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The Treatment of White Collar Crime in China

By David W. Fulton

The industrial city of Shenyang, capital of the Liaoning Province.

Introduction

This article attempts to supply a framework for a basic understanding of the treatment of some aspects of white-collar crime in the People's Republic of China. It is directed primarily toward the Western business community, which is often familiar neither with Chinese culture nor with Chinese law. If economic contact between the West and China continues to expand, there will be a corresponding increase in the possibility that Westerners will be prosecuted in Chinese courts. Some of the offenses will be intentional and it will be seen that the best hope for these defendants lies in diplomatic appeal and political bargaining. Others will commit unintentional or negligent offenses, and it will be seen that hope for these defendants may be found in the Chinese legal system itself, if fairly applied. But just as with other legal systems, the goal of business is to avoid confrontational entanglement in Chinese courts, either as defendant or plaintiff. With the idea in mind that "forewarned is forearmed", the discussion will attempt to provide some understanding of Chinese law and of how to avoid problems with it.

The discussion adopts a standard analytic technique used in the study of Western law, examination of black-letter law and of cases prosecuted under it. Comparison of the two is intended to show what the law is supposed to be, and what it becomes when applied. We are interested primarily in what may conveniently be described as white-collar crime, on the assumption that representatives of Western culture will not go about committing violent crimes against their hosts. The term is used here to describe acts which are malum prohibitum, acts which are not inherently immoral, but become so because their commission is expressly forbidden by positive law, or whose illegality results from positive law.

The corpus of Chinese law has been swelled recently by promulgation of new laws governing a wide range of topics. The 1980 Criminal Law forms the centerpiece of our discussion, covering jurisdiction, punishment, and details of specific offenses with which businessmen must be concerned, such as embezzlement and corruption. Article 117 provides entry into the criminal law for other new enactments governing taxes, joint ventures, exchange control, and environmental protection. These other new laws contain their own administrative penalties, but when an offense is serious (and this line is never drawn with clarity) they commonly allow for punishment under the criminal law.

Two caveats are necessary at this point. English translations of these new laws are now becoming available and each tends to give a slightly different meaning to the provision in question. Where the translations show potentially significant variation, such as in the sections on intentional or negligent violations of public security, the reader's attention will be directed to differing results which might arise from a prosecution under one or the other. At this writing, there exists no official translation as such. The reader should also be aware that cases discussed in connection with various provisions are not cases in the sense used to describe the publications of the National Reporter System in the United States, but rather are cases reported in sources such as the Joint Publications Research Service. These publications glean their material from mainland radio and newspaper reports which are themselves subject to almost total control by the Chinese authorities. This is important for two reasons. First, the Communist Party has traditionally used the law as an instrument of social engineering and cases which are reported in the media may carry a political message directed at a domestic audience above and beyond the niceties a legal scholar may discern in them. Second, the cases discussed here represent only part of the total number of cases reported in the Chinese media, a situation resulting from reliance on English language sources. The author must therefore emphasize that the discussion is intended only as a framework for understanding and not as a final black and white statement of the law.

Economic Regulatory Offenses

This section deals with articles drawn not only from the 1980 Criminal Law, but also from some of the new rules and regulations promulgated as part of the current regime's
The Great Wall of China stretching nearly 1500 miles was built in the 3rd century B.C. to protect China from the evils of the outside world.

The policy of de-centralizing economic planning and of expanding contacts with capitalist enterprises. The discussion includes consideration of new laws on income taxes, exchange controls and joint ventures, and of articles in the Criminal Law itself, which deal with embezzlement, forgery, speculation, manipulation, and bribery. The businessman who wants to get involved with China should note that the trend towards de-centralization of economic planning may have the unwanted effect of increasing the number of offenders prosecuted under these economic and corruption statutes. Chinese management techniques will no longer be geared exclusively towards reaching a production quota set by a central planner without regard to actual demand. Managers will be more aware of, and more vulnerable to market forces as the concept of profit becomes more important. Depending on how far this new emphasis on market forces is allowed to carry, some enterprises may be forced to cease operations because they cannot compete with more efficient enterprises. Managers faced with such a prospect may adopt illegal tactics in an effort to remain solvent.

a. Corruption

Corruption has been a major concern of the Communist Party since the early years of its campaign against the Kuomintang. Corrupt and inefficient government by the KMT was a factor contributing to popular acceptance of Communist rule, and the Party is naturally sensitive to any charge that officials now in power are abusing their positions for personal gain. One of the earliest laws promulgated by the regime was the 1951 Statute on Penalties For Corruption in the Chinese People's Republic. It contained severe penalties in many of its articles, some of which are still enforceable today. Penalties under the new law are only slightly less stringent.

The 1951 Statute on Corruption presents a catch-all definition of corruption in Article Two.

The seizure, theft, or appropriation of state property by deception or substitution, the appropriation by extortion of the property of other persons, bribery and other illegal acts committed by workers in state institutions, enterprises, schools and the agencies under their jurisdiction in the guise of taking care of the public interest are considered corruption.

The punishments for corruption are laid out in Article three and range from death for unusually serious offenses to one year of surveillance if the amount involved is less than 10,000,000 yuan. (Note that in 1951 China was still in the grip of hyper-inflation.) Property of the guilty parties was subject to confiscation and the presence of certain aggravating circumstances listed in Article Four would serve to increase the punishment. These included organized corruption, serious injury to the State, theft or sale of state economic information, and "other especially malicious circumstances". Officials and citizens alike were encouraged to expose corrupt practices by Articles Thirteen and Fourteen, which provided that directors of government agencies who discover but fail to expose corruption on the part of their subordinates would be punished, and that any citizen had the right to expose corruption and to be protected from the vengeance of those so exposed. Furthermore, Article Five provided that punishment would be mitigated or omitted for offenders who expose others engaged in corrupt practices. The 1980 Criminal Law does not include a general description of corruption but instead deals with several specific offenses in Chapter VI Offenses Against the Socialist Economic Order and Chapter VII Malfeasance. The current campaign against corruption has taken the form of a crackdown on 'special privileges' enjoyed by cadres, aided in part by aggressive newspaper reporting. The case of Zheng Xuyu is illustrative. Mr. Zheng was accused by the People's Daily of illegally occupying a private residence for an extended period of time. Given the crowded conditions in which many Chinese live, this abuse of power seems to be particularly galling to the media, if not to every rank-and-file citizen. Mr. Zheng was forced to relinquish the residence and to submit a self-criticism to the party committee of the military district of Hebei Province. However, at a later date Mr. Zheng retracted this criticism, refuted his disclosure of past mistakes, and brought suits for libel against the reporters and editor of People's Daily. At this writing, these cases are still pending before the Supreme People's Court. The incident emphasizes the power of the press to affect once untouchable members of the party. Mr. Zheng had occupied the residence from 1970 to 1979 and had ignored...
orders to move out sent to him on numerous occasions by "superior organizations and leaders." When the People's Daily publicized his offense, he moved out almost instantly, although he has since attempted to re-establish his alleged right to the residence and to force a retraction by the newspaper.

The press is not the only initiator of action against corrupt practices, as the case of Guo Zhongwen shows. Mr. Guo was dismissed from his position as a party main branch secretary for organizing private parties and dinners, accepting gifts, and engaging in activities which "blemished" the spirit of the party. Mr. Guo's offenses consisted primarily of mis-using state property and accepting gifts which he exchanged at retail stores for cash. The Cangshan County Party Committee dismissed him after an in-depth investigation, but did not prefer criminal charges against him, though they could easily have done so under Article Two of the 1951 Statute on Corruption, set forth above. The 1980 Criminal Law contains several articles which would apply if Mr. Guo were prosecuted, most notably Article 151, "Anyone who takes away a relatively large amount of public or private property by stealing, swindling or plundering will be sentenced to imprisonment for not more than 5 years, detention or surveillance," and Article 155 on embezzlement, discussed in more detail below, "A state functionary who takes advantage of his position and power to embezzle public property will be sentenced to detention or imprisonment for not more than 5 years."

The punishment actually provided for Mr. Guo tends to cast doubt upon the consistency of the campaign against special privilege. Although the reader should not minimize the punitive effect of dismissing Mr. Guo from a party position, albeit at a fairly low-level, the kinds of petty abuses involved here would seem to be perfectly suited to making an example out of the offender. Once again, the fact situation indicates that political considerations played a major role in the final disposition of the case.

b. Embezzlement

Embezzlement is defined in the West as "the fraudulent conversion of the property of another by one who has lawful possession of the property and whose fraudulent conversion has been made punishable by statute." It is distinguished from the other theft crimes by the requirement that the embezzler have lawful possession of the property before the act of conversion takes place. Under the current constitution, ownership in the PRC takes two main forms, socialist collective ownership by the working people and commune collective ownership by the working people. Commune members and non-agricultural individual laborers are allowed to engage in sideline pursuits involving no exploitation of others, but for the most part the property of which a potential embezzler will have lawful possession in the Western sense will belong to the state. As such, conversion of that property will be an offense against the state and will therefore, in theory at least, be punished severely.

The 1951 Statute on Corruption did not deal with embezzlement by name but includes several articles worded in such a fashion as to allow a prosecution under them. As discussed earlier, Article Two is very broad, providing that "The seizure, theft, or appropriation of state property by deception or substitution . . . is considered corruption." Article Eight stipulates that "non-government officials who have . . . appropriated state property by deception" must either reimburse the state or pay a fine, and, if the crime is serious, may be punished under Article Three with a jail term and confiscation of all property. If the offense includes theft or sale of state economic information, Article Four provides that the punishment shall be even more severe. Articles 15 and 16, again almost as an afterthought, make the entire statute applicable to workers in public organizations and soldiers in the revolutionary army.

The 1980 Criminal Law deals with embezzlement in Articles 126 and 155, and with what are referred to as "swindlers" in Articles 151 and 152. Article 155 provides penalties ranging up to life imprisonment or death, but unlike the 1955 Statute on Corruption does not specify the point where ordinary embezzlement becomes "extremely grave", thus warranting harsher treatment. Article 126 does not use the term embezzlement, but provides a penalty of up to seven years imprisonment for "personnel directly responsible for serious cases of misappropriation of state funds . . ." Articles 151 and 152 provide penalties of up to ten years or life for "anyone who takes away a relatively large amount of public or private property by stealing, swindling or plundering." Swindling is nowhere defined, but appears to be quite similar to what the West knows as larceny by fraud — "purposely obtaining property of another by deception." Such an interpretation is urged by the inclusion of Article 153, which provides that anyone who uses violence or threats of violence in order to "hide the booty, resist arrest or destroy evidence' will be charged with robbery under Article 150. Thus, it would appear that Articles 151 and 152 deal with fraud crimes which do not involve lawful possession of the property prior to conversion but rather where possession is gained by deceit. The use of violence in gaining or maintaining that possession therefore becomes ordinary robbery. The two articles are included in this discussion of embezzlement because "swindling" is not defined in the statute and might therefore be used in prosecution of an embezzler.

Prosecutions for embezzlement are reported frequently in the Chinese media, probably as a warning to potential offenders and to demonstrate to the public that the law is indeed being enforced. The two cases included in this section are fairly typical. The first is the case of Tai Hung-sheng, who was convicted of embezzling almost 1000 yuan from the Haiming Shoe and Hat Shop, where he was cashier and "temporarily leading member." By his own admission in court, Mr. Tai "did not enter receipts into the accounts and . . . did not deposit cash in the bank." Mr. Tai was sentenced under Article 3(4) of the 1951 Statute on Corruption, which provides a penalty of up to one year imprisonment, and under Article 5(2), which allows mitigation of punishment in the event of a (Continued on page 23)
Congressional Action and the Practice of Polygamy Among the Mormons
by Bradford J. Bruton

The founding of the Church of Jesus Christ of Latter-day Saints (the Mormon Church) and the history of the marrying of multiple wives (polygamy), as practiced by that group from the early 1830's until 1890, are the subjects of numerous scholarly books and articles. This article is an effort to identify the issues and document the history of Congress as to this matter.

A few facts on the Mormon church and polygamy are offered for background purposes. The Mormon church was officially incorporated in New York by Joseph Smith, Jr. on 6 April 1830. Early declarations of church policy and doctrine, some purporting to be revelation received by Smith, establish that the Mormon church is to be guided by a law-giving prophet. From 1830 until today the Mormons have accepted the principle that the head of the church — the prophet — receives revelation and declares it as law. Polygamy began as a practice under this system.

The Mormons believe Smith received a law to practice polygamy from the Lord. The actual author of the practice and the actual initiation date are subjects of intense debate and uncertainty. "Plural marriage" was first publicly taught in Salt Lake City in 1852, however, it is known the practice began prior to that, sometime after 1830 but no later than 1845.

Congress enacted legislation against polygamy in 1862, 1874, 1882 and 1887. In 1890 Wilford Woodruff, fourth president of the church, announced that due to the government's efforts and passage of "laws to destroy the Latter-day Saints," he had received a revelation suspending the practice of polygamy. Today any Mormon who engages in polygamy is immediately excommunicated.

The first remarks on polygamy by members of Congress were rather light-hearted. On 1 May 1854, Congress was debating a series of appropriations for salaries of territorial officers. John M. Bernhisel, the Utah delegate, moved to increase the Utah territorial secretary's salary. Alabama Representative William R. Cobb suggested that Congress increase the secretary's salary "provided he have only one wife." The House received the remark with "laughter" and promptly approved the increase without stipulation. Bernhisel then moved for an increase in Governor Brigham Young's salary to $3,000 yearly. Congressman Mike Walsh of New York, favoring the proposal, but unable to resist the opportunity, rose in endorsement and stated:

We are now getting yearly at the rate of $3,000 per year, and I find it fully as much as I can do to support one wife on that apportionment. I understand this gentleman has some three of four and think the least he can have is $3,000.

