justifiable self-defense, over and above which is criminal, the Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do. The criminal laws under which we live in our social order are prescribed by the state through the Legislature and the

penalties for their violation are likewise prescribed by legislative enactment. Any attempt to delegate either of such powers to private persons with the excesses that naturally follow when crime or punishment are placed elsewhere than with the state, is violative of the powers placed exclusively with the Legislature by our state Constitution.

The argument has been advanced that section 29-114, R. S. Supp., 1969, when properly interpreted, has not changed the preexisting rule which has long been upheld in this state and elsewhere. We cannot accept the basis of this argument for two reasons, first, because unless the amendment here put in isuse was intended to change the existing law there would have been no reason for enacting section 29-114, R. S. Supp., 1969, and second, amendments were twice offered and rejected in the Legislature to properly limit the defense of self-defense. The intent of the Legislature, which we are required to determine and follow, is clear and not constitutionally acceptable.

We cannot in effect rewrite the statute to meet constitutional requirements. On the other hand, the constitutionality of the act is not raised which ordinarily precludes us from a consideration of that question. But where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried. Consequently we hold that section 29-114, R. S. Supp., 1969, is unconstitutional and void.

Instruction No. 9 contains no error prejudicial to the rights of the defendant, in fact, the instruction was more favorable to the defendant than she was entitled to. Defendant's requested instruction herein discussed was in effect given by inclusion in instruction No. 9 and it was properly denied by the trial court. The evidence is sufficient to sustain the verdict of the jury and the

judgment of the trial court ought to be and is affirmed.

AFFIRMED.

SPENCER and BOSLAUGH, JJ., dissenting.

The majority opinion herein violates a fundamental principle of constitutional construction. Neither the State nor the defendant raise an issue as to the constitutionality of the Self-Defense Act, section 29-114, R. S. Supp., 1969. Yet the majority opinion declares the statute invalid without the benefit of briefs or arguments upon the issue of constitutionality.

The following from *Stanton v. Mattson*, 175 Neb. 767, 123 N. W. 2d 844, indicates the extent of this abrupt departure from well-defined precedent: "All acts of the Legislature are presumed to be constitutional. The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature."

It is unnecessary to reach any question of the constitutionality of section 29-114, R. S. Supp., 1969, in this case. The instruction relating to self-defense, which was given in this case, advised the jury that self-defense was "the use of such force by any means necessary to repel an attack as at the time appeared to defendant to be necessary." (Emphasis supplied.) The instruction conformed to the statute in that the only limitation placed upon the force that might be used was that it be "necessary."

The instruction as given also conformed to the instruction requested by the defendant except that the trial court included a paragraph, taken from NJI 14.33, stating that a person who uses more force than that permitted by the definition contained in the instruction is criminally responsible therefor. The defendant contends that this part of the instruction was erroneous.

The Self-Defense Act does not authorize the use of unlimited force nor does it provide that persons who use more force than necessary should be immune from prosecution. The defendant's criticism of the instruction given is without merit.

~~IRENE NEEMAN, APPELLEE, V. OTOE COUNTY ET AL.,
APPELLEES, IMPEADED WITH AETNA INSURANCE COMPANY,
APPELLANT.~~

~~MAURICE V. KARSPECK, APPELLEE, V. OTOE COUNTY ET AL.,
APPELLEES, IMPEADED WITH AETNA INSURANCE COMPANY,
APPELLANT.~~

~~RUTH M. WILLIAMS, APPELLEE, V. OTOE COUNTY ET AL.,
APPELLEES, IMPEADED WITH AETNA INSURANCE COMPANY,
APPELLANT.~~

~~LORETTA H. BASSINGER, APPELLEE, V. OTOE COUNTY ET AL.,
APPELLEES, IMPEADED WITH AETNA INSURANCE COMPANY,
APPELLANT.~~

~~— N. W. 2d —~~

~~Filed January 29, 1971. Nos. 87631, 87632, 87633, 87634.~~

- ~~1. Workmen's Compensation: Insurance. Rule XI of the Rules of Procedure of the Nebraska Workmen's Compensation Court requiring that notice of cancellation of compensation insurance be filed within 10 days after cancellation of the policy is primarily for the protection of claimants entitled to compensation.~~
- ~~2. ———: ———. Where a workmen's compensation insurance policy is canceled and is replaced by a new policy issued and certified by another insurance company and effective on the date of cancellation of the old policy, a failure to file notice of cancellation with the Nebraska Workmen's Compensation Court within the time specified by Rule XI does not in and of itself invalidate the cancellation.~~
- ~~3. ———. A new compensation insurance carrier has no standing to complain of a delay by the former carrier in complying with Rule XI. The new carrier should be held solely responsible for payment of workmen's compensation liability arising on or after the effective date of its policy and after the date of cancellation of the replaced policy.~~
- ~~4. Workmen's Compensation: Words and Phrases. A workmen's~~

