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Book Reviews

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THE SUPREME COURT AND RELIGION. By *Richard E. Morgan*.† New York: The Free Press, 1972. Pp. 216. $7.95.

A reviewer is sometimes blessed with a charge!! When asked to review the book, *The Supreme Court and Religion*, I accepted in the hope of learning something about a field in which I have labored. I had hoped to offer some initial remarks which might sharpen the issues of a very complex and important constitutional question. I was thoroughly pleased to find that the author had accomplished this purpose extremely well.

The problem of Church-State relationships, of religious-government tensions, of God-man priorities has been with us from the very foundation of societal structures. Much has been made of the dictum enunciated by Jefferson reflecting his idea of the proper relationship between Church and State. Essentially he urged: Construct a wall of separation to separately identify and restrain these respective societies in their existence and operation.[1] Long before Jefferson, Christ Himself said something similar: "Render to Caesar the things which are Caesar's, and to God the things which are God's." I submit, however, and Richard Morgan seems to agree, that the wall of separation between Church and State neither runs so deep nor rises so high, nor is built so thick as to preclude any viable and mutual cooperation of religious institutions and values within a pluralistic and secularistic society. Similarly, the Gospel mandate is not an absolute—a black and white situation; very few situations in life are.

Within the context and framework of such a mentality, this reviewer found Richard Morgan's book a fascinating piece of legal literature. The historical development of the problem of Church and State in America is a complex one. Competing theologies in religion, radically different sociological and psychological frames of reference, and overtones of bigotry and prejudice contribute to making the dialogue be-

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1. This oft-cited premise is taken from an excerpt of Jefferson's New Year's Day letter, 1802, to the gentleman of the Danbury Connecticut Baptist Association. R. MORGAN, THE SUPREME COURT AND RELIGION 28, 29 (1972).

tween religion and government vibrant and vital in our age and, indeed, in every age. Richard Morgan captures the spirit of this tension in his historical explanation of the origin of the guarantees given to religion under our Constituion and the subsequent development of these seed ideas into constitutional principles through his clear and lucid analysis of Supreme Court decisions affecting religion. His historical perspective is illuminating, his legal analysis penetrating. He has a gifted ability to communicate complex ideas and subtle distinctions simply and clearly. These qualities make it a joy to read his book.

The book is well documented and betrays a thorough job of research on the part of the author. In spite of many biased legal articles, opinions, books and other research materials cited, the author did maintain an objectivity of judgment on the issues under discussion and analysis; so much so, this reviewer could not ascertain what the personal position of the author was on the various issues he examined until the concluding chapter.

Consequently, anyone desirous of appreciating the legal development of the constitutional principles concerning religion and government as seen through the eyes of the Supreme Court of the United States could hardly do better than to read and study this book. For one whose interest lies in this field, he would discover a little jewel; for another who seeks to learn about the issues involved in Church-State matters, he could hardly discover a finer book for his initial orientation.

*Rev. Adam J. Maida**

WHO RUNS CONGRESS? THE PRESIDENT, BIG BUSINESS, OR YOU? By *Mark J. Green*,† *James M. Fallows*†† and *David R. Zwick*.††† New York: Bantam Books and Grossman Publishers, 1972. Pp. 307. $1.95.

In the public's mind, Ralph Nader's name has become synonymous with consumer crusades and raids to uncover defects or malpractices by business or government. He has concentrated his energies on reforming laws for automobile safety, unhealthy meat, and the construction of a

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†† An editor of *The Washington Monthly*.
††† Director, Clean Water Action Project, Washington, D.C.

framework to provide consumer protections. Last year Nader and his Raiders trained their sights on the seat, or repository, of the legal handling of many of the nation's problems: the Congress. Using lengthy questionnaires, they compiled large dossiers on a majority of the Members of Congress, which formed the basis of more than four hundred personal profiles. While there was some bristling about the unfairness or false impressions given by many of the profiles, they were on the whole tamer and probably more sympathetic of the individual Members' problems than most Members might have expected. However, synthesizing the information gathered from the profiles into a single tome is another matter—and the book falls short of the tempting mark set by Mr. Nader in his press conference announcing its publication by Bantam/Grossman.

Its title, *Who Runs Congress?*, is so sufficiently authoritative and provocative that I thought at long last I would receive useful inside information on who runs the nation's legislative arm of government. I would add that after fourteen months membership in the House of Representatives, it is easy to see why the public has no clear picture of who runs Congress, or even how Congress runs, because congressional power, and in fact, congressional operation, is diffused across two separate bodies, 535 Members, 45 committees, many of them with overlapping powers. In recent years, and particularly in recent weeks, the running of Congress, its leadership, and its power as a decision making and even policy making institution, has been seriously questioned. There has been considerable discussion of the juxtaposition between Congress and the executive branch of government, which stands accused of usurping more and more power for itself. Part of the discussion is fed by Congress itself, which seems outflanked; which seems ill-equipped to deal with the major problems facing the country; and which seems to feel that it can be made the scapegoat for government decisions which are as unpopular with the people as increased taxes and increased government spending.