The remark received "great laughter," but this increase was not approved because no bona fide need was shown.

The light-hearted remarks of May 1 became serious debate three days later. On 4 May 1854, the House was considering H.R. No. 317 entitled "A Bill to Establish the Office of Surveyor-General in Utah." The bill was virtually identical to other bills providing for donation of public lands to homesteaders. This bill, however, had a unique provision which provided "That the benefits of this act shall not extend to any person who shall now, or at any time hereafter, be the husband of more than one wife." This clause effectively disqualified anyone who was a polygamist or who later became a polygamist from qualifying for free government homestead lands.

The delegate from Utah, of course, immediately objected and moved to strike the clause. The House, then acting as a Committee of the Whole, thereupon engaged in a lengthy discussion. For the first time in history, the merits of polygamy were discussed in Congressional debate. Generally, the comments were not favorable. The clause was apparently not in the original version of H.R. No. 317. Congressman Cobb appeared to be jesting on May 1 when he suggested an increase in salary for the
terrestrial secretary so long as he had only one wife. However, regardless of his disposition on the 1st, by the 4th Cobb was taking the idea very seriously. He stated, and Rep. David Disnet of the Committee on Public Lands confirmed, that he was responsible for the inclusion of the proviso. The remarks suggest that it was authored and included between May 1 and May 4. Though the record is not precise, it appears that what originated as a jest provoked the first real Congressional dispute on polygamy.

In the May 4 debate Mr. Cobb solicited Mr. Bernhisel's response to an interrogatory. Mr. Cobb stated that he might vote to strike his own clause, depending on the answer. Mr. Bernhisel being willing, Mr. Cobb asked if the clause would “work any very considerable injustice or hardship to any considerable number of the inhabitants of Utah?” Mr. Bernhisel responded that the disqualification would cause hardship as “... the more wives a man has, the more farms he needs to support them.” The House as a group responded with “laughter.” Mr. Cobb responded with a statement of appreciation for the response, but the record is otherwise silent as to how the answer was received.

The debate of 4 May 1854 raised several points which eventually developed into major problems and issues in the fifty year history of Congressional action upon polygamy. The major pre-Civil War issue was the relation of the polygamy question to slavery. In 1854 the gentlemen in Congress could be debating virtually any subject and find an opportunity to turn the debate into one on slavery. The Southern representatives undoubtedly felt some compulsion to argue with the principle of popular sovereignty. The Northern representatives, of course, asserted that Congress had power over polygamy and slavery in the territories. The logic of these associations was somewhat strained as the Mormons were not slaveholders and were basically opposed to slavery. In fact, their anti-slavery position was one of the reasons causing them to be driven from Missouri in 1836. In 1844 Joseph Smith advocated a six year plan for eliminating slavery by compensating slaveholders from the sale of territorial lands. A Southern representative would find such people hard to support even in the name of popular sovereignty. A recent study, however, suggests that the Mormons attempted to employ political gamesmanship in attracting Southern favor. Utah law recognized slavery and only an extremely close examination would reveal that, in reality, the practice was disfavored by the territorial government. This move was to curry favor, political and otherwise, in Southerners.

The debates became even more strained when Congressmen could not resist the opportunity to interject personal or regional indictments. For example, Congressman Joshua R. Giddings, a Free Soil Whig from Ohio, charged that as heinous as polygamy was, slavery was much worse. Giddings pointed to the inconsistency in allowing Nebraska to have slavery but not allowing Utah to have polygamy.

I will permit the Mormon to enjoy his dozen wives, and I believe I could do it with a great deal better conscience than I could give the slaveholder the privilege of an unlimited number of concubines... when the Mormon marries, he does it openly... His children are legitimate. They are educated...

Significantly, the first debate on polygamy overshadowed a major issue as to the passage of laws affecting polygamy that would intensify after the Civil War. The issue discussed on 4 May 1854 was the possible conflict of anti-polygamy legislation with the First Amendment's “freedom of religion” guarantee. One representative, in discussing the possible inter-relation, asked, “Sir, what religious test is there here?” There was, in fact, none. The Supreme Court had never considered a case on the freedom of religion clause.

The big highlight and grand finale of the May 1854 debates was a speech by Rep. Caleb Lyon of Lyonsville, New York. Lyon gave an eloquent, impassioned oration on the evils of polygamy. He compared the Mormons and Joseph Smith to “Musselmens” and “Mahomet.” He predicted “degradation of women,” “brutalization of man,” and “infanticide” in the Mormonedom of Utah.” Lyon in an emotional conclusion warned the representatives that polygamy was a...
He climaxed his oration by calling on Congress to act "for liberty not licentiousness" in blotting out polygamy as a "stigma, a dishonor, a disgrace, from existence on the soil of North America." The report records that Lyon's oration caused nothing short of "sensation." His ringing words were answered with cries of "Good!" and "Well done!"

On 21 February 1855, the President signed the Utah Surveyor-General Act into law. The law appointed a surveyor-general and authorized a territorial survey and donation of lands for schools. Congress, having failed to resolve the polygamy issue, passed a homestead bill without any provision for homesteading.

Polygamy apparently slipped away from Congress' view in 1854. The next significant event in the U.S. government's actions to suppress polygamy occurred in Philadelphia in 1856. On 17 June 1856, the Republican party met in its first national convention and adopted an anti-slavery platform. Note the exact wording of the official statement:

Resolved. That the Constitution confers on Congress sovereign powers over the Territories of the United States for their government; and that, in the exercise of this power, it is both the right and duty of Congress to prohibit in the territories those twin relics of barbarism-polygamy and slavery.

This statement had three immediate effects: one on the Democrats, one on the Mormons and one on a Congressman named Justin Smith Morrill.

The Democrats were immediately put on their guard. Polygamy was universally unpopular, but slavery was a sensitive issue. The Republicans accomplished their goal of confusing the popular sovereignists by condemning the two practices together.

The Mormons, of course, were troubled by the statement. Their basic disposition was to oppose slavery. Their allegiance would have been Republican, but not when slavery was linked to polygamy in the party's platform. Mindful of their desire for statehood and concerned for their political position, Brigham Young and his counselor Heber C. Kimball made the following comment in a general epistle to the church:

It is not our purpose in this epistle to discuss political questions, but we cannot refrain from honestly and sincerely invoking the power of Him who sits enthroned in the heavens, to behold those who are distracting the Councils of our nation and hastening the destruction of this great Confederacy of sovereign States, and to thwart their wicked and nefarious purposes, to restrain their iniquity and cause others to arise in their places who will rule in righteousness and save our distracted but beloved country from its impending ruin.

Mormons concede that this statement is relatively soft-spoken for Brigham Young. Some of Young's actions and harsher statements were construed or misconstrued by the wrong people at the wrong time, producing disastrous results for the Mormons.

In 1857, owing to very poor communication and very great misunderstandings, a federal army was sent to Utah to suppress a supposed Mormon rebellion. Mormon historians suggest that President Buchanan ordered the expedition after being persuaded by a host of embittered federal appointees who failed to find Utah to their liking. Their records suggest many of the federally appointed judges and officials were drunk, adulterers or embezzelers who were maddened by being denied their particular desires in Utah. However, it is probably more realistic to attribute the reports received by Buchanan to a combination of factors; first, inflammatory statements by Mormon leaders and a cool reception of federal officials by the Utah Mormon populace; and second, the lack of real substance to the federal positions, which were materially altered by the territorial legislature to conserve as much real power as possible in Mormon hands. Buchanan did act on the excited advice of such men and a public pressure born from their letters and reports in newspapers and other media. Known as the "Utah War" or "Buchanan's Blunder," the single long-term effect of the $15,000,000 expedition was that from 1857 on Brigham Young no longer served as territorial governor.

The third major effect of the Republican party platform was to prompt Justin Smith Morrill into action.

In 1854, Morrill was elected to Congress as an Anti-Slavery Whig. He played an historic role in the formulation of the Vermont Republican Party in 1855. Morrill ultimately left a forty-four year record of continuous service and a score of landmark legislation. In 1856, he became Congress' leading opponent of polygamy.

In 1856, Morrill introduced the first "anti-bigamy" legislation ever presented to Congress. Nine days after the Republican Party Convention he reported his bill out of Committee to the full House. The bill, however, was never debated nor taken up by the House.

In 1858, Morrill again authored anti-bigamy legislation, this new session should have been a more receptive group with many more Republicans in attendance. However, the bill was apparently lost. Neither the Judiciary Committee nor the Committee on Territories could find the act and a substitute was not introduced.

In 1860 Representative Morrill introduced his third anti-polygamy proposal. For the first time in six years additional voices demanded action. This bill, H.R. No. 7, provided for the criminalization of polygamy.

H.R. No. 7 as initially written had four basic provisions: 1) It applied to all territories or other places where the United States Federal courts had exclusive jurisdiction, 2) it made it a criminal act to intermarry after one was already married, or to cohabit, 3) it provided fines up to $500 and jail sentences of a minimum of two years and a maximum of five years, and 4) it expressly annulled a territorial law incorporating the Church of Jesus Christ of Latter-Day Saints in Utah. Note that provision two in prohibiting intermarriage effectively eliminated future contracting of polygamous matrimony and in prohibiting cohabitation effectively restricted the practice of polygamous relationships already entered into.

H.R. No. 7 was the object of intense debate. But the real subject of the debates was elusive. The representatives talked about polygamy. When they spoke they used the
word “polygamy.” But the actual issue, the true topic under consideration was slavery and the debate centered on Congress’ power over the practice in the territories. The bill was an affront to, and the debate was one on popular sovereignty. As one Southern Democrat, Mr. Branch, stated, “I will suggest to my friends upon this side of the House, that if we can render polygamy criminal, it may be claimed that we can also render criminal that other twin relic of barbarism — slavery.”

The popular sovereignists, mainly Southern Democrats, led the opposition to the bill, but were far from united in the effort. Their objections were largely focussed at Congressional power and were based mainly in semantical distinctions. The main arguments fell into the following categories: 1) Congress had no power to enact legislation for the territories, 2) Congress had no power to enact legislation of this type for the territories, 3) Congress had power to enact legislation of this type but was precedent bound not to do so, 4) Congress had power to enact legislation of this type but not to enact legislation of a type that would affect slavery.

As the debate wore on, the real issues became more and more apparent until “slavery” had supplanted “polygamy” in the congressmen’s comments. Representative Daniel Gooch, a Massachusetts Republican, could not resist the opportunity to reprove the Democrats:

I had hoped that one question could be introduced into this Hall and discussed without the introduction of the subject of slavery; and I am glad that this side of the House thus far has participated in the discussions of this question upon its merits, without once alluding to the subject of slavery.

In reply to the defense that slavery was involved in the bill, Gooch graciously added, “If it makes for the institution of slavery, in the decision at which the House may arrive, let slavery have the benefit of it; and if it makes against it, slavery must take the consequences.” The gentleman’s offer was gratuitous as he knew precisely the implications of the bill on the slavery question. In addition to the popular sovereignty issues, the main argument against the bill was on its unenforceability. On the very first day of the debates Thomas Hindman, a Democrat from Arkansas, suggested that the bill “... would be a dead letter on the statute book ... it leaves ... enforcement to Mormon juries, acting under Mormon law.” This theme was argued repeatedly, generally by representatives favoring alternate proposals. John McClernand, a Democrat from Illinois, argued:

This is the whole extent of the remedy proposed by the committee’s bill — a bill which assumes and relies upon the Mormons — polygamists themselves, to execute its provisions. Does not everyone know that the Mormons will not enforce such a law against themselves? ... that a grand jury of polygamists will not indict a polygamist? ... Does not every man know that? Well, then, how utterly futile the measure to effect the object it professes.

Abraham Olin, a New York Republican, offered that, even if ineffectual the bill “may stand at least as a protest of the nation against the enormities which now curse and disgrace the Territory of Utah.” In an excited retort, Eli Thayer, a Massachusetts Republican, responded that “such an expression of opinion is superfluous,” and suggested Congress should have the courage “to vote bayonets and revolvers to shoot or stab polygamy out of Brigham Young and his followers.”

Hindman and McClernand were accurate in their prophecies of doom as the version of H.R. No. 7 which eventually became law had to be supplemented by additional legislation twice before it began to accomplish the goal of eliminating polygamy.

Several alternative proposals were either formally introduced or discussed as part of the debate of H.R. No. 7. These alternates were raised either because their authors wanted to avoid an affront to popular sovereignty or in a desire to enact a more effective bill.

Perhaps the most discussed and unique alternative came from the Committee on Territories.

The amendment proposed to repeal the organic act making Utah a territory. Congress would then create two new territories. Nevada and Jeffersonia (later called Colorado) and divide the Mormon population evenly between them. Hindman immediately pointed out the advantage of this proposal, in that it would open “the jury-box and legislative seats to citizens free from Mormon taint.”

Of all of the bill’s language this was virtually the only part not touched upon by debate or the subject of an amendment. Gooch offered an amendment to the jurisdictional clause to make the bill effective in the territory of Utah only. Reagan offered an amendment which would have had the effect of making the bill prospective only, outlawing the contracting of new marriages but not affecting those already made. But only in passing was this major matter of freedom of religion conflict touched upon.

To say that religious freedom was not discussed is not to say that the Mormon religion was left untouched. Much of the debates were focussed on Mormonism. Of the Mormons it was observed, “We certainly had no right to expect from them a very high degree of morality. ... It was fit ... that so low and degrading an imposture should reveal itself in its devilish fruits.” Polygamy was referred to as “nauseating and disgusting,” “a crying evil,” “a scarlet whore,” “an excess which could not have been excelled in Sodom and Gomorrah.” The Mormons themselves were called “poor, deluded, ignorant Fanatics.” Brigham Young was called “a shrewd and selfish and unscrupulous adventurer.”