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

NB-40
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

February 9, 1971

Mr. Jack W. Rodgers
Director of Research
Nebraska Legislative Council
State House
Lincoln, Nebraska 68509

Dear Mr. Rodgers:

A local news article mentioned that your self-defense statute was held invalid by your supreme court on January 29. Please send a copy of the court's decision. Presumably the statute in question is sec. 29-114 of the Nebraska Revised Statutes, Supp. 1969. If not, please send a copy of the right statute too.

Our legislature is presently considering enactment of a more-or-less similar statute (using the phrase "reasonably necessary force" rather than "by any means necessary"), and your early reply would be much appreciated. Thank you.

Yours truly,

Arthur H. Peterson
Revisor of Statutes

AHP/sm

re HB 40

Nebraska Revised Statutes, Supp. 1969

shall have been issued, nor shall any person be prosecuted, tried or punished for any misdemeanor or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal statute, unless the indictment, information or action for the same shall be found or instituted within one year and six months from the time of committing the offense or incurring the fine or forfeiture, or within one year for any offense the punishment of which is restricted by a fine not exceeding one hundred dollars and to imprisonment not exceeding three months; *Provided*, nothing herein contained shall extend to any person fleeing from justice; *provided further*, where any suit, information or indictment for any crime or misdemeanor is limited by any statute to be brought or exhibited within any other time than is hereby limited, then the same shall be brought or exhibited within the time limited by such statute; *and provided further*, where any indictment, information or suit shall be quashed or the proceedings in the same set aside or reversed on writ of error, the time during the pendency of such indictment, information or suit so quashed, set aside or reversed, shall not be reckoned within this statute so as to bar any new indictment, information or suit for the same offense.

Source: G.S. p. 783; R.S. 1913, § 8910; C.S. 1922, § 9931; C.S. 1929, § 29-110; R.S. 1943, § 29-110; Laws 1965, c. 147, § 1, p. 489. Effective date November 18, 1965.

29-113. Convicts of other states; disqualifications enumerated; general pardon; effect. Any person who shall have been actually imprisoned in the penitentiary of any other state or territory of this Union, under sentence for the commission of any crime which, by the laws of this state, is punishable by imprisonment in the Nebraska Penal and Correctional Complex, shall be deemed incompetent to be an elector or juror, or to hold any office of honor, trust or profit within this state, unless such convict shall have received a general pardon from the Board of Pardons of the state in which he may have been imprisoned, agreeably to the laws thereof.

Source: G.S. p. 783; R.S. 1913, § 8913; C.S. 1922, § 9934; C.S. 1929, § 29-113; R.S. 1943, § 29-113; Laws 1951, c. 89, § 2, p. 210; Laws 1969, c. 236, § 1. Effective date December 23, 1969.

29-114. Legal jeopardy; self defense; aiding another; indemnification; reimbursement. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

When substantial question of self defense in such a case shall exist, which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the State of Ne-

braska shall indemnify or reimburse such defendant for all loss of time, legal fees, court costs, or other expense involved in his defense.

Source: Laws 1969, c. 233, § 1. Effective date June 5, 1969.

ARTICLE 2

POWERS AND DUTIES OF CERTAIN OFFICERS

29-204. Constables; powers and duties.

Constables have authority to execute *State v. Carpenter*, 181 Neb. 830, 150 N.W.2d 129.

29-205. City and village marshals; general powers and duties.

Police officers had the right to stop motor vehicle outside the limits of city where circumstances indicate commission of crime. *State v. Carpenter*, 181 Neb. 830, 150 N.W.2d 129.

ARTICLE 4

WARRANT AND ARREST OF ACCUSED

Section.

- 29-401. Law violators; arrest by sheriff or other peace officer.
- 29-404. Complaint; county attorney; Attorney General; other complainant with consent of county attorney; filing; consent to filing when given; warrant; issuance.
- 29-404.01. Warrant; supplemental act.
- 29-404.02. Warrant; arrest; when not required.
- 29-404.03. Warrant; reasonable cause for arrest; conditions.
- 29-411. Warrants; execution; powers of officer; direction for executing.

29-401. Law violators; arrest by sheriff or other peace officer. Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, police officer, or peace officer as defined in subdivision (17) of section 49-801, shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained.