Who Runs Congress? was prepared for the Ralph Nader Congressional Project by three trusted staffers, Mark J. Green, James M. Fallows, and David R. Zwick. To a large extent it berates Congress for its shortcomings and shortsightedness, and it portrays Congress' shortcomings as almost conspiratorial in nature, working almost intentionally to the detriment of the American people. Unfortunately, this treatise sheds no new light on the failures of Congress as an institution. It re-

lies heavily on other analyses of Congress for its verification of facts, and deals with the subject matter in something of a haphazard fashion.

Incorporating a vast body of undigested rumors, news stories and twice-told tales produces a less than credible analysis of the ills of Congress and an even weaker prescription for reform. The problem is that *Who Runs Congress?* takes an all too familiar tack. It postulates that Congress is manipulated and unduly influenced by lobbyists, forty powerful Members, and an executive branch which gains strength at the expense of Congress. The suggestion of evil at work is so strong that it is difficult to discern how it is possible for Congress to pass what, the authors would admit, is positive and even socially redeemable legislation.

For example, the tobacco lobby is cited as a very influential lobby which contributed widely to election campaigns. Yet when it came to the point that irrefutable evidence established a link between cancer and smoking, Congress voted to ban cigarette advertising from the airways in the public interest.

For another example, Medicare came out of Congress despite the fact that many of its Members receive contributions from the AMA, which strongly opposed the program. Yet the authors seem to be preoccupied with the unhealthy aspect of lobbying to the exclusion of any other influence. They seem to be saying that legislation is for sale to the highest bidder in our national political market place. While this satisfies a dour and rather apocalyptic view of political life in America, it leaves no room for positive action or for change, nor is it an accurate generalization.

The whole discussion of lobbying is somewhat sophomoric. It presumes that Congress votes the way they do because of huge payoffs to their campaigns. What the book fails to see is that philosophically many Congressmen believe that helping business and industry to thrive is the way to solve most of this nation's social and economic problems as well as many of its international problems in trade. Whether this philosophy is right or wrong, I would also suggest that a majority of the American people probably believe this and they are also willing to believe that too much government activity in their behalf becomes overly bureaucratic, costly, and inflationary, whether this is the case or not.

In arguing elsewhere that Congress is victimized and powerless before an aggressive President, the authors weaken their credibility by overlooking the fact that it was Congress which stimulated, formulated,

and legislated numerous social programs and changes during the last four years, and, for example, that it was the Congress which passed water quality legislation stronger than that desired by a reluctant Administration. The Congress does have failings. One central dilemma is that the Congress has not the power, the desire, nor the interest to develop a coherent picture of the total costs of the programs it enacts; nor is it cognizant of the conflicts which often exist in these programs. This leads to the heart of the problem of impoundments discussed by the authors.[1] There is the suggestion that Richard Nixon is the first President to use impoundment extensively;[2] even to the point of frustrating congressional intent. I think to a large extent this may be true. But it is true because Congress has done too much in proportion to tax revenues, not too little.

The Congress has also failed to face up to practical realities in other areas. In 1969 the President asked Congress to pass legislation to reorganize government agencies into four main departments which he believed to be the most efficient use of executive power. Yet for four years Congress has stared at legislation and not produced it. As a result, the President has used the impoundment of funds and transfers to eliminate programs and, in the case of the Office of Economic Opportunity, whole departments. While those of us in Congress will want to argue over the special value of many of the programs, I thing Congress is in a decidely weakened position to defend many of the expenditures because all too frequently programs which have popular appeal are pork barrel which gets something into everyone's district rather than programs which work for the national interest. A good example of this is the Impact Aid Program used to benefit school districts which have a high proportion of children whose parents work for the government. The poorest and neediest school districts do not benefit from these programs nearly so much as the wealthiest county in the country; for example, Montgomery County, Maryland, which has a very high proportion of well-paid government employees. Because of the closeness of a number of Senators, and more frequently Congressmen, to their constituents, it is more difficult for them to make decisions on matters like this than for the President, and yet the authors choose not to take this into account.

1. M. GREEN, J. FALLOWS, & D. ZWICK, WHO RUNS CONGRESS? THE PRESIDENT, BIG BUSINESS, OR YOU? 113-17 (1972).
2. *Id.* at 115.

I would also add that the argument of impounding has obscured the fact that many Presidents have impounded funds authorized and appropriated by Congress. Thomas Jefferson refused to spend $50,000 provided for the maintenance of gunboats because he did not think it was necessary. Since the time of Dwight D. Eisenhower, in the later 1950's, imopundments have ranged annually between $6 and $10.6 billion, and until Congress caught the fever of their constituents who wanted more funds for elementary and secondary schools, requests for such programs of education ran only to 30 per cent of the authorization levels. While the question of impoundments was not raised then, the Kennedy Administration impounded funds for the B-1 Bomber without incurring the same sense of congressional outrage. Dramatizing a curruent situation without illuminating the causes gives little guidance to those who have a right to expect it after buying the book.