Mr. Pryor raised the point that institutions of religion might be protected by the Constitution. He hastily qualified any grant of protection by pointing out that not “... any abomination ...” was so included. But then he dismissed any need for further discussion by asserting that polygamy was not an institution of the Mormon faith, in other words, not a religious practice. When Mr. Hooper interceded to the contrary Mr. Pryor ended all debate on the matter by stating:

Mr. Speaker, I have looked through the Mormon Bible — a disgusting farage of nonsense and blasphemy, written in ribald parody of the more obvious characteristics of scripture phraseology — I have examined this only dogmatic exposition of the Mormon faith, and nowhere do I find a word in recognition of the practice of polygamy.

(Continued on page 2)
Armenia, Genocide and Terrorists —
Who are the Murderers now?

by Christopher Armenak Docksey

In 1975 the Armenian Secret Army for the Liberation of Armenia (ASALA) was founded, dedicated to attacking Turkey "by any means possible." Since its inception the organization has murdered 20 Turkish officials, including two ambassadors, and claims to have committed 200 bombings and assassinations. Over the last six months there have been two major incidents, the murder on January 28th of this year of the Turkish Consul in California, Kemal Arikan, and on 24th September 1981 the occupation of the Turkish Consulate in Paris. Before the four gunmen involved surrendered to the French police they had killed a security guard, badly injured the Vice Consul, and held over 50 people hostage for 15 hours. Strangely, the gunmen spoke no Armenian, only French and Arabic. The purpose of this short piece is to explain the background to this novel phenomenon of Armenian terrorist activity.

Levon V, the last Armenian King, fled to exile in France in 1375, leaving his people subjects of the Ottoman Turks for 500 years of well documented mistreatment, culminating in the brutal massacres of 1894-96 and the "final solution" of 1915-16. The latter half of the nineteenth century saw an increase in repression by Sultan Abdul Hamid II, "le Sultan rouge," driven on by the dismemberment of his European provinces and fear and hatred of his last remaining substantial Christian minority, the Armenians. Writing his memoirs in 1919, Ambassador Morgenthau of the United States looked back to that time and wrote:

"... for more than 30 years Turkey gave the world an illustration of government by massacre... through all these years the existence of the Armenians was one of continuous nightmares. Their property as stolen, their men were murdered, their women ravished, their young girls kidnapped and forced to live in Turkish harems.

The worst years were 1894-96 when whole villages and districts were wiped out by Turkish irregulars and Kurds, the violence being interrupted and exacerbated by European interventions on behalf of the victims. British, French and Russian commissioners reported late in 1894 that

We have, in our report, given it in our conviction, arrived at from the evidence brought before us, that the Armenians were massacred without distinction of age or sex, and indeed for a period of some three weeks, viz from the 12th of August to the 4th of September [1894], it is not too much to say that the Armenians were absolutely hunted like wild beasts, to be killed wherever they were met... The conviction has forced itself upon us that it was not so much... the suppression of a pseudo-revolt, as... extermination, pure and simple...

By 1896 the bloodshed reached Constantinople. Raving mobs roamed the streets for three days and nights seeking out Armenians and clubbing them to death. By the third day, French and British Consular attaches reported that over 5,000 Armenians had been killed (bringing the tally to over a quarter of a million since 1894). Outraged, the European Powers threatened to invade Turkey unless the killing stopped, and that day, at the Sultan's command, the killing finally came to an end.

After this humiliation the powers of the Sultan gradually waned until he was deposed in 1909 by the Young Turks. These one time pro-western idealists had become nationalists embittered by Turkey's helplessness in the face of foreign intervention and suspicious of the Armenian minority which they regarded as an alien Fifth Column in their midst. The onset of the Great War in Europe in 1914 removed the protection of the European Powers, and the young Turks began to plan the first of the great Genocides of the Twentieth Century, setting the pattern for Hitler to follow. They began in April, 1915 and were mainly finished by the summer of 1916, when Talat, the Minister of the Interior, was finally able to declare to his German allies that "La question armenienne n'existe plus."

The method involved was simpler and less expensive than the Jewish Holocaust 25 years later. Able bodied Armenians were drafted into the Turkish Army and murdered unit by unit, first with machine guns, but later, on the grounds of economy, with clubs, axes, spades and swords. The Armenian intelligentsia were rounded up and removed from the cities, and in all the villages of Turkish Armenia a decree went out that Armenians should present themselves to the authorities for "temporary" transportation, each person carrying no more than one suitcase.
The first convoy set off from the town of Zeitoun in Cilicia on April 8th, 1915 and the deportations continued until November 6th, when Constantinople ordered that no further convoys of the remnants of the Armenian population should be commenced. As the deportees filed out of the towns and villages, they would see Turkish refugees from Greece and Bulgaria being resettled into their homes, a memory which soon faded on the march as they were attacked continually by Turkish peasantry, Kurds and their own guards, with Gendarmerie. Each column became in due course a starving, scrambling mob caked with mud and filth and half crazed with fear, brutality and fatigue. Some were clubbed to death, women were violated or dragged off to serve as prostitutes in Turkish brothels. Some were hacked to death or shot, some managed to put an end to themselves, and many simply fell and died on the long road across Turkey, stretching to the depots and concentration camps deep in the Syrian desert. One column from Harpoot and Sivas began with 18,000 people on June 1, 1915. After 70 days, 150 survivors arrived at the depot outside of Aleppo. It is not known how many survived the final march into the desert.

Estimates vary as to the final tally of the dead, but the latest literature seems to suggest that between one to one and a half million people had disappeared by summer 1916, well over half the Armenian population of Turkey. The survivors, cowering in Turkey or refugees in the Russian provinces of Armenia, were no longer seen as a threat by the Turkish government. By late 1915 Talaat was able to claim that

I have accomplished more toward solving the Armenian problem in three months than Abdul Hamid accomplished in thirty years!

However, history had not yet finished with the Armenians. In 1917, Nicholas I of Russia was overthrown by the Bolsheviks, who pulled rapidly out of the war leaving the Russian Armenians and the refugees defenseless. A Turkish army corps began to push north. On May 28th, 1918, the Armenians declared themselves an independent republic on the contemporary western democratic model and set up their own de facto government and their own army, drawn from the Armenian Legion which had been fighting in the forces of Nicholas I. On January 19th, 1920 the Allied Supreme Council recognized the Republic of Armenia and her de facto Government, and on April 23rd, 1920 the United States accorded similar recognition and received an Armenian diplomatic mission in Washington, D.C. On August 10th, Turkey was forced by the Allies to sign the Treaty of Sèvres recognizing Armenia and mandating the president of United States to draw the final frontiers of the new Republic. After due consideration these boundaries were never implemented. Following a secret agreement between the new leader of Turkey, Kemal Ataturk, and Lenin, the Bolsheviks rearmed the Turks and both parties attacked and repartitioned Armenia.

Nine-tenths of Armenia remains the desolate frontier area of Turkey to this day, the remaining one-tenth, shorn of land allotted to the republics of Georgia and Azerbaijan, constituting the modern Soviet Armenian Republic. In 1923, the Treaty of Sevres was replaced by the Treaty of Lausanne, which made no mention of the Armenians whatsoever.

In spite of persecution and disaster, and of ruthless and scientific repression, Armenia still claims justice from the world. (Lloyd George, Manchester, 1918)

There are two elements to the claim to justice in international law: a claim for reparations under the *jure gentium* crime of genocide, reinforced by the right of return, and a claim to restoration of territory under the principle of self-determination of peoples.

To establish the genocide argument, the Armenians must demonstrate that the massacres constituted a crime existing in international law in 1916. The term “genocide” came later, coined in 1944 to describe Hitler’s Final Solution, which was declared by the UN General Assembly in 1947 to be an international crime entailing individual and national responsibility. Similarly, the Charter of the Nuremberg Tribunal specified wartime genocide as a crime against humanity, and war criminals were punished accordingly. It seems that wartime genocide at least was regarded as an international crime by 1945. The Genocide Convention of 1948 served to define and extend the meaning of genocide, for example to peacetime genocide, genetic controls, etc., and may be regarded as declaratory rather than constitutive of the basic offense. The question arises, however, how far back one may regard genocide-without-a-name as unlawful, and the best evidence of its existence in 1918 are the statements of the Allied Powers and the new Turkish Government regarding the Armenian massacres themselves. For example, the Peace Conference specifically designated the massacres as an international crime for which Turkey was responsible:

...your Excellency makes not attempt to excuse or qualify the crimes of which the Turkish Government was then guilty ... Government for whose misdeeds the Turkish people were not responsible ... But a nation must be judged by the Government which rules it.

Notwithstanding subsequent Turkish denials insisting that the massacres never actually took place, it is clear that Turkey is guilty of the crime of genocide. Turkish liability to make reparation is simplified by the passage of time, which has removed the war criminals and most of the survivors and hence arguments over individual punishment and compensation. A general reparation to the Armenian people is still appropriate, which might consist solely or mainly of the restoration of the Homeland. Unlike the Jews, the Armenians were dispossessed of their state only sixty years ago, and, more importantly, the territory of that State is under the possession and control of Turkey, the guilty state liable to make reparation.

The claim to restoration of the Homeland is reinforced by the survivors’ individual right of return and by the right of self-determination of the Armenian people.
The right of return is embodied in the Universal Declaration of Human Rights of 1948, article 13(2), and the International Covenant on Civil and Political Rights of 1966, art. 12(4), both of which express the right to return to one's own country in general terms, not limited to "nationals" of a "State." These provisions have been regarded as declaratory of customary international law, in the same way as the Genocide Convention, on the basis of evidence flowing from the plight of the Palestinian refugees after the collapse of the Mandate.

A more important right vested in the Armenian people as a whole is the right of self-determination of peoples, embodied in art. 2(1) of the U.N. Charter and two major General Assembly Resolutions, the seminal "Declaration of the Granting of Independence to Colonial Countries and Territories," Resolution 1514(XV) of 14 December 1960, and the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States," Resolution — 2625(XXV) of 24 October 1970.

Resolution 1514 is generally regarded as reflecting accepted customary international law, passing by a 90 vote majority, no opposing votes, and nine abstentions. It declares that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights (para. 1) and that "[a]ll people have the right to self-determination". (para. 2).

Resolution 2625 is an authoritative interpretation of the Charter by the General Assembly, that "all peoples have the right freely to determine without external interference, their political status . . . and every state has the duty to respect this right in avoidance with the provisions of the Charter." Once again, the voting indicates a level of acceptance indicative of a rule of customary international law — 86 votes in favour, 5 against, and 15 abstentions.

In addition to these treaty and General Assembly provisions, the right of self-determination as a rule of law is evidenced by modern state practice, in particular the rapid dismantlement of colonial empires since the Second World War, and authoritative statements of law in Advisory Opinions of the International Court of Justice in the Namibia (I.C.J. Reports 1971, p. 16) and Western Sahara (I.C.J. Report 1975 p. 12) cases. In international law a "people" has the right to self-determination. The Jews and, ironicaly, the Palestinians, have claimed this right in recent years. It seems clear that the Armenians are a "people" too, and possess the same right under international law. Indeed, their case is stronger, since they existed as an independent, self-governing state until its brutal reapportionment between Turkey and the Soviet Union in 1923. In law, they have a valid claim to restoration of an independent reunited Armenia via the principle of self-determination, or at least to restoration of Turkish Armenia by way of reparation for the genocide of 1916.

For sixty years, however, the Armenians claim for justice has been ignored, paling today beside flagrant violations of the right of self-determination in Afghanistan, the West, Bank, Namibia and Poland. The willingness of young Armenians to kill, rob and maim may be comprehended in this light, as a reluctance to allow a cynical world so easily to forget. "Terrorism is theatre," commented an elderly Palestinian villager in the West Bank when the Munich Olympics splashed the claims of the Palestinians across the television screens of the world.

The question arises, however, whether the Armenian terrorists actually represent the interests of the Armenian people. The attackers have received no support from the leadership of the Armenian communities in exile, nor much individual support from individual members of those communities. For example, the group arrested in France last September consisted solely of Lebanese Armenians and did not draw at all from the 150,000 or so French Armenians living in Paris and Marsailles. The most active non-Lebanese Armenian militants come from California, which has provided Suzy Mahseredjian of Canoga Park, captured after a premature bomb explosion in Geneva in 1980 and convicted of extortion from fellow Armenians, and the Sassounian brothers of Pasadena. Harout Sassounian is accused of firebombing the home of Consul Arikan in 1980, and his brother, Harpaig, of murdering Mr. Arikan in January, 1982.

So whose purpose do the Armenian terrorists serve? Claire Sterling has recently shown that Armenians train in the shadowy PLO terrorist camps in Lebanon controlled, ultimately, by the KGB. Not only Armenians and Palestinians, but also members of the IRA, the Italian Red Brigades, the Baader-Meinhof group and the Weathermen have trained together in the general interest of the Kremlin, not as forces consciously supporting the Soviet Union but indirectly, in effect, as potent destabilizing elements within their areas of operation. In 1977, there were 54 guerrilla training camps worldwide, 35 in the USSR and the remainder in Cuba, Libya, Syria and Lebanon. It is no surprise that the ASALA's first press conference in September 1981 took place in Syrian-controlled Beirut in a building owned by a Libyan-backed Lebanese militia group, the Lebanese Arab Army. Ms. Sterling concludes that the Soviet Union merely puts a gun on the table and leaves others to wage a global war by proxy. Whatever the motives of the Armenian terrorists, it is clear that their activities tend to destabilize NATO. They exacerbate sensitive relations between Turkey and Greece and serve to alienate Turkey from the Western alliance. At the very least, the aggrieved Turks complain that Western countries do not protect their diplomats. How sad to see the dreams of the Armenians hijacked by terrorists who blacken their name with every fresh atrocity. The Armenian people will not cheer the next explosion. It will not help them home.