Source: G.S. p. 789; R.S. 1913, § 8937; C.S. 1922, § 9941; C.S. 1929, § 29-401; R.S. 1943, § 29-401; Laws 1967, c. 175, § 1, p. 500. Effective date April 19, 1967.

Firing of shots at tires of speeding automobile was justified in making arrest. *Greese v. Newman*, 179 Neb. 878, 140 N.W.2d 803.

29-404. Complaint; county attorney; Attorney General; other complainant with consent of county attorney; filing; consent to filing when given; warrant; issuance. No complaint shall be filed with the magistrate, unless such complaint is in writing and upon oath, signed by the county attorney or by any other complainant. If the complainant be other than the county attorney he shall either have the consent of the county attorney or shall furnish to the magistrate a bond with good and sufficient sureties in such amount as the magistrate shall determine to indemnify the person complained against for wrongful or malicious prosecution. Whenever a complaint shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest

APRIL 10, 1968
The state's highest court
Friday in sustaining the
second-degree murder
conviction of an Omaha
woman, Judith Marie
Goodall, who had invoked
the law in her defense.

The state's highest court said
the law, in effect, assigns the
penalty threatened by the law of
murder. The punishment
for the offense.

MEMORANDUM

State of Alaska

TO: John E. Havelock
Attorney General

DATE: February 2, 1971

SUBJECT: HB 47 (Rep. Colletta)

FROM: M. Gregory Papas *mbp*
Assistant Attorney General

The following comments were made by me during a hearing of the House Judiciary Committee, held on January 29, 1971, in response to an invitation to the department to offer testimony regarding the above-mentioned bill. I made no recommendations as to what type of bill the department would wish to see enacted but limited myself to a statement of the arguments pro and con which have developed in the current judicial examination of the felony-murder rule. This discussion is in outline form since taken from my pre-hearing notes.

1. Alaska does not presently have a genuine felony-murder rule due to the use of the word "purposely" in our murder statute, AS 11.15.010.

- a) Gray v. State, 463 P.2d 902 (1970) points out this fact clearly.
- b) Smith v. Myers, (Pa. 1970) 261 A.2d 550 interpretes the Ohio statute, after which the Alaska Statute was patterned, as not being a true felony-murder rule.

2. HB 47 is a true felony-murder statute.

- a) Effect of rule at common law: To imply malice aforethought in a murder which occurred during the commission of one of the named felonies.
- b) Effect of HB 47: (1) Imputes the act of killing to the felon, whether he is the physical killer or not. This was not common in the United States until about 30 years ago.
(2) Imputes the element of malice aforethought to raise a criminal homicide to murder in the first degree.
- c) Applications of the felony-murder rule:
 - (1) i, felon kills victim
 - ii, felon kills co-felon
 - iii, felon kills resister
(cop/ 3rd person)
 - iiii, felon kills bystander

- (2) i, victim kills felon
- ii, cop kills felon
- iii, cop or victim kills bystander
- iiii, unusual situations
(victim kills co-victim)

d) Under those situations denominated as c(1), above, successful prosecution does not depend entirely upon the felony-murder doctrine; whereas in those situations denominated as c(2), above, the felony-murder rule is essential if stern prosecution is desired.

3. Many states still follow the rule that any killing which is perpetrated in the commission or attempt to commit one of the enumerated felonies, even if accidental or unintentional, is first degree murder.

- a) The wording of section B of the bill (HB 47) makes completely unnecessary proof of a strict causal connection between the felony and resultant homicide.
- b) The only specific intent is that needed to commit the felony involved.
- c) Courts in states following this concept apply the civil tort concept of "proximate cause", i.e. a felon is criminally responsible for the natural or reasonably foreseeable results of his felonious undertakings.

4. Theoretical criticisms of the broad rule which are applicable, equally, to HB 47.

- a) The extension of the common law doctrine to its present stage is based on a misinterpretation of the word "murder" to mean "killing". The common law application was, first, to classify the killing as murder, manslaughter or justifiable or excusable homicide and, if found to be murder, then to characterize it as in the first degree. That is, under a proper application of the rule as taken from the common law malice aforethought may be imputed to the felon but not the act of killing; that the mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine. Under this view the rule is limited in application to situations where the felon is the physical killer. See Clark & Marshall, section 10.07.
- b) The presumption which is utilized when imputing the act of killing to the felon in cases where he provokes another person to kill is subject to possible Constitutional strictures.

(1) Background: the U.S. Supreme Court has rejected the idea that a state legislature has the power to create any presumption it wishes. The constitutional right to a fair trial and the presumption of innocence requires the prosecution to prove beyond a reasonable doubt

every element of the offense charged; that is, there can be no directed verdicts of guilty in a criminal case. Purely arbitrary presumptions violate these rights.