The shaded area encompasses historical Armenia.
Further reading:
H. Morgenthau, "Ambassador Morgenthau's Story" (1919)
D.H. Boyajian, 'Armenia, The Case of Forgotten Genocide' (1972)

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The Impact of the Ethics in Government Act of 1978
by Loretta Santacroce

During the Presidential campaign of 1976, Democratic Party candidate Jimmy Carter promised that if he was elected he would work to restore the diminishing faith of the electorate in the federal government. In the aftermath of the Watergate Scandal, which exposed government corruption at the highest level, there has been much discussion on how to insure government integrity and thereby end the present era of malcontent and disillusionment caused by government corruption. The Ethics in Government Act of 1978, in part a brainchild of Carter himself, is one of the resulting efforts to advance government integrity.
Titles I, II and III of the Act require the filing of public financial disclosure reports by top ranking officials in each of the federal government’s three branches. Title V places certain restrictions on the post-government employment of officials in order to ensure detection of existing conflicts of interest and prevent prospective conflicts from developing in “individuals with past ties to Government and present ties to the private sector.” The remainder of the Act provides for its effective enforcement: Title IV establishes the Office of Government Ethics, “a special unit within the Office of Personnel Management, charged with oversight responsibility for the Federal executive branch ethical standards program.” Title VI amends Title 28 of the United States Code to provide authority and procedures for the appointment of a special prosecutor. Title VII establishes an office of Senate Legal Counsel.

Since October of 1978, when the Ethics in Government Act of 1978 was signed into law, there has been much speculation concerning its political wisdom. At that time discussion consisted largely of predictions for a mass exodus of government personnel before the 1979 effective date of key parts of the Act. Subsequently, commentators predicted that government would be unable to recruit competent personnel to replace those leaving government because of increasingly burdensome duties and constraints on those employees covered under the Act. Commentators also anticipated a difficult transition out of government and into the private sector for individuals who had been employed by government at any time after the Act took effect.

In consideration of these criticisms, this article will explore the political wisdom of the Ethics in Government Act of 1978, as amended, by comparing the duties and constraints imposed by the Act with those which existed previously. It will also examine the magnitude of the Act’s adverse impact on Government’s ability to attract and retain able and experienced personnel. The Act has had the greatest impact on the executive branch and its administrative law program. This article is therefore limited in scope.

EXECUTIVE BRANCH FINANCIAL DISCLOSURE

As early as 1863, the United States Code required Executive branch officers and employees to disclose all financial interest in matters in which they participated personally and substantially as government officers or employees. In 1965, by Executive Order, President Lyndon Johnson established ethical standards and required confidential financial disclosure statements from officers and designated employees of the executive branch. Executive Order No. 11222 was issued in furtherance of the following policy statement: “When government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.”

To give form to the provisions of the Order, Johnson sanctioned the Civil Service Commission to prescribe regulations pursuant to it. In March of 1975, with Executive Order No. 11222 still in effect, President Gerald Ford required White House staff members who were paid at an annual salary level of GS-13 or above to disclose certain financial information to the Office of Counsel to the President. During the Carter Administration, all White House employees were required to disclose their financial interests to the White House Counsel. Carter appointees subject to Senate confirmation were also required to file a public statement of their financial interests. When the current Ethics Act was first proposed in 1977, it contained no novel ideas for financial disclosure, but merely marked an escalation of past efforts to secure public confidence in Federal Government through disclosure of financial interest by Government officials and high level employees.

The pre-Ethics Act program for financial disclosure had proven inadequate in several respects. First, disclosure requirements varied somewhat from agency to agency and from branch to branch within the Federal system. Second, some high level officials, including the President and the Vice-President, were not required to disclose. Third, the CSC had given little priority to Johnson’s 1965 Executive Order. Procedures to ensure collection, review and control of disclosure statements were left mostly to the individual agencies, and the procedures were ineffectual. The Civil Service Commission rarely guided the agencies, and interpretative rulings on the promulgated regulations were rare. With no mandate for directing individual agency enforcement of the regulations, and no central supervisory authority, the Civil Service Commission was powerless to prosecute the frequent violations of disclosure rules. The 1978 Act ought, therefore, to eliminate inconsistencies in the disclosure system and provide for strong, non-discriminatory enforcement through the newly instituted Office of Government Ethics.

From the perspective of the individual required to disclose, the most objectionable change in the nature of disclosure in the Ethics in Government Act of 1978 has been the requirement that disclosure statements be placed on the public record. Titles I, II and III of the Act provide that within 15 calendar days after the report is filed, it will be made available upon request to any person, provided that person state his name, occupation and address, and the name and address of any other person or organization on whose behalf the inspection or copy is requested. Publication of the private interests of government officials and employees has been characterized as a burdensome and unnecessary invasion of privacy. Bob Flynn, Chief of Agency Relations for the Office of Government Ethics, relates his knowledge of one particular individual who declined a nomination for a high level Executive branch position because he did not want his children to have access to statements of his financial holdings. Fred Fielding, White House Counsel to President Reagan, has listened recently to the concerns of prospective Reagan appointees “worried about disclosing the names of their partners and anxious about making their children targets for kidnappers.”

But the advantages of disclosure have been overlooked. Bob Flynn points out that public financial disclosure is like-
ly to bring an end to what is called the "collateral issue syndrome." Frequently, says Flynn, when a high level Government official becomes unpopular, opponents begin a political assault on him by unearthing evidence of possible conflicts of interest. By filing a record of one's financial interests, and having it subsequently reviewed and approved by an agency's own ethics officer or the Office of Government Ethics, the absence of a conflict of interest has already been determined. Any charge of conflict of interest is, therefore, without merit.

Flynn also believes that at least in the case of Presidential appointees requiring Senate confirmation, the public financial form reveals little more than that which is revealed at the appointee's confirmation hearing. By the time a Senate Committee has made a recommendation to the full Senate on an appointee, every aspect of his financial status has been scrutinized. For the Presidential appointee subject to confirmation by the Senate, public financial disclosure is simply re-publication.

Fears of widespread dissemination of an official's financial interests are probably unfounded. First, the Act expressly prohibits use of any financial disclosure report: "(A) for any unlawful purpose; (B) for any commercial purpose other than by news and communications media for dissemination to the general public; (C) for determining or establishing the credit rating of an individual; or (D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose." Moreover, the Act grants the Attorney General of the United States the power to bring a civil action and impose a penalty not in excess of $5000 against one who obtains or uses a report for a prohibited purpose. This power provides a strong deterrent for abuse of disclosure information. Finally, it is the right of every reporting individual to obtain the name of any person who has requested his disclosure report. A file of all requests is retained by the recipient agency, thereby limiting the likelihood that reports will be used for illegal or clandestine purposes.

In fact, there have been few requests for access to the disclosure statements. Financial disclosure reports are in such small public demand that the Ethics in Government Act's oversight hearings, scheduled for early 1982, will probably include a discussion on whether resources should be allocated to keep open these rarely examined public files.

In the opinion of Clendon H. Lee Jr., Staff Counsel at the Senate Select Committee on Ethics, the numerous protests among Executive and Judicial branch officials over the requirements of public disclosure are little more than a common reaction to a new and sometimes inconvenient responsibility. On Capitol Hill, where public financial disclosure has been in force for several years now, the protesting has subsided. In Lee's opinion, it is simply a matter of time before the other branches become acclimated to public financial disclosure.

In the interim, the case of Duplantier v. United States illustrates that the strongest objections to public financial disclosure have come from the judiciary. Adrian Duplantier, an Article III Federal judge in Louisiana, filed a class action suit in 1979 challenging the provision in the Ethics in Government Act of 1978 requiring public financial disclosure by Federal judges. Duplantier charged that Title III of the Act violates the Constitution on several counts: (1) that the Act is contrary to the doctrine of separation of powers because it intrudes on the independent decisional freedom of United States judges; (2) that the imposition of civil penalties on judges who fail to file a violation of the Article III prohibition against diminution of a judge's compensation during his tenure; (3) that the Act violates the Due Process and Equal Protection clauses of the Fifth Amendment both by reason of being irrational and arbitrary, and by placing stricter duties on judges, who are required to file disclosure statements with two different offices, than on other federal officials regulated by the Act; (4) that the Act, in requiring disclosure at all, impermissibly intrudes into the sphere of family life constitutionally protected by the rights of privacy under the case of Whalen v. Roe.

The Fifth Circuit Court of Appeals heard the case on the merits despite the absence of certain interested parties over which the Court lacked personal jurisdiction. In passing on the constitutionality of the Act, the Court rejected each of Duplantier's arguments and so put to rest any further contentions that the Act fails to pass constitutional muster. The Court cited Plantes v. Gonzalez for the proposition that laws requiring financial disclosure by public officials are generally valid. Next, the Court found that the overriding need to promote public confidence in government and deter conflicts of interest gave Congress the power to legislate in furtherance of that need, when only a slight interference with the autonomy of the judiciary resulted. For the same reasons, the Court held that the Act did not violate either the Due Process or the Equal Protection Clause. The Court further held that penalties which may be assessed against a judge for noncompliance with the financial disclosure provisions of the Act do not constitute an Article III Compensation Clause violation, and the judge's legitimate expectations of privacy, like those of elected officials, is necessarily lessened by his assumption of duties as a public servant. By so holding, the Court resolved all doubt as to the legality of the Act, remaining questions of political wisdom notwithstanding.

LIMITATIONS ON POST-GOVERNMENT EMPLOYMENT

If the public financial disclosure provisions of the Ethics in Government Act of 1978 are criticized by present and future federal officials who are or may be subject to them, it is because the provisions are sometimes burdensome, and may constitute an invasion of privacy. For the skeptic who feels that the American public will not come to believe that Government is less corrupt merely because the private finances of public officials are a matter of public record, the burdens of public disclosure are without countervailing benefit. But it is difficult to imagine more than a few instances of competent individuals actually declining positions in public service because of a prere-
Life After Law School
by Michael R. Schoenenberger

Dean Michael Schoenenberger actively assists Marshall-Wythe students in job searches.

Is there life after law school? For many third-years, this simple question takes on a seriousness that it never had in many of those bull-sessions in the student lounge. For most of the class, the answer is simple. Jobs will be waiting for them after graduation. In fact, our surveys of the last two graduating classes show almost 70% of the class is recruited before graduation with the remainder of the class finding their jobs after taking the summer bar exam.

Many of our alumni find it hard to believe that so many of our students are recruited before graduation. Many of them contact the placement office in the first few weeks after graduation looking for new associates and are sometimes frustrated by the lack of job candidates. Much of this confusion can be traced to press reports on the status of the job market for new lawyers. In the early 1970's, a number of researchers took a look at the sudden rise of law school enrollments and concluded the market for new lawyers would be flooded by the end of the decade. The legal press and various professional organizations expressed grave concern for the political effect this flood of new lawyers would have on lawyers' incomes and level of employment.

Despite the dire warnings, however, the market for legal services continued to expand and the demand managed to keep up with the supply. In the latest figures released by the National Association for Law Placement, more than 94% of the law graduates eligible for employment had found a position within 9 months of graduation. Our experience at Marshall-Wythe closely tracks the national trend and these figures have remained stable over the last five years.

On-Campus Recruiting

While recruiting at Marshall-Wythe has followed the national experience, it is important to understand how the market has grown and developed. With the increased competition for new recruits, many law firms and other legal employers have come to recognize that recruiting requires a more businesslike approach than in times past. The most striking change involves the way many employers are rethinking and revising their entire recruiting process. In order to sell themselves in a competitive, wide-open market, many employers are marketing themselves to our students in a very sophisticated way. For example, we have witnessed a major change in the way smaller firms recruit on-campus. In the past, only the larger firms recruited our second-year students offering them employment in their summer programs with the hope of attracting them into the firm well in advance of their graduation. Now we find the smaller firms following the techniques of their larger brethren. They are developing their summer programs and making offers to our second-years. In this way, they find that they can compete with the larger firms and recruit on their own terms. So far, this development has benefited the recruiter and the recruit. It allows the student to take a good look at a potential employer over the course of the summer while at the same time, enabling the employer to avoid a costly employment mistake.

But for every move in the recruiting wars, there is always a counter move designed to beat the competition. The larger firms are now moving to set earlier on-campus interview dates and even asking about the possibility of interviewing first-year students in the late spring. All of this activity is calculated to get the jump on the competition. As a result, we have experienced a more than 40% increase in on-campus interviews at Marshall-Wythe with more than 100 employers conducting in excess of 2100 interviews in the last twelve months.

Off-Campus Programs

In addition to the on-campus programs, Marshall-Wythe has joined with 10 other law schools in the South in sponsoring a special recruiting conference called the Southeastern Law Placement Consortium. This conference meets on one weekend in the fall inviting students from each of the member schools to interview with employers from all areas of the South. Firms from more than 10 states ranging from Virginia to Texas come to recruit at the conference. In the weekend program conducted last fall, approximately 150 employer representatives from more than 80 firms conducted in excess of 3200 interviews at the conference.

Overall, this increase in recruiting activity has given our students a broader perspective on the market opening new opportunities for career development. In some cases, it has
resulted in a number of summer offers with a few students opting to split their summer between two employers.

Areas of Employment

Knowing jobs are available, still does not tell us where the jobs are. While it is hard to generalize about the market, it is possible to track some of the traditional patterns followed by many students entering the profession. In the last two years, approximately half of our graduates entered the private sector ranging from solo practice to practice with some of the largest firms in the country. In addition, almost 15% accepted judicial clerkships, 11.5% entered government service, 7.1% took corporate positions, 5.7% entered the military JAGC, 5% went into public service positions, and 4.3% went on for advanced study. While the statistics for the various employment categories remained rather stable over the past few years, the percentage of those entering government service experienced a marked decline. The areas of greatest growth were in private practice, judicial clerkships, and the corporate positions.

Perhaps our most important achievement was scored in the acceptance of a clerkship on the U.S. Supreme Court by one of our 1981 graduates, Jane Vehko. It was first and foremost a great personal triumph with the recognition given her talent by Supreme Court Justice Sandra D. O'Connor who met Jane while participating in a judicial conference at Marshall-Wythe in 1980. It was here that Justice O'Connor got a first hand look at Marshall-Wythe which underscores the interdependence of each element of our educational program. After all, our reputation is created by the work and contributions of our entire legal community including our students, faculty and alumni.

Outlook for the Future

Employment of lawyers grew very rapidly over the decade of the 1970's. Faster-than-average growth is expected to continue through the 1980's as increased population, business activity and government regulation helps sustain the demand for new attorneys. While the strong demand will continue, there will also be a large supply of new graduates entering the market each year thereby creating keen competition for the available jobs. Employers will continue to be very selective in hiring new lawyers.

In addition, many forecasters are predicting a subtle shift in the kind of entry level positions expected to open up. Some observers claim the growth in large private firms may peak in the near future. They say that some of the larger firms may be caught between the anvil and hammer of rapidly mounting costs and the inability to pass those costs on to clients. On the other hand, they are predicting some positive growth factors in other areas of the private sector.

Corporate legal departments are one area of the market slated for impressive growth in the next few years. To offset expenses, corporations are resorting more and more to in-house legal services. Approximately 15 percent of all lawyers now practice in-house — a number that has quadrupled over the past two decades. In-house legal services generally cost one-half to one-third less than comparable outside counsel. The economics alone ensure the continued growth of in-house counsel.

In the public sector, there is a great deal of gloom. Rising deficits are impacting on state and federal budgets. In an effort to control costs, many government units impose hiring freezes as their first line of defense resulting in a very tight market at all levels of government. Of course, a turnaround in the general economy could change this situation overnight.

One bright spot in the private sector may be found in the practice of small and medium-sized firms located in the smaller and medium-sized cities. Many of the new lawyers who graduated in the 1970's flocked to the large urban areas overlooking the smaller cities and towns. The ratio of lawyers to possible clients still varies widely in different parts of the country. For example, the people-per-lawyer ratio ranges from about 1,100-1 in West Virginia to 400-1 in New York. This opens up some excellent opportunities for those who would rather go to a smaller city.

All of these trends are emerging in the recruiting process at the law school. More and more we see smaller growing firms from smaller cities with very active economies coming to recruit. Many times, they will hire two or three students with each visit. In the corporate market, we have encountered a similar trend. In the past, corporations recruited only experienced attorneys and usually avoided recruiting on the law school campus. Today, we have Fortune 500 companies as well as the smaller Virginia-based companies visiting our campus.

Although the overall market for Marshall-Wythe graduates continues to improve, each student will have to remain aware of the change taking place in an ever-shifting market place. In the final analysis, however, it will be the reputation of its students, alumni and faculty that will carry Marshall-Wythe into the future.

Michael R. Schoenenberger is the Associate Dean of Placement at the Marshall-Wythe School of Law. Mr. Schoenenberger is an undergraduate alumnus of William and Mary and received his J.D. from the University of North Carolina in 1971. From 1971-1977, he served as staff counsel on a Congressional committee and since 1977, has been on the staff of the College. He is also responsible for alumni affairs and development at Marshall-Wythe.
Ethics — continued from page 13

A quasire obligation to disclose personal financial interests. Similar assumptions cannot be made about Title V’s post-employm

Title V, as amended by PL. 96-28 in 1979 imposes on former Government employees:

(1) A lifetime prohibition against representing anyone on a particular matter which the former government employee 'personally and substantially' handled while with the government.
(2) A two year prohibition against representing anyone on a particular matter for which the former government employee had 'official responsibility' while with the government. 'Official responsibility' is defined by 18 U.S.C. 202(b).
(3) A two year ban on assisting in representing, in person, anyone at the proceeding involving a particular matter which the former employee had handled personally and substantially while with the government, and
(4) A one year ban on oral or written attempts to influence the former employee's agency on behalf of anyone on any matter whatsoever.

Title V is an attempt to slow down the revolving door by placing limits on the activity of one who returns to the private sector. Implemented to curb the use of Government position and influence for undue advantage and personal gain, it prevents persons returning to the private sector from arousing public suspicion of impropriety.

In a 1978 message to Congress endorsing the Ethics Act, President Carter noted that its post-government employment restrictions reflected a balance: (While) 'they do not place unfair restrictions on the jobs former government officials may choose... they will prevent the misuse of influence acquired through public service.' Many since have questioned the accuracy of Carter's 1978 statement.

When passed in 1978, Title V was viewed as so restrictive that numerous high level officials spoke of leaving federal employment before its July 1, 1979 effective date. Hale Champion, Assistant Secretary of HEW, and several of his subordinates, threatened resignation to avoid the probability that upon leaving government after July 1, 1979, they would "have to go and pump gas or do something else for a year before return-ing to their colleges and universities."

Attorney Griffin Bell, faced with the prospect of the two year prohibition against representing anyone on a particular matter for which he has "substantial responsibility" as the nation's chief law enforcement officer, thought the ban so broad that "it would probably be better for me to go to a monastery, one where I couldn't even speak."

Roger Markle, former Director of the Department of the Interior's Bureau of Mines did leave Federal employment in apprehension of Title V restrictions. In early 1979, in his letter of resignation to President Carter, he stated: "The restrictions imposed are all-encompassing and presume that virtually any direct or indirect post-Government employment with a previous Government employer is, ip-so facto, a conflict of interest subject to criminal prosecution. My ability to pursue private sector employment opportunities reasonably equivalent to that held by me prior to accepting the appointment of director are substantially impaired by the restrictions."

Citing the concerns of individuals like Champion, Bell, and Markle, journalists foretold an imminent threat to government resulting from a mass exodus, a "brain drain" in Washington. But the anticipated exodus did not materialize. On July 7, 1979, the National Journal published a list of forty high ranking officials in the federal bureaucracy who had returned to the private sector in the months before Title V took effect, but was unable to attribute many of those departures to the post-employment restrictions. More likely, theorized Josh Fitzhugh of the National Journal, Title V simply hastened the inevitable departure of many Government employees already contemplating a return to the private sector. Frequently, those in high level government positions are private sector super-powers who have made their name and fortunes already. They join government to perform a public service for a few years, intending from the start to limit their stay. Many of these individuals, says Fitzhugh, simply left their government posts a few months early in 1979 to avoid all complications presented by the Act.

Galen Powers, former Assistant General Counsel for Health Care Financing at HEW, gave reasons for leaving HEW prior to Title V's effective date which support Fitzhugh's theory: "(Planning to leave soon, my) thought was that if I didn't want to continue my government career... I better get out before the Act began to effect me." Granting that there was an increase in the number of departures from high level government positions just prior to July 1, 1979, the departures are evidence of something less than a mass exodus triggered by highly burdensome post-employment restrictions.

Probably many others who contemplated leaving Government service when the Ethics in Government Act went into effect reconsidered following the passage of two amendments to the 1978 Act in June 1979. The amendment altering the Act's original post-government employment provisions was P.L. 96-28. It exempted from the one year "no contact" provision former Federal officials who became employed by state and local governments, colleges and universities, and medical research and treatment facilities. House Majority Whip John Brademas explained the need for this exemption: "In trying to write a law to take care of generals who go from the Pentagon to the aerospace or defense industry, we shot down educators and scientists going back to their former careers."

The same amendment altered the two year "assisting in representing" prohibition. As amended, it now applies only to those matters in which government employee had participated both "personally" and "substantially" as a government employee. More significantly, it provides that only in-person "assisting in representing" is prohibited by the Act. Thus, it became lawful for a former agency employee to advise a colleague on how to deal with his former government employer so long as he made no personal appearance before the agency during the two year hiatus period.

The Office of Government Ethics attributes much of the
and the continued aversion to the Act to mis-

1979 panic and the continued aversion to the Act to mis-

information concerning its scope. When the actual limita-

tion imposed by the Act are accurately detailed by the Of-

fice of Government Ethics, the individual requesting in-

formation on the Act is less concerned. Bob Flynn in the Of-

fice of Government Ethics is quick to point out that in

large the restrictions imposed by Title V duplicate conflict of interest and revolving door disciplinary rules in the American Bar Association's Code of Professional Responsibility. The Government attorney, as a member of the Bar, is bound by these same limitations from the start of his legal career. DR9-101(B) of the ABA Code of Professional Responsibility provides that a "lawyer shall at accept private employment in a matter in which he had substantial responsibility while he was a public employee." Federal case law is filled with successful motions to disqualify attorneys under DR9-101(B) from cases substantially related to matters they handled as government attorneys. In the recent case of Armstrong v. McAlpin, the Second Circuit Court of Appeals rules that a law firm may be disqualified from any case on which a partner or associate worked during employ with the government, notwithstanding the use of screening devices to exclude the former government employee from any contact with the case. With or without the Ethics in Government Act of 1978, there are stringent limitations on an attorney's movement from public to private employment.

Bob Flynn also points to the Office of Government Ethics's advisory opinions as support for the assertion that Title V is not unduly burdensome. In its short life, Office of Government Ethics has received a number of ruling requests from government officials leaving to enter the private sector. They describe their duties with government and the position they wish to assume in the private sector, and ask the Office to rule on the propriety of the transition. The Office of Government Ethics most often approves the transition plan. At worst, a former government employee or officer may have to let his private sector subordinate handle a decision on a matter substantially related to a matter he handled as a public servant.

The change in Presidential administrations in 1980 marks the first time a complete transition in the Executive branch has occurred since the Ethics in Government Act became law in 1978. A view of where the Carter appointees who are subject to the Act have gone since leaving the government is helpful to a determination of whether the Act places undue limitations on post-government employment. In fact, it appears that many members of the Carter Administration are now more employable than they were four years ago. The National Law Journal offers some insights:

"Former Labor Secretary Ray Marshall, as expected, has joined the Kamber Group, a Washington labor and political consulting firm where some other members of the former Administration are working." "Former White House chief of staff Jack H. Watson Jr. probably will return to Atlanta; he's being courted by the law firm of King & Spalding and may run for mayor of the city or governor of Georgia." "June McGrew, general counsel of the Housing and Urban Development Department, is returning to the Washington law firm of Steptoe and Johnson as a part-

And as Bob Flynn observes, many of the Carter people are staying in Washington. They would not, if they could not make a living there.

This paper has so far discussed what Titles I, II, III and V of the Ethics in Government Act of 1978 require of high level Federal officers and employees, both explicitly and by implication. It has examined whether those requirements have proved to be unduly burdensome and politically unwise. There remains, however, one element which has not been factored into the determination of whether the Federal Government is and will continue to be adversely affected by the requirements of the Act in its search for competent public servants. That element is that individuals have always been willing to make significant sacrifices to join the highest echelon in the Federal Government. Charles G. Wilson, president of General Motors, divested himself of all his G.M. stock before the Senate would confirm him as President Eisenhower's Secretary of Defense. Robert S. McNamara, president of the Ford Motor Company, similarly sold all his Ford stock before he could serve as Defense Secretary in the Kennedy Administration. Richard Nixon's Deputy Secretary of Defense, David Packwood, gave $500,000,000 worth of Hewlett-Packard Company stock to charity in order to get confirmation.

Individuals have also accepted tremendous cuts in salary in order to assume Government positions. Joseph Califano left his firm of Williams, Connolly, and Califano, where he earned $550,000 a year, to earn $66,000 as Secretary of HEW in the Carter Administration. Cyrus R. Vance left a $250,000 job as partner in the firm of Simpson, Thatcher, and Bartlett to become President Carter's Secretary of State for $66,000 a year.

New York Times writer David E. Rosenbaum reports that three years ago Fortune magazine surveyed top ranking business executives on the question of whether they would be willing to serve in government despite the financial sacrifice and loss of privacy. Three out of four said they would.

Whether the motive is a desire to serve the public, an yearning for national recognition, or an opportunity to wield real power, persons who aspire to high federal office are not easily deterred. As Caspar Weinberger, who left an excellent position as vice president of Bechtel to become Secretary of Defense under President Reagan, commented, "I have found it very difficult to say no to Presidents. It's always an automatic acceptance." For most individuals considering key Government positions regulated by the Ethics in Government Act of 1978, the duties and restraints it imposes will continue to be tolerated, and quality personnel will be available for Government recruitment.
Clinical Education: Its Value in a Law School Curriculum

by Robert F. Roach

Nowadays, clinical programs are maturing into an accepted part of the law school curriculum. Of course, clinical programs were not always recognized for their educational value. Their role has developed slowly over many years.

In this article, I outline the goals and purposes of clinical legal education. In order to obtain a true appreciation of clinical programs, however, we must first look at the development of the traditional casebook method of legal education as well.

At its beginning, American legal education was mainly an apprenticeship system. Apprentice lawyers worked in law offices and learned by observing the preparation of the legal system on a daily basis. Because of the needs of an agricultural America, the offices where these apprentices learned were small and generalized. However, as American business grew, often times its specialized needs could not be met by the small general practice. Thus, larger firms developed and to fill them, law schools, with their specialized curricula, grew as well.

As they developed in the early and mid-nineteenth century, law schools generally taught their students through the use of substantive text books and lectures. In the late nineteenth century, this method of teaching was changed by Christopher Columbus Langdell, a Harvard law teacher. He introduced the use of appellate cases (the Harvard or casebook method) as a legal teaching tool.

To fully appreciate the casebook method of legal teaching, something must be known of its founding father. During his own legal training, Langdell was almost constantly in the law library and for several years served as law librarian. While he practiced in New York for sixteen years, he was rarely known to try a case. Langdell spent most of his time in the New York Law Institute law library or inaccessibly secluded in his office. He worked mostly for other lawyers, preparing briefs and other legal documents for them. Because Langdell's legal experience was devoid of clients, judges, juries and other real life factors, his method of teaching was equally devoid of real life.