- (2) Premise: a criminal statutory presumption must be regarded as irrational or arbitrary, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary v. U.S.*, 395 US at 36.
 - (3) In HB 47 the proved fact is the commission of a felony, the presumed fact is that the felon committed the act of killing.
 - (4) HB 47 glosses over the numerous distinctions between types of homicides by use of this presumption and lumps them all together as murder first.
- c) The concept of proximate cause in connection with felony-murder has been abolished in Penn. and Calif.; other states have recognized numerous limitations in its application.
- (1) *Smith v. Myers*, supra, held that the concept of proximate cause has undergone great expansion in recent years; utilizing this concept in prosecutions for criminal homicide would be to extend possible criminal liability to persons chargeable with unlawful or reckless conduct in circumstances not generally considered to present the likelihood of a resultant death.
 - (2) *People v. Washington*, (Calif. 1965) 402 P.2d 130 held that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application, thus by implication rejecting the proximate cause argument.
 - (3) Later Calif. cases have rejected the rule's use in situations where the underlying felony is assault with a deadly weapon, on the basis of the "included in fact" test, in

an effort to preserve distinctions between types of homicides. 22 Stan. L. Rev., No. 5, 1970.

d) The felony-murder concept is legally unsound.

- (1) A crime is generally defined as the unity or joint operation of an act (declared unlawful) and intent (to do that act).
- (2) It is argued that the unity of act and intent that exists when the felony-murder doctrine is utilized is fictitious at best for it is the combination of the intent to do one act (the felony) with the commission of another act (the homicide).
- (3) The presently accepted theory is characterized as particularly unsound when it is carried one step further by considering a homicide to be murder when the actual, physical killer (cop/victim/3rd person) has no legal or moral culpability. The argument is that the felon's guilt should be no greater than the actual killer's.

e) Absence of Mens Rea.

- (1) Homicides are distinguished on the basis of the state of mind of the perpetrator; that is, whether his act is wilful, deliberate and premeditated, upon a sudden heat of passion, in the commission of an unlawful act, or constitutes culpable negligence.
- (2) The felony-murder rule sweeps all these distinctions away, notwithstanding the facts of the particular case. It thus imposes the most serious penalties in cases otherwise meriting lesser punishment.

5. Arguments which favor application of the rule in its broadest terms.

- a) Underlying each of the arguments in support of the rule is the statement of Justice Oliver Wendell Holmes in The Common Law:
"Acts should be judged by their tendency under the

- known circumstances, not by the actual intent which accompanies them. . . the object of the law is to prevent human life being endangered or taken. . . the law requires [men] at their peril to know the teachings of common experience, just as it requires them to know the law. . . the test of murder is the degree of danger to life attending the act under the known circumstances of the case".
- (b) The moment that a person forms the intent to commit a felony which is inherently dangerous to human life he develops a man endangering state of mind, which is malice aforethought. Thereafter any killing is a product of that malice. The law does this very thing in other circumstances. Example - it is first degree murder to shoot and kill one man even though the actor's intent was to kill another person.
 - c) A killing (done by any person) is initiated by the felon since: (1) he is committing an act in itself dangerous to human life and (2) the killing would not have occurred but for the provocation of the felony. The law does not measure the delicate scruples of a felon but rather imputes to him the knowledge that he is inviting dangerous countermeasures.
 - d) The legislature may properly classify murders committed with premeditation, or by torture, poison, or lying in wait as first degree. It may also classify murders during heinous felonies as first degree.
 - e) America is experiencing a rampant crime wave, which necessitates, for the protection of society in general, sentences which are commensurate punishment for the crime. This means severe sentences which will act as a deterrent to prospective and repeating criminals. The argument implies that the sentence for robbery, for example, should be more severe when a killing occurs than when no harm is caused.

APPENDIX A

During the course of the discussion, in which I characterized the arguments against the felony-murder rule as somewhat theoretical and those in support as a hard-line approach, it became apparent that the bulk of the committee were not overly impressed with those theoretical arguments. One of the committee members commented that a victim or bystander is just as dead whether killed by the felon or some other person. Chairman Moran, Mr. Hillstrand, Mrs. Banfield and one other seemed to prefer the view that a felon be charged with the consequences of his act. However, each member seemed to grasp the validity of some of the arguments against the rule and expressed a desire to avoid the pitfalls which are becoming evident. The Chairman thereupon inquired if the department has any recommendation, to which I responded that none had formally been agreed upon. However, as a point of discussion, I threw out the formulation of the rule which I proposed in my January 27 memo to you. This statement, plus a committee substitute for HB 47, are currently under consideration. The chairman expressed a wish to proceed judiciously and has agreed to accept further testimony from this department regarding our suggested approach to the problem. My specific request for additional time during which you will be able to formulate the department's position was granted. At this point the committee awaits your pleasure.