Accordingly, law became an abstract science. After the introduction of the Langdell method, the Harvard Law School claimed that it was an intellectual disadvantage for a law teacher to have practiced law for any length of time because they would lose the scientific intellect. Harvard bragged that its faculty consisted mostly of men who never had been at the bar or on the bench.

The Langdell method of teaching, however, was quite acceptable to large law firms and corporations. Unencumbered by clients and complex factual situations, students could concentrate on learning basic analytical skills, such as issue recognition, and writing and research skills. The large firms could take the time to teach any other skills needed for their practice.

Law school faculty and administration were generally happy with the system as well. Law teachers could concentrate on broad legal issues and avoid many of the difficult and mundane aspects of the practice of law. The system also pleased law school administration because the large student-to-faculty ratio permitted by the Langdell method was economically productive.

Finally, students were often pleased with this system because it held the potential for entering the affluent and influential world of large law firms and corporations.

As a complete legal education system, however, the
Langdell casebook method has significant shortcomings. Initially, it presents a somewhat unrealistic approach to legal decision making. The Langdell method is based on ex post facto appellate opinions. The opinions are judges' censored expositions of what induced them to arrive at a decision they have already made. Invariably, these opinions fail to include many of the important facts which may have prompted the trial judges or juries to reach their verdict. Moreover, appellate opinions cannot reflect many of the non-rational factors which make up the “atmosphere” of a case and which are often a primary influence to the trial judge or jury. Thus, the Langdell method cannot train students to predict, as practicing attorneys, the legal consequences of their clients' actions or desired actions with accuracy.

Additionally, while the Langdell method may be useful in training future associates for large law firms, it does not provide students with the basic skills needed for many legal occupations they may wish to enter. For example, the Langdell method cannot be adequately used to teach client counseling, legal drafting, developing facts and case strategy, negotiating and other skills.

In response to these criticisms, a number of changes in law school curricula were recommended. Included in these recommendations was a proposal for clinical education. Appeals for clinical education arose as early as the 1930's and a number of schools even developed student law clinics. However, the major impetus for change did not occur until the 1960's. During that time period many American institutions came under careful scrutiny. Major changes were demanded and made. The American law school did not escape this wave of change. Students began to recognize that other alternatives existed besides large law firms and sought the training necessary for these careers. Even the bastions of the legal establishment began to recognize the need for change. In a speech before the American Bar Association meeting in Dallas on August 10, 1969, Chief Justice Warren Burger stated:

"The shortcoming of today's law graduate lies not in a deficient knowledge of the law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made. It is a rare law graduate, for example, who knows how to ask questions—simple, single questions, one at a time, in order to develop facts in evidence either in interviewing a witness or examining him in court. And a lawyer who cannot do that cannot perform properly—in or out of court."

In response to these demands and criticisms, most schools began to develop clinical courses. A review of the educational goals and purposes of clinical education shows how it makes up for many of the deficiencies of the Langdell method. The educational goals clinical programs may serve may be separated into five categories: improving judgment and analysis skills; developing technical lawyering skills; increasing knowledge of substantive law; increasing student awareness of professional ethics and responsibilities; and providing learning methodology.

As with the Langdell method, clinical programs seek to develop the student’s capacity for legal analysis, judgment and decision making. In clinical programs, however, skills in issue recognition and analysis and in strategy, tactics and decision making are challenged and improved in a fashion which is quite different from the classroom. Rather than censored appellate opinions, students are presented with clients, complex factual situations and real life problems. Thus, the cases which they must analyze are more complete than casebook cases. Students must develop and exercise the type of judgment and analysis skills they will need in actual practice. Moreover, the students' ability in judgment and analysis may be improved when, in a clinical program, they are presented with the integrated, nature of the law and they are forced to synthesize the subjects they have learned in more traditional classroom courses.

Clinical education also exposes the student to a wide variety of technical skills not covered in ordinary classroom courses. They include client interviewing, client counseling, fact investigating, negotiating, trial and appellate advocacy. Thus, clinical education can help prepare students for a wider variety of legal occupations.

Clinical programs may also allow the students to develop a more detailed understanding of substantive law. For example, students who work in a public defender's or prosecutor's office as part of a clinical program can expand their knowledge of criminal law. Also, clinical courses, in effect, may expand a law school's substantive law curriculum, by exposing students to areas of substantive law not otherwise offered in the classroom. Moreover, the interdisciplinary and issue oriented approach to substantive law often encountered in clinical courses may be very stimulating to the students.

Clinical programs also offer an excellent opportunity for learning legal ethics and professional responsibility. While law students are now required to take a course in professional responsibility, the real life situations which arise in clinical programs present problems in ethics and responsibility which cannot be duplicated equally in the classroom. Additionally, the students can actually observe the role of the legal profession in society.

Transcending, or perhaps synthesizing, the four categories listed above is a fifth goal. Generally, as we gain in years of experience we increase in our ability as attorneys.

Clinical education is unique in legal education because it provides law teachers the opportunity to give the students a methodology for learning from experience. Despite the positive objectives of clinical education, it has not been uniformly accepted. To the contrary, it has been the subject of a variety of criticisms. Initially, there are those members of the law school faculty who perceive clinical education as unworthy of a place in a graduate school, academic environment. Thus, it is not uncommon to hear such comments as "We're not trade schools; we're centers of learning" or "Our task is to teach students to think like lawyers."

This academic elitism is reflected in a second criticism. Clinical programs traditionally have not led to publishable scholarly work. For faculty who supervise clinical programs, tenure and status are threatened in an academic community which prizes scholarly research and writing.
Third, some members of law school faculty and administration fail to see any educational value in clinical programs. Rather, they see clinical courses as merely an early opportunity for students to escape the classroom.

Finally, there is also a concern of law school administrations over the costs of clinical programs. Because of the low student-to-faculty ratio in clinical courses, they are often the most expensive courses in a law school's curriculum.

Of course, some criticism of clinical programs is quite valid. Most often, they have failed where proper emphasis and attention has not been placed on the educational purposes or goals of the program. As noted above, there is a wide variety of educational goals which a clinical course may serve. Yet, it should be readily apparent that no clinical course should attempt to achieve all of these goals. Some clinical programs have failed because they have been too aggressive and attempted to achieve too much.

More often, however, failure occurs because program administrators have failed to carefully plan for educational goals and provide adequate supervision. This has most often occurred in "farm out" programs where students are placed in private firms or government agencies. Generally, in these programs students have not been supervised by faculty but have been supervised by cooperating attorneys who work for the firm or agency. The cooperating attorney perceives the student as an unpaid employee. Unfortunately, the role of the employee and the role of the student are not equivalent. Therefore, in many such programs, economic, and not educational, objectives have been achieved. Moreover, in many of the programs, particularly in legal aid or defender placements, the cooperating attorneys are only recent graduates themselves and do not have the experience necessary to supervise the students adequately.

Fortunately, many of the difficulties encountered with clinical programs have been corrected. They have gone through a maturing process. Numerous articles have been written on clinical programs which have been successful and on those which have not been successful. Additionally, there is an increasing volume of theoretical material both on methodology for running clinical programs and on substantive technical skills such as client interviewing and counseling and negotiation. Thus, clinical teachers have an increasing body of literature to assist them in planning and administering clinical courses.

Overall, despite the difficulties encountered in its early development, clinical programs offer excellent opportunities for law students. When properly planned and supported, clinical courses can effectively overcome many shortcomings of traditional legal education.

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The Marshall-Wythe Mental Health Law Project

The histories of this law school and Eastern State mental hospital have been linked since their creations. George Wythe, for whom this law school is named and who was the school's and country's first law professor, sat on the hospital's original board of directors. Like the law school, Eastern State was the first institution of its kind on this continent—a public mental institution. It stood on a site just a stone's throw from the law school's present location, behind the modern courthouse.

If nothing else, this link serves to remind us of the connection between law and the treatment of people considered to be mentally ill or insane. The law may deprive such people of their liberty, force them to undergo sometimes hazardous treatments and label them as "dangerous" or "mentally ill". Since its creation, Eastern State has treated its patients with lobotomies, sterilization, electroshock and forced drug ingestion. Although most of these practices have ceased, problems remain. Furthermore, as a result of their medical confinement, voluntary or involuntary, patients may be cut off from access to basic legal services not directly connected to their hospitalization, e.g., landlord-tenant and domestic relations problems.
Clearly, a need for legal services exists at institutions like Eastern State. The Marshall-Wythe Mental Health Law Project seeks, with limited resources, to do what it can to fill this need. The Project relies on the part-time services of a local legal aid attorney and law students from the Marshall-Wythe School of Law, who receive one credit per semester for their work.

Students, in consultation with the legal aid attorney, Jim Hanagan, advise patients concerning their legal problems. In addition, the Project has handled several commitment appeals and two federal court actions aimed at expanding the rights of mental patients.

Students involved in the Project have encountered several problem areas in their work at Eastern State. First, because commitment hearings are held within a short period of time following initial detention (48 hours) and because of the low compensation received by the attorneys who handle such hearings, some patients receive inadequate protection of their due process rights at the time of their commitment to the facility.

Second, involuntary patients may be medicated without their consent. The medications involved, called psychotropics, lead to troublesome side effects some of which are serious and irreversible. This, in turn, raises questions concerning the types of due process procedures patients deserve before they are involuntarily medicated, a question expected to be before the United States Supreme Court this year.

Third, is the atmosphere of institutions like Eastern State. There is constant boredom and occasional violence. Limited resources at such institutions prevent staff from administering much therapy, beyond the use of behavior-controlling medication.

Fourth, there is a lack of available alternatives to institutionalization. This shortage serves to undermine the statutory requirement that people not be committed when a "less restrictive alternative" to confinement exists.

Finally, there are the ethical issues raised by representation of mentally disabled persons. The attorney's perceptions of his client's best interests and the client's own perceptions will often differ. The experience may test the student's devotion to the principle that zealous advocacy for the client is the attorney's primary duty. Such advocacy may be especially important in the institutional context where the student/attorney may be the only "professional" to pay serious attention to the wishes of the client.

Students may also take other perceptions away from work with the Project. The dilution of personal stereotypes concerning people labelled as "mentally ill" may help the future attorney to serve that population in his own practice. Each member of the Marshall-Wythe Mental Health Law Project, through very real and very personal experience, may come to appreciate the limits of legal solutions to problems of human suffering and oppression.

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**Crossing the Bar**

By Larry David Willis

February 24, 1982 was the last time that a student could take the Virginia Bar Examination without having completed all requirements for graduation from law school. Although there are some good reasons for the new policy, many will miss the opportunity to get a head start on their paychecks.

The change comes in answer to long-standing law school criticism. Many third-year law students were considered liabilities in Spring courses if they were taking the February exam. The first half of the semester was spent studying for the bar, the second half trying to catch-up and study for class exams. As a result, large numbers of third-years did not read daily assignments or contribute in class. Professors complained and the pressure eventually reached the Bar Examiners.

An undocumented, but highly logical second reason for the policy change involves money. As more and more law schools graduate ever-increasing numbers of eager young lawyers, there is real economic benefit to those already in practice to delay the entry of more competition. This brings to mind the current pass rate for the Virginia Bar Examination of 52% (more on that later).

**THE ORDEAL** — The court system, we have learned in law school, is a civilized replacement for the medieval trial by ordeal. Civilization, it seems, has not yet reached the licensing of attorneys in Virginia.

Early birds started studying for the February bar in October, a full five months before the exam was given. By writing a check for $375.00, a student received a brown book with BARIBRI (the name of the local review course) on the cover alongside "VIRGINIA", and the right to listen to tapes twice a week. These sessions were a bonus for those who wanted an extra dose of review material. Actual studying during this time was limited to a few "early nurds".

January 2, 1982, the real Bar review course began. Class was held all day, every day until law school vacation was over. The scheduling then went to Monday and Wednesday nights, all day Saturday and Sunday. During this time, the remainder of the books were issued, lectures became videotape or live, studying became a way of life, and people realized how much or how little they had learned in the last two and one-half years.

The condensation process of learning the law is amaz-
ing. After two and a half years of preparation, students take two months to learn enough to get them through two days of testing. Whole courses are reduced to a few pages of general concepts. The BAR/BRI progression goes like this: Multistate and Virginia big books, Multistate test book, Virginia questions and answers, and the Conviser Mini-Review. In the big books a course might take from 30-60 pages, there might be as many as 100 sample bar exam questions on it, and the mini-review would cover the material in five pages. It’s a lot of condensation, but someone has to do it.

COMRADERIE — A fraternity of sorts develops out of those studying for the bar. It would be more surprising if a group of students, all carrying the same brown books with BAR/BRI emblazoned on the cover, all attending the same lectures ad infinitum, and all fighting to retain their sanity, did not feel a close kinship to one another. This comraderie is probably greater for the February than the July bar for several reasons. First, there are fewer people taking the early bar so it is easier to identify with the others in the course. Second, Marshall-Wythe students have to take the February review in Williamsburg so they can pretend to attend classes. By June or July, bar students could be in Richmond, Charlottesville, Washington, D.C. or who knows where. Third, BAR/BRI readers have to take extra breaks. The combination of tension, overstudy and desperation create a condition which can only be treated by sitting in the lounge or lobby for extended periods of discussing anything not law-related. (Bahamas, orange-peels, football, basketball, men, women, etc.).

LINGO — With the bar exam, like any new endeavor, comes a new vocabulary. Multistate, convisor, Q’s & A’s, all become part of everyday speech. For those who want a head start on bar review, or who just want to communicate with a reviewer, here are the basic terms to know:

BAR/BRI: A company that makes big bucks selling bar review books and tapes to desperate law students. Also, the course sold by the company of the same name.