One suggestion that I would make, in view of the committee's attitude, is to adopt my suggestion of January 27, 1971 (which is a restatement of HB 496, 6th Legis. - Second Session, introduced at the request of the governor) which fixes the felon's responsibility for his direct acts. In combination with this AS 11.15.080 (negligent homicide) might be beefed up to refer specifically to situations where a felon provokes another person to kill when the killing occurs as a result of resistance to the commission of the felony or during the apprehension of the felons. This approach is, I feel, preferable to the features of CSHB 47 which would necessitate the exploration of what is a probable result of the commission of a felony.

MGP:slb

CC: Secretary of
House Judiciary Committee

HB-47

THE SUPREME COURT OF THE STATE OF ALASKA

ARLIE ROY POPE,)
)
Appellant,)
)
v.)
)
STATE OF ALASKA,)
)
Appellee.)
_____)

File No. 1127

O P I N I O N

[No. 660 - December 21, 1970]

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Anchorage,
Ralph E. Moody, Judge.

Appearances: James R. Clouse, Jr., Anchorage,
for Appellant. G. Kent Edwards, Attorney
General, Juneau, Harold W. Tobey, District
Attorney, and Richard R. Felton, Assistant
District Attorney, Anchorage, for Appellee.

Before: Boney, Chief Justice, Dimond, Rabinowitz,
Connor and Erwin, Justices.

ERWIN, Justice.
CONNOR, Justice, concurring in part and dissenting
in part.

Appellant, Pope, was convicted of second degree
murder in connection with the death of one David Silva on
July 9, 1968. According to his own testimony, he arose on
that date at his usual hour and prepared himself for work.
While driving to work he began to feel sick and decided to have
only coffee in place of his usual breakfast. As appellant con-
tinued towards his job, the sickness became more severe and he

decided to turn around and drive back to his motel. He testified that this condition of nervousness and sickness at his stomach had occurred with frequency in the period of time shortly before the shooting occurred.

After returning to his motel room, appellant consumed a little less than one-half of a pint of alcoholic beverage, remaining in his room and watching television. He made several attempts to reach his former wife, Irma Pope, and was at last successful. However, Mrs. Pope refused to speak with him, slamming down the telephone. Appellant stated that the reason that he had attempted to call his former wife was that he felt really sick and was looking for help from someone.

After being rejected over the telephone, appellant described a strange feeling, "like something was spinning around the top of my head, from right to left, right underneath the skin against the skull and when you closed your eyes you could see -- could see a streak of light coming around and around. . . ." He described the light as not being mean or anything, but the light said "kill him, kill him, kill him" -- just kept repeating it; and finally he said it to himself and as soon as he did he felt very good and was not sick any more. Appellant further stated that after the lights had stopped in his head, he felt very sorry for David Silva because of what was going to happen; he did not think there was anything that he could do to prevent the killing of David Silva, and he knew he was going to do it, but he didn't yet know just how. When

appellant finally agreed with the light in his head which told him to kill Silva, the nervousness disappeared, as did his upset stomach.

Appellant's recollection of the events that occurred after he left the motel was hazy and vague. He recalled only being near the parking lot at Anchorage Bedding and Furniture and next seeing the gun in his hand on the door ledge of his automobile. Appellant did not recall shooting the decedent, but only remembered watching the decedent sitting down and then lying backwards on the ground.

Officer Pavlovich was the first law enforcement officer to arrive on the scene. Upon arriving he observed the deceased, a woman at the head of the decedent, and another man, later identified as the appellant, alongside the decedent in either a squatting or kneeling position. Officer Pavlovich went over to the decedent, checked his pulse, and pronounced him dead. He next asked the woman what had happened. The woman, Mrs. Silva, indicated that appellant had shot Mr. Silva. In response to this, Pavlovich stood the appellant up and started to search him for weapons.

At this point in the sequence of events there is a dispute as to the actual occurrences. A Mr. McConnell testified that he observed Officer Pavlovich going over to appellant and questioning him for a minute or two before finally searching him for a weapon. The officer, on the other hand, testified that after he had examined Silva he immediately started to search

appellant. Appellant's version of the story is that as he was being frisked by Officer Pavlovich, he was asked if he had a gun, to which he responded yes, that it was in the car. Officer Pavlovich claims that the information about the gun was volunteered by Pope and that no such question had been asked.

Mr. McConnell stated that after eliciting this information, Officer Pavlovich proceeded to appellant's car, with his arm on appellant's arm, to retrieve the weapon, which was located in the middle of the front seat. Officer Pavlovich stated that after Pope had volunteered the information as to the whereabouts of the gun, Pope proceeded to the automobile and Pavlovich hurried to beat him to the car in an effort to retrieve the weapon.

On cross-examination Officer Pavlovich described the appellant's appearance as being dazed and testified that his feeling at the time was that appellant was not drunk, but either dazed or at least under the influence of alcohol -- but he could not tell which. Officer Pavlovich further testified that although he detected nothing radically wrong with appellant, that is, appellant walked normally and spoke clearly and distinctly, albeit very slowly, he nevertheless seemed to be preoccupied. At another point in his testimony Pavlovich stated that he thought appellant was either under the influence of alcohol or in a state of shock. Furthermore, he was not sure whether appellant was in possession of his faculties at this time.

On August 5, 1968, Pope was indicted by the grand jury for first degree murder and arraigned immediately thereafter.

Appellant entered a plea of not guilty, and the trial date was set for December 12, 1968, before the Honorable Edward V. Davis, Superior Court Judge. Prior to trial, on November 29, 1968, at the request of the prosecutor, a competency hearing was held. On January 16, 1969, the Superior Court entered an order to the effect that the appellant was competent to stand trial.

Because of continuances, trial did not begin until February 10, 1969. At that time the defendant appeared before the Honorable Ralph E. Moody, Judge of the Superior Court, rather than Edward V. Davis, to whom the case had been assigned originally. Timely objection was made by appellant to the unannounced change. On February 18, 1969, the jury returned a verdict of guilty of murder in the second degree. Notice of appeal was duly filed.

Appellant raises four specifications of error in the trial below. His first specification is that the court committed prejudicial error in reassigning appellant's case from Judge Davis to Judge Moody without giving appellant five days from the date of reassignment to consider and possibly file a peremptory challenge affidavit as provided in AS 22.20.022; his second, that the trial court erred in overruling the appellant's motion to suppress the evidence seized by Officer Pavlovich from the appellant's car prior to a lawful arrest; and his third, that the trial court incorrectly admitted the statements of appellant made prior to his being given the proper Miranda warnings and after he had become a suspect in the crime and had been substantially deprived of his freedom of action.

Finally, he contends that the trial court should have ruled as a matter of law that the burden of proving sanity is on the state rather than the burden of proving insanity being upon the defendant, when there was some evidence in the record to indicate that sanity was at issue.

I

In his first claim of error, appellant contends that because of the assignment procedure used herein,¹ he did not have sufficient opportunity to determine and if necessary file an affidavit alleging he believed that he could not obtain a fair and impartial trial.

Trial proceeded on February 10, 1969, appellant making timely motion,² which motion was denied.

¹ There was no advance notice to counsel of the reassignment of this case from Judge Davis to Judge Moody on the day of trial. It should be noted that subsequent to the trial herein this court in the case of Roberts v. State, 458 P.2d 340, 346 (Alaska 1969) pointed out the potential problems of such a practice in suggesting that this method of reassignment of a case should be avoided in the future:

A method should be devised and utilized to make assignment of cases to judges sufficiently in advance of trial or hearing, with notice of the assignment being given to the parties, so that the parties can be afforded their rights under AS 22.20.022 without interfering with the scheduled hearing or trial dates.

² The motion was as follows:

Mr. Clouse: Your Honor, for the record, at this time, I would like to state an objection to the Court's requiring us to go to trial at this time and not before the -- Judge Davis who was previously assigned this case. This deprives the defendant of the opportunity to investigate and exercise any challenge that he may have within the five day period as provided by rule and statute.

Appellant correctly points out that the granting of the five-day period is to allow a party or his attorney an opportunity to investigate the judge to whom the case is assigned and if necessary file the requisite affidavit for disqualification, thus avoiding the waste of judicial time which would result if an affidavit or disqualification were not filed until the date of trial because this would mean that the case would have to be continued until another judge could be assigned and the disqualified judge would not be ready at that time to start the trial of another action.³ Appellant

2 [Contd.]

The Court: Motion's denied since this is merely a procedural matter and it delays the -- delays the carrying on of Court business if we give effect to that for the five days rule. Other than the objection, is defense ready to proceed?

Mr. Clouse: Yes, your Honor.