VIRGINIA: One of the two major outline books for the BAR/BRI course. Contains, surprisingly, Virginia rules of law in 23 action-packed subjects.

MULTISTATE: The other major outline book for the BAR/BRI course. Contains the basics: Contracts, Torts, Constitutional Law, etc.

CONVISOR: The mini-review outline for multistate subjects.

MINI-REVIEW: Convisor-type outline for Virginia subjects.

Q’s & A’s: Questions from previous bar exams with proposed answers. See also, false sense of security, repetitious bar examiners.

OUT OF ORDER: February 1982 Bar Examination in which the sequence of subjects was changed for the first time.

HOTEL JOHN MARSHALL: February meeting place for masochistic law students. Also, semi-annual reunion for unsuccessful bar candidates. See also, Hotel Roanoke for July meeting.

MAJOR ACCENT: Brand name of see-through book highlighter, comes in yellow, green, blue, pink, etc. See also, ways to remember if you’ve read a subject outline.

TAKE A BREAK: Major pastime in week before bar examination. See also, veg out, spaz out, get radioactive, cruise the lobby, empty the vending machines.

MUNICIPAL CORPORATIONS: Now known as local government. Don’t worry, they never ask a question about this. See also, Nixon always loses, your mother swims after troopships.

THE EVENT — General preparation for the Virginia Bar Examination has taken most people nineteen years (twenty if you went to Kindergarten), with intense preparation for the last two months. The actual exam only takes twelve hours: two sessions of three hours on both Tuesday and Wednesday. The event begins with arrival in the city on the night before.

Hotel lobbies, especially the John Marshall, are filled with students checking in for the night. BAR/BRI books outnumber suitcases. Many appear as though they haven’t slept or shaved (the men, at least) for several days. A nervous electricity fills the air. The more nervous are suspicious of calmer ones, calling them “chipper” or other derogatory terms. Restaurants serve food to students looking through the Virginia books one last time. Sleep comes after the Tonight Show, if at all, often artificially induced.

Queasy stomachs around Tuesday morning as many elect not to eat breakfast, fearing the consequences. Arriving in the John Marshall lobby, nervous candidates mill around in search of their testing room.

The 746 or so test-takers were assigned to these rooms alphabetically. Most trooped through all three rooms, searching hundreds of tables for a typed name card which would show the seat they would occupy. Momentary reunions with undergraduate friends and other acquaintances were stifled by the urgency of the impending exam. Nervous, anxious, overflowing with anticipation, the candidates listened as an old man needlessly asked for their attention.

At lunch, the Virginia books were in abundance. If a subject had been covered in the morning, it would probably not reappear in the afternoon. Through elimination, the courses to study were revealed and many tried to skim the remaining subjects in search of one or two points. Points that could make the difference between swearing-in ceremonies and bar exam repetition.

Everyone had been told that it was really impossible to study for the multiple choice Multistate section. Secure in that knowledge, many tried to enjoy a bookless dinner in some of the finer eating establishments in downtown Richmond. Partial relaxation was possible, but most could not forget that the exam was only one half over. Convisor was everywhere Tuesday night and Wednesday morning.

After two and one half or three years in law school, it
would seem that students would know the rules of acceptable behavior. For those who don't, here they are:

RULES OF ACCEPTABLE BEHAVIOR
1. Do not approach people in the lobby — or anywhere — and begin conversation with: "Rule 23(b) was the key to number 4," or "Sure glad I read the Virginia Supreme Court Slip Opinions yesterday so I'd know the answer to number 10 was NO JURISDICTION." This is a good way to make enemies and suffer possible bodily harm.
2. Do not approach a quivering person and announce that you saw the bar examiners laughing at his answers.
3. Do not announce that you've read everything six times and have memorized most of the Q's and A's.
4. Do not ask people if this is their second or third try.
5. Do not crack knuckles, grip teeth, tap pencils, etc. during the exam.
6. Do not practice your primal scream therapy half way through the session.

Strict adherence to these rules and other aspects of common courtesy will make for the best possible terrible experience.

THE WAIT — No discussion of the bar examination would be complete without mention of an extremely hard part of the ordeal. The candidate does nothing during this phase (a little over two months) but wait for the results to arrive in the mail. Doing nothing was never so hard before.

Shortly after the examination, rumors abound. This question is being thrown out, all the answers were good, all the answers were bad — the list of possible variations is endless. A week later, a list of probably answers to the essay questions is posted, compiled by a faculty member. Then, nothing happens.

At the end of April, a letter will be sent to all of those who took the bar in February. Legend has it that those who passed receive a letter-sized white envelope. The others receive a manila envelope with registration materials for the July bar. If this were not bad enough, a list of successful candidates is published May 1 in the Richmond newspapers, and later in every other paper in the state. There's no hiding the results of the bar exam.

Through the period of tense nerves, amid the statistics which show the passing percentage drop from 87 to 85 to 80 to 70 to 63 to 52 in the last several years, one quotation keeps hopes high. It is a quotation from one of the videotaped multistate lectures. No one believed it, then or now, but it does offer hope. "These bar examiners would like nothing better than to pass everybody."

Crime in China — continued from page 3

"frank and full confession after discovery of the crime, sincere and spontaneous repentance, [and] compensation as far as possible for the property stolen by corruption." Mr. Tai had confessed fully and, with the aid of his father, who also testified, had already repaid most of the money by the time his case came to trial. The trial itself was concerned primarily with Mr. Tai's repentant attitude; his guilt had been established beforehand by the prosecutor's investigation and by Mr. Tai's own confession. His father and several co-workers testified that he was basically a good man, but had been influenced by the "gang of four". Because Mr. Tai made a full confession and demonstrated sincerity, he was exempted from penal servitude and sentenced only to reimburse the amount stolen.

The second case involves embezzlement on a much higher level and over a much longer period of time. Ms. Wang Shouxin was convicted of embezzling the equivalent of more than $350,000 over a seven year period, a "staggering" figure in China, where the average wage is less than $30.00 a month. She was a cashier at the Binxian County Fuel Company in Heilongjiang Province until political purges during the Cultural Revolution allowed her to rise in rank to become the fuel company's party secretary — a post of considerable importance. There, according to People's Daily, she and her accomplices turned the company into an "independent kingdom", and embezzled a large amount of money with which they purchased scarce luxury items such as televisions and bicycles. Ms. Wang and her son pried the staff with banquets and gifts to keep them quiet, though one of them did make a report to higher authorities. Ms. Wang tried to find this informer by administering handwriting tests, ransacking homes, and firing ten workers. She was tried in a court in Heilongjiang Province, convicted, and condemned to death. According to one report, the 2,200 people attending the trial applauded when this sentence was pronounced.

Given the recent trend in Chinese jurisprudence toward a more orderly judicial process, one might understandably register some surprise when informed that embezzlers are still condemned to death at trials attended by thousands of people. And indeed, a survey of press reports indicates that most publicized executions are for violent crimes such as murder and rape, not white collar crimes like embezzlement. This case includes several aggravating legal, political, and social factors which, I submit, resulted in this harsh penalty for what was otherwise an ordinary embezzler.

First, the sum involved here was tremendous, probably more than enough in 1951 dollars to fall under the first section of Article 3, which provides imprisonment for ten years to life if the sum appropriated exceeds 100,000,000 yuan or death “if circumstances of the crime are unusually serious.” Ms. Wang was also liable under Article Fourteen, above, which makes it a criminal offense to persecute or to take revenge upon someone who exposes corruption. Article Four provides that where corruption is accompanied by other crimes such as persecution, punishment will be prescribed for the totality. It also provides

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a list of factors which will result in a more severe punishment, including repetition and failure to repent, organization of corruption involving several persons, inflicting serious injury on the state or the public or the people's security, and "other especially malicious circumstances." All of these may be observed in Ms. Wang's offense.

Second, Ms. Wang rose to her influential position during the Cultural Revolution, implying that she allowed herself to be associated with the radicals who were attempting to seize power. She may have made political enemies in the process and the fact that the radicals have been surprised indicates that she probably no longer has many friends in the current regime. Political revenge of this sort is very unpleasant to contemplate, but should not be ruled out in this case. After all, more than one official who was hounded from power during the Cultural Revolution has returned under the auspices of Mr. Deng. In this regard, one might also note the description of her operation as an "independent kingdom." This is a bit of political jargon which readers familiar with the removal of Kao Kang will recognize. It refers to periods in Chinese history when the central government was too weak to enforce its authority in all areas, resulting in the establishment of local power centers in competition with it. Kao Kang was closely associated with the Soviet Union during the late 1940's and early 1950's, and was a powerful figure in Manchuria, which borders the Soviet Union and contains much of China's heavy industry. He was removed from power because of the fear that if the Americans invaded China over the Yalu River, he would seize control of Manchuria, establish his own "independent kingdom", and invite the Soviet army to back him up. The use of the term in this case implies that Ms. Wang was acquiring too much political power and influence, in addition to stealing from the fuel company.

Finally, the execution of Ms. Wang can be viewed as a gesture to public opinion. The large sum of money involved here could not help but give Ms. Wang and her associates a very high profile. The various items for which at least some of the money was spent might be called conspicuous consumption of goods and, just like Zheng Xuyu's usurpation of a private residence, discussed above, such goods would not go unnoticed by others. Considering that Ms. Wang was already in a highly visible position as party secretary, it is very possible that she incurred the enmity of many people with whom she had no direct contact. The fact that her trial was conducted in public and attended by some 2,000 people argues strongly that she was executed as much to serve public opinion as for crimes against the state.

Article 117 of the 1980 Criminal Law

Article 117 is discussed in a separate section because it covers a large area of potential criminal liability, including several activities in which foreigners will be especially interested. It states:

Fixed-term imprisonment of not more than 3 years or detention. They can concurrently or exclusively be sentenced to fines or the confiscation of property.

This article provides an entry into the criminal law to be used against those who violate other laws regulating the economy, several of which were promulgated within the last three years. As discussed above, the trend towards de-centralized economic planning and the desire to attract foreign business have required a more detailed set of rules than ever before. These rules are necessary not only to provide continuity and predictability to the economy, but also to protect it from unscrupulous or desperate managers. For example, the years of central planning, beginning with an emphasis on Soviet methods, have resulted in a concentration of certain production capabilities in the hands of a relatively few enterprises. The survival of an established but inefficient enterprise might depend on its ability to destroy competition through predatory pricing, a phenomenon often observed in capitalist economics. The degree of control by central authorities over such supply bottlenecks is quite large, and any concerted effort would have to be approved by a high level official, but the prospect of losing just such a high level position if the enterprise were to become insolvent might provide the necessary motivation. On a lower level of the economy, an investigation into commodity prices in Tianjin was launched in early May, 1980 in response to criticism of sharp increases. Tianjin Daily reported that an investigation was made in every unit to check price hikes. The municipal revolutionary committee produced an order indicating that "all units which violate the price policy or which impose unauthorized price hikes directly or indirectly, will have to be rectified", and that penalties would be imposed on those who inflated prices without the permission of the committee. The People's Daily reported on June 12, 1980 that Chongqing (Chungking) municipality had conducted four "extensive" price investigations revealing more than 20 "serious cases of violations against pricing policies and regulations", and urged strong action by the authorities.

c. Exchange Control

The Provisional Regulations for Exchange Control of the People's Republic of China were promulgated by the state council on December 18, 1980 and by their terms apply to:

All foreign exchange income and expenditure, the issuance and circulation of all kinds of payment instruments in foreign currency, dispatch and carriage into and out of the People's Republic of China of foreign exchange, precious metals and payment instruments in foreign currency...

These regulations are drawn to keep very tight control over the movement of foreign exchange or hard currencies in and out of the country. As does any developing nation, China needs hard currency to finance imports from the industrialized countries. Individual possession of foreign exchange is limited to whatever is already inside the country, and most transactions must be conducted through the Bank of China, including transactions by governmental and
non-governmental bodies alike. Conversion to and from renminbi must also be carried out through the Bank of China, and sending renminbi or denominated cheques, drafts, and other instruments out of the country is prohibited.

These regulations represent a new phase in Chinese law. The provisions are as detailed as anything found in the West, and foreigners planning to do business with the Chinese would be well advised to study them with care, especially in light of Article 31, which provides a reward for units or individuals reporting violations. Article 31 also provides such penalties as compulsory exchange of foreign currency for renminbi, fines, confiscation of property, and punishment under Article 117 of the Criminal Law.

The possibility of increasing profits on a foreign trade deal through violation of exchange control regulations is a temptation known to any businessman working on overseas projects. For example, the price differential on the black market for hard currency, or the opportunity to purchase imports at a future date without going through the Bank of China at the official exchange rate might lead a Chinese manager to ask for direct payment in foreign exchange instead of renminbi. Such activity is subject to fines and/or a prison term of up to three years.

d. Taxes

The PRC issued two new income tax laws in September 1980, one concerning joint ventures using Chinese and foreign investment, and one dealing with individuals. Detailed implementation regulations soon followed. The enactments total some 95 articles in all, and use tax terminology familiar in Western systems such as straight-line depreciation, residual value of fixed assets, amortization and so on. The tax regulations are just as detailed as the exchange regulations discussed above, and are specifically directed towards foreign business and investment. The temptation to avoid these taxes is lessened somewhat by what the Chinese claim is a lower tax rate than prevails elsewhere in the world, a mere 33%. Offenders are liable under Article 14 of Joint Venture Tax Law and Article 12 of the Individual Tax Law, which provide that the tax authorities may, in addition to collecting the tax due, impose a penalty of up to five times the tax not paid. Gross violations will be handled by the local people’s courts under Article 121 of the Criminal Law, which carries a penalty of up to three years fixed-term imprisonment for the personnel directly responsible. Exactly what constitutes direct responsibility will probably be determined on a case-by-case basis, and, since trial will be on the level of the local people’s court, could vary widely, depending on the political situation at the time of trial.