AS 22.20.022 states in relevant part:

"Peremptory disqualification of a superior court judge.

(a) If a party or his attorney in a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding judge shall at once, and without requiring proof, assign the action to another judge of that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay."

* * *

"(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time."

³ Roberts v. State, 458 P.2d 340, 346 (Alaska 1969).

further correctly argues that the provisions of this statute have been interpreted by this court to mean that once the affidavit is filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. Channel Flying Inc. v. Bernhardt, 451 P.2d 570 (Alaska 1969).

But appellant has not shown that any harm resulted to him from the denial of his motion. Instead, he invites us to speculate that he suffered some possible prejudice, even though he did not challenge the trial judge because he felt that any challenge he made might have a prejudicial effect on the jury. The gist of appellant's argument appears to be that since any challenge might affect the jury he never seriously considered whether or not he should exercise the challenge because the reassignment made the choice more difficult. Since appellant could have exercised the challenge at any time within five days of reassignment, even during trial, we hold that his failure to do so was a waiver of his right to a peremptory challenge to the trial judge, and it was not error for the court to refuse to grant a continuance of five days to permit appellant to ponder this matter at length.

II

Appellant claims that the trial court committed error in refusing to suppress as evidence (1) appellant's oral statement about the gun, and (2) the gun itself, which the officer seized in appellant's car. The argument is that this evidence is tainted because the required warnings under Miranda v.

Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966) were not given by the officer until after the seizure of the gun, that appellant had already become a suspect in the crime, and that he had been substantially deprived of his freedom in a significant way. The test of when warnings must be given under Miranda is whether the accused has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." 384 U.S. at 478, 16 L.Ed.2d at 726.

We need not explore such problems as whether the "in custody" test of Miranda displaces the "focus" test of Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977 (1964), or whether the two tests can be regarded as alternatives to some extent.⁴ For it is plain to us that this case falls within an important exception stated by the court in its opinion in Miranda. After pointing out that it did not intend to hamper the traditional function of police officers in investigating crime, the court said:

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. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling

⁴ United States v. Hall, 421 F.2d 540 (2nd Cir. 1969); Graham, What is Custodial Interrogation?: California's Anticipatory Application of Miranda v. Arizona, 14 U.C.L.A. L.Rev. 59, 114-15.

atmosphere inherent in the process of in-custody interrogation is not necessarily present. 384 U.S. at 477-78, 16 L.Ed.2d at 725-26.

In interpreting Miranda various courts have had to draw lines between what are permissible investigative interviews and custodial interrogations. The United States Supreme Court itself has made it plain that custodial interrogation could take place outside the station-house where one was "not free to go where he pleased but was 'under arrest.'" Orozco v. Texas, 394 U.S. 324, 325, 22 L.Ed.2d 311, 314 (1969). The courts must determine, therefore, in each case whether the atmosphere and setting of an interrogation are of such coercive effect or indicate such significant restraint as to trigger the need for a Miranda warning. There is not always agreement about the criteria for such a determination.

But the case at bar is a strong one for applying the "on-the-scene questioning" exception to the Miranda warning requirement. The officer here was presented with a situation of great emergency. A crime of violence had occurred, the victim was lying on the ground dead. There was more than one person present. Both to protect his own safety and that of others, the officer had to elicit information about what had happened, and about the gun which had obviously been used in the killing. For the same reason the officer also had the right to conduct a strictly limited search ("frisk") of Pope's person for weapons under the rule of Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 869 (1968),

which he did.⁵ To hold that, while a policeman faced with an emergency such as the one which confronted Officer Pavlovich may "frisk" a suspect for weapons he may not simultaneously ask him whether he is armed, would be an unrealistic and unreasonable extension of the Miranda rule.

Appellant also contends that, because the revolver was seized from Pope's automobile prior to the time he was placed under arrest, it was inadmissible because it was not the product of a search incident to arrest. The difficulty with this line of argument is that the gun was not the product of a "search" at all; it was lying on the front seat of the car in plain view. As soon as he saw it, Officer Pavlovich seized it and unloaded it, both to preserve it and its cartridges as evidence and to prevent appellant, who was standing beside him, from getting hold of it. His conduct was entirely justified.

It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. ⁶

III

The final point raised by appellant is a challenge to the burden of proof in insanity cases as set forth in the

⁵ See Maze v. State, 425 P.2d 235, 238 (Alaska 1967).