Environmental Protection Law

Environmental protection is a new subject in Chinese law. The first enactment, entitled The Environmental Protection Law of the People’s Republic of China (hereinafter "Environmental Law"), was adopted in principle in September 1979. Its stated function is:

> to ensure, during the construction of a modernized socialist state, rational use of natural environment, prevention and elimination of environmental pollution and damage to ecosystems, in order to create a clean and favorable living and working environment, protect the health of the people and promote economic development.

Article 26 establishes an Environmental Protection office charged with carrying out this task.

The rush to industrialize has created pollution problems in China, which the current regime apparently wants to avoid in the future. But protecting the environment can be expensive, and existing facilities sometimes will be hard pressed to meet any standards established by the State Council under Article 33. The investment return on new projects may suffer as well if planners are required to include pollution control at the design stage. Chapter Six of this law provides both rewards and punishments to encourage obedience. These rewards include commendations, tax reductions on products manufactured using waste gas or waste residues, and cash prizes.

Penalties for violation of the law and other environmental regulations laid down in Article 32 include warnings, fines, money damages, and orders to halt production. Those offenders directly responsible for serious pollution and resulting damages to persons, farming, forestry, animal husbandry, sideline production and fishing may be liable administratively, economically, and criminally. Criminal charges would not be levied under any particular article of the 1980 Criminal Law, but rather would be prosecuted under a variety of scattered provisions depending upon the exact nature of the offense. Article 114 deals with safety regulations in factories, mines, and construction units, while Article 115 covers regulations on control of explosives, flammables, radioactive materials, poisons, and corrosive goods. Violations resulting in "serious accidents" and "grave consequences" are punished by a minimum of three years to a maximum of seven years imprisonment. These two articles are worded broadly enough to cover sudden, violent acts of pollution such as oil or chemical spills, and may also be invoked against the slower, more insidious types of pollution such as seepage pits or smoke discharges. The statute of limitation under the criminal law is ten years for offenses carrying a maximum penalty of less than ten years. The period of limitation is calculated from the date of the offense, but for a continuous or continuing offense, the calculation is based on the date of the termination of the offense. Thus, if the court were to hold that an offense was a continuing one, a company and its directors could be held liable for damage caused by a pollution source such as a seepage pit decades after the close of operations.

The Environmental Law itself covers the major types of pollution under Chapter Three. "Prevention and Elimination of Pollution and Other Hazards to the Public." Article 16 demands control of noxious substances from factories, mines, enterprises and urban life, Article 17 provides for protection of residential areas, water resource protection zones, places of historic interest and scenic beauty, and nature conservation areas, and Article 19 requires compliance with standards set by the State for smoke discharge devices, industrial furnaces, motor
vehicles, and ships. Article 20 prohibits ships from discharging substances containing oil or poison into Chinese waters. Other articles urge development of high effect, low toxicity pesticides and require control of noise and vibration. Article 13 requires strict adherence to the National Forestry Law and urges reforestation "so as to turn the whole land into a big park." Penalties are provided in the Criminal Law under Articles 128 and 129, ranging from fines to fixed-term imprisonment of up to three years.

A strictly enforced Environmental Protection Law carrying criminal penalties presents obvious problems for foreign investors. Probably the safest course would be to seek actively to comply with the new law through all phases of a project — design, construction, and operation. The Chinese managerial contribution to a joint venture should be viewed not so much as unreliable but rather as inexperienced in pollution control and therefore prone to errors in judgment. The fiscal pressures which lead managers to circumvent pollution control laws in the West are also present in China, with the added incentive that a manager whose project fails may be hard pressed to find another.

Press reports indicate that these new laws are being enforced with fines and jail terms, as the cases in this section illustrate. The first case involves fines levied on the basis of changes brought by injured units and people in the city of Shenyang. This is permitted under Article Eight of the Environmental Law: "The Citizen has the right to supervise, accuse and bring a complaint before the court against the unit or the individual who has caused the pollution and damage to the environment." The Shenyang People's Procurate, the Shenyang intermediate people's court and the Shenyang Environmental Protection Bureau cooperated in an investigation of pollution caused by an electro-plating plant, vehicle maintenance shops, and by the Shenyang Scientific Instruments Plant of the Chinese Academy of Sciences. These organizations were fined 60,000 yuan for polluting two wells which supplied water to residences in the city. The Shenyang Petrochemical Plant was ordered to pay compensation to two production units whose wells and vegetable plots were contaminated by chromium when covers on piles of chromium residue deteriorated, allowing seepage into irrigation water. The plant was ordered to remedy the problem by June 1, 1980 and to halt discharge of hydrogen chloride waste gas.

The second case involves the discharge near Shanghai of enough cyanogen to kill 48 million people, shortly after the new Environmental Law was promulgated. Worker's Daily reported that the city of Suzhong (population: 1.3 million) was thrown into confusion after 28 tons of water contaminated with cyanogen flowed out of chemical plant into a canal when a factory worker forgot to close a valve controlling the flow of cyanogen from a tank to another container. A local court sentenced the worker, Zhang Shouxin, to two years in prison and fined the plant 440,000 yuan. The heavy penalties in this case were seen as indicating that the accident may have caused some casualties.

These cases illustrate what seems to be an ongoing campaign both to punish polluters and to educate the people on the effects and prevention of pollution. Press reports on fines for polluters and calls for stricter controls have begun to appear with increasing frequency, spurred by foreign reports of mercury pollution in Japan and phenomena such as Love Canal in the United States. Whether or not the campaign will continue at the current level of intensity if the economy falters and funds for new investment become scarce remains to be seen.

**Conclusion**

Several points should be emphasized in concluding this discussion. The laws which have been examined here are all very new and their manner of application is not yet settled, especially in regard to foreigners. This uncertainty is compounded by the absence of any official translation and by the disparity between existing unofficial translations. In addition, the cases which accompanied analysis of these unofficial translations were often seen to hold as much political as legal import, thus casting much doubt on their validity as precedent for future decisions.

With this caveat in mind, we have seen that the 1980 Criminal Law is a unique blend of Chinese and communist features and cannot be understood without reference to the philosophy of each.

The capacity of the law for overwhelming a defense based on legal technicality or semantic distinction is reinforced by the emphasis placed on the attitude of the offender in sentencing and the harsh results to be expected upon failure to repent. The cases of Tai Hung-sheng and Wang Shouxin provide an excellent illustration of the point. Mr. Tai confessed, showed a proper attitude, and was treated leniently. Ms. Wang prosecuted her accusers, showed an improper attitude, and was treated harshly. The case also serves to re-emphasize the political factor in modern Chinese law. Ms. Wang rose to power during the Cultural Revolution and probably made political enemies. The offenders involved in the industrial accidents discussed in the section on Violations Against Public Security received sentences which varied according to their political status. The political factor carries a great deal of weight in Chinese criminal prosecutions and, while the current regime seems committed to rule by law instead of political expediency, overnight elimination of political considerations in legal decisions seems unlikely, especially where foreigners are involved.

This is not to say that the capacity for rule by law is not present however. The framework for a regularized legal system has been laid in the law, in the courts, and in the schools. Whether the trend will continue to a complete separation of law and politics, and indeed, whether such a separation is even possible under Marxism-Leninism-Mao Zedong Thought, remains to be seen.

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**Polygamy — continued from page 7**

In over three dozen pages of debate on the bill which would set off a chain leading to the first Supreme Court case dealing with religious freedom, the question of religious freedom was dealt with in less than two dozen lines.

Passage of H.R. No. 7 by the House of Representatives was the end of that piece of legislation. It was never debated nor voted upon by the Senate.

In 1862, Morrill introduced his fourth bi-annual anti-polygamy bill styled H.R. No. 391. The 1862 session of Congress had no popular sovereigntists. They had all retired to the armies and assemblies of the Southern Confederacy. Morrill guided H.R. No. 391 through the House and Senate without delay. All that needed to be said or considered had been handled in the debates of 1860. H.R. No. 391 was debated, in effect, in 1860 and passed in 1862.

On 9 April 1862 Morrill introduced the bill and it was referred to the Committee on Territories. That committee reported the bill to the full House on 28 April with the recommendation that "it do pass." Morrill, calling the bill "identical" to the 1860 legislation, and asserting that the bill had passed the House with "almost unanimous support" called for a final vote. Without debate or discussion, the bill was passed by the House with a voice vote.

A breakdown of the vote reveals precisely where its support lay. Of the Republicans 97 voted for the bill, only 1 against. The American party members voted 22 for and only 3 against. The Democrats were split with 26 voting for and 55 voting against. Northern representatives supported the bill 119 to 28. The Southerners split with 29 for and 32 against.

The combined vote of the Northern Republicans and the Americans would have passed the bill with 119 votes. The Republicans presented a united front and rejected the sovereignty arguments outright. The Democrats divided their loyalty to sovereignty with their dislike of polygamy. Even the Southern Democrats, who had the most to lose, failed to unite.

The representatives from California and Oregon, the Mormons' Western neighbors, all voted to defeat the bill.

Before moving from this discussion of what the debates did include, it is important to note what was not discussed. At only one point in the debate did a representative raise the question of a possible conflict with freedom of religion. The bill itself had some language that may have been directed to that matter;

> provided, that this act shall be so limited and construed as not to affect or interfere with . . . the right 'to worship God according to the dictates of conscience,' but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities sacraments, ceremonies, consecrations, or other contrivances.

This alternative failed to pass for two reasons. First, it was offered to avoid Congress acting within a territory and thus infringing on popular sovereignty. The side with the votes, the Republicans, had no desire to seek such an alternative. Second, serious objections were raised as to the feasibility of the plan. Mr. Gooch pointed out the geographic limitations involved, Salt Lake City being farther from Denver City than North Carolina from Massachusetts. He added that the real populations of Nevada and "Pike's Peak" were unknown and any numbers were speculative, thus the ability to outvote the Mormons was uncertain. His greatest objection was directed pointblank at the sovereigntist-Republican argument. He said that if anyone had the obligation to act and power to intercede "it belongs to this government, and not to an infant Territory situated at Pike's Peak or Carson Valley." The amendment was rejected 36 to 159.

Three other proposals were discussed but had no better success. First, one representative suggested repealing the Utah organic act and making the Mormons subject to the general laws governing unorganized lands. Another proposal was to buy the Mormon's lands and send them out of the country, effectively banishing them. Neither proposal was formally offered nor voted upon. The third alternative was to establish a governor and thirteen federal appointees to constitute a ruling legislative council. This proposal had some historic precedent. It was, however, the first amendment to be voted upon and in a count indicative of the final vote on the bill it lost 47 to 151.

H.R. No. 7 came to a vote in the House of Representatives on 5 April 1860. The representatives first disposed of the two amendments for which the vote totals are listed above. Then the bill was passed 149 to 60.

On 9 May 1862 the Senate Judiciary Committee reported the bill to the full Senate and recommended its passage, with certain amendments. The Senate took the bill up on 3 June. The Judiciary Committee offered two amendments to the bill. First, the bill was re-worded so as not to punish co-habitation without marriage, i.e. fornication and adultery. "It would be of no utility to carry the act beyond the evil intended to be remedied." Secondly, the Committee added a provision limiting the real property holdings of a church in any territory to $100,000. Both amendments were accepted without objection and the $100,000 ceiling was lowered to $50,000.

On the passage of H.R. No. 391 as amended, only one Senator rose to object. James A. McDougall of California, pointed out that considering the current hostilities, the bill might threaten communications to the West Coast and was ill-timed. He also observed that the bill would be unobserved, ignored and of no effect. No one responded to him and upon his conclusion the Senate passed the bill as amended 37 to 2. The California Democrats voted against. The sole Oregon Senator did not vote.
On 19 June 1862 the House took up the Senate version of the bill. The bill was informally passed over on that date to allow Representative John S. Phelps of Missouri time to verify a concern. He felt that in the haste to limit Mormon holdings in Utah, the House might also infringe upon Catholic holdings in New Mexico. Apparently the former was desirable but the latter was not.

On 24 June Morrill called up the bill. He assured Phelps that the Catholic holdings in Santa Fe were safe as they were protected by foreign treaties. He then moved the previous question for passage of the Senate's version of the bill. With no debate, no discussion and apparently no dissent, H.R. No. 391 passed the House of Representatives on a voice vote.

On 1 July 1862 Abraham Lincoln signed the bill into law, and the House was so advised on 2 July. The act became known as the Morrill Anti-Bigamy Act of 1862.

The United States' first anti-polygamy law provided that: 1) any person living in any U.S. territory or place of exclusive federal jurisdiction who should intermarry, having a spouse then living, was subject to a fine up to $500 and imprisonment up to five years; 2) the territorial ordinance incorporating the Church of Jesus Christ of Latter-day Saints was annulled; and 3) no religious or charitable organization in any territory could hold real property in excess of $50,000, with any excess to escheat to the United States.

It should be noted that the bill applied to all U.S. territories, not only Utah. The bill outlawed contracting new marriages, but did not effect those already existing. The official record shows that the law was signed on July 1st.

The first anti-polygamy law, then, went on the books. The law had virtually no impact. The unenforceability arguments of 1860 predicted the reason. Mormon bishops were generally the local judges. When jurors were called, they were Mormons also. It took enabling legislation in 1874 and 1882 to make the Morrill Act effective.

A possibly inaccurate, but often repeated story makes a fitting conclusion to the history of the Morrill Act and may help explain its ineffectiveness. It is reported that Abraham Lincoln met with a Mormon shortly after signing the bill and told him:

When I was a boy on the farm in Illinois there was a great deal of timber on the farms which we had to clear away. Occasionally we would come to a log which had fallen down. It was too hard to split, too set to burn and too heavy to move, so we plowed around it. That's what I intend to do with the Mormons. You go back and tell Brigham Young that if he will let me alone, I will let him alone.

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