⁶ Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069 (1968); Creighton v. United States, 406 F.2d 651 (D.C. Cir. 1968); Klockenbrink v. State, 472 P.2d 958, 961 (Alaska 1970). See Stevens v. State, 443 P.2d 600, 602 (Alaska 1968).

opinion of this court in Chase v. State.⁷ A review of the record reveals that the only testimony before this court in reviewing this point is the testimony of Officer Pavlovich, the appellant, Pope, Bill McConnell, and the cross-examination of appellant's ex-wife. Testimony given by Dr. J. Ray Langdon, a psychiatrist, and Marie Doyle, a psychologist, at the trial, as well as the testimony of additional police officers and others at the scene of the crime, was not made a part of the record on appeal.

While proper objections were made at the trial concerning burden of proof in insanity cases, no objection was made to instructions on the test for insanity as given by the trial court, nor was any testimony presented nor instructions requested concerning such an issue.

Since in our opinion the burden of proof as to the defense of insanity and the actual test for insanity are inseparably intertwined,⁸ we are placed in the position of attempting to review the entire basis for the present rule on the defense of insanity in Alaska on an inadequate record without complete presentation of these issues to the trial court. This we decline to do.⁹

⁷ 369 P.2d 997, 1003 (Alaska 1962).

⁸ Approximately one-half of the states put the burden on the defendant while the other half and the federal courts put the basic burden on the prosecution. See annot. 17 A.L.R.3rd 146 (1968).

⁹ For a similar action by a federal court, see Ramer v. United States, 390 F.2d 564 (9th Cir. 1968).

The importance of the defense of insanity has been underscored recently by a series of excellent opinions in federal courts which have considered, and in many cases adopted, the A.L.I. test for insanity,¹⁰ and a series of equally searching state court opinions which have noted more than one position, but have tended to retain the M'Naghten rule.¹¹ These opinions note that there are presently four separate tests for insanity¹² which have received varying degrees of judicial acceptance. They serve to underscore the difficulty of choosing a proper test for insanity and the corresponding burden of proof without

¹⁰ Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651, 20 L.Ed.2d 1317 (1968); United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied 377 U.S. 946, 12 L.Ed.2d 309 (1964); United States v. Smith, 404 F.2d 720 (6th Cir. 1968).

¹¹ FOR A.L.I.: State v. White, 456 P.2d 797 (Idaho 1969).
FOR M'NAGHTEN: State v. Malumphy, 461 P.2d 677 (Ariz. 1969); State v. Moeller, 433 P.2d 136 (Hawaii 1967); State v. Harkness, 160 N.W.2d 324 (Iowa 1968); Williams v. State, 451 P.2d 848, 851 (Nev. 1969); State v. Gilmore, 410 P.2d 240 (Ore. 1966); Commonwealth v. Rightnour, 253 A.2d 644 (Pa. 1969) (Aff'd by equally divided court).

¹² (1) The M'Naghten Test, Daniel M'Naghten case, 8 Eng. Rep. 718 (H.L. 1843).

(2) Durham Test, Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

(3) American Law Institute Test, American Law Institute, Model Penal Code, Section 4.01(1) (Final Draft 1962).

(4) English Test, British Royal Commission on Capital Punishment, 1949-1953, 1953 Report at page 116, quoted in United States v. Currens, 290 F.2d 751, 774, n. 32 (3rd Cir. 1961).

complete presentation on the issue in the trial court and ultimately in this court.¹³

The judgment of the Superior Court is hereby affirmed.

¹³ Once before this court has refused to review the test for insanity for Alaska based on an inadequate record. See *Dimmick v. State*, 449 P.2d 774, 776 (Alaska 1969).

CONNOR, J., concurring in part and dissenting in part.

I concur with the majority opinion except the portion dealing with the burden of proof in insanity cases, and allied questions. As to that portion of the majority opinion I must respectfully dissent.

This case went to the jury on instructions concerning the defense of insanity which were patterned on those approved by this court in Chase v. State, 369 P.2d 997 (Alaska 1962). Counsel for appellant objected to those instructions as improperly placing the burden on the accused to establish his insanity by a preponderance of the evidence. He thus raised and preserved for appeal the questions of what is the burden of proof and where it should be placed in these cases. He is properly entitled to a decision on those questions.

The majority of my colleagues feel that the burden of proof question and the substantive test of insanity are inter-related. I agree. But for that very reason I believe that both topics logically can, and properly should, be determined by the court.^{1/}

The lack of an adversary presentation of the legal arguments bearing upon the proper test of insanity in criminal cases should not be an impediment to decision in this particular instance. Ultimately one must read a large body of legal and

^{1/} For a case in which a distinguished court took a relaxed view of the manner in which counsel raised the question of the proper test of insanity in the trial court, see United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). The failure of trial counsel in that case to object to the insanity test itself was not deemed critical.