If the object of *Who Runs Congress?* is to focus on the institution's problems as a means of providing some solutions, the book quickly deteriorates into retreading worn-out stories of the excesses and idiosyncracies of individual Congressmen, under the guise of "law-makers as law-breakers."[3] It also deals with the familiar subject of archaic rules which hamstring progressive action. The book provides a primer for citizens' action to "take on Congress," and makes a strong plea for Congress to remove the cloak of secrecy from its activities in order to operate in the open, free from restraints of dominating interest groups. While those of us who cherish the concept of a working and effective Congress would agree that operating in a fishbowl is one of the prerequisites, I can tell you that, after one year's experience, it is not the complete answer to Congress' problems. It is unfortunate, but the book's bias and shortsightedness prevent it from providing a more global attack on the problems that hinder Congress. In the main, the authors will not concede that Congress does not always surrender to the bad guys who invariably have most of the money, nor will they yield the point that—even occasionally—public policy results from the conflicting pressures of various vector forces. Overall, there is a failure to recognize that one man's vested interest may in fact be another man's public interest.

Who Runs Congress? magnifies defects which have been observed since the creation of Congress but it does not take into account many of the changes which have taken place to reform Congress. Although

3. *Id.* at 131.

there is some distance yet to go, in the last few years Congress has gone more public. Much of the business it conducted in private is moving into the open, which I believe will change the nature of legislation passed. For example, the old secret teller vote, which allowed Congressmen to hide their true positions on crucial amendments behind the anonymity of a secret ballot—or even to miss votes they did not want to cast—is now a relic; it has been replaced by recorded teller votes. And these, I believe, are probably the main reasons for the increasing public responsibility of Congress on issues like environmental controls and consumer protection. Committees are also conducting more business in public and majorities in both the Republican and Democratic parties are on record as favoring the public markup of bills in committee. What will also shape the future of legislation is the loosening of the tight rein committee chairmen hold on the legislation considered by their committees. Not only are subcommittee chairmanships doled out to a wider number of members as a result of the rule that a Congressman can no longer hold more than one such chairmanship, but there is a growing movement to set limits on the number of years a chairman can hold power.

While the authors ignore these changes, they also fail to recognize that Members of Congress are human beings; they have feelings and egos, and constituents. They are all essentially different people with different interests. And no one Congressman or group of Congressmen has a monopoly on virtue or the public interest. In a system such as ours, what helps one man frequently hurts another.

If Congress has a basic flaw which the authors failed to turn up, it is that Congress has not provided itself with the wherewithal and the technology to deal with the complexity of a country of 209 million people with a trillion dollar Gross National Product and many unsolved social problems. The Congress has neither the strong leadership, sufficient motivation, nor the consensus to develop priorities or strategies in the public policy areas that really count so that America can face a bright future. As a member who has become something of an expert in running for election, having had two opportunities within a year, I can tell you that the process of staying elected and serving as ombudsmen for constituents takes away time that might well be spent in developing an effective legislative thrust, and yet it is something that we in Congress cling to because it is our contact with our public. Perhaps one other shortcoming of the book is that it is so preoccupied with Congress'

problems that it failed to note that neither Congress nor the President seem much concerned about the future. No one seems to give much thought to the fact that incredible burgeoning manpower costs in our "new volunteer army" may drive an already bloated Pentagon budget off the top of the balance sheet. In addition, the costs of civil service and military pension programs are rapidly mounting, adding additional fixed costs to an already badly strained federal budget.

This means that neither Congress nor the President, in a few years, will be able to deal with the fixed costs that government has in such areas as military manpower, pensions, and debt service. And these may prove greater problems for government than any of us imagine.

In short, after reading *Who Runs Congress?*, I do not think I found the answer. What I have found more useful to me, however, are books by two Congressmen. *House Out of Order*, by Richard Bolling, deals quite cogently with many of the problems we are beginning to work on, and *The Job of A Congressman*, by Morris K. Udall, not only provides valid information on the requirements, but also contains an excellent bibliography for additional reading. Neither of these books pulls any punches and both provide a welter of information, and I can recommend them.

Ralph Nader and his team of bright, aggressive, and extremely committed young lawyers and researchers have produced much important information and many valuable insights over the years. *Unsafe At Any Speed* is something of a classic, being the book that brought Ralph Nader to the attention of the entire nation. Investigations of the Interstate Commerce Commission, meat inspection, and many other consumer and environmental causes have involved the Nader Organization in a tremendous number of complex areas. As a result, the Nader Group is spread too thin to attack the most complex institution of all, and *Who Runs Congress?* is a victim of the commercialism and poor quality control that Mr. Nader so frequently deplores.

*H. John Heinz III**

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PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819. By *Francis N. Stites*†. Amherst: The University of Massachusetts Press, 1972. Pp. 176. $9.50.

It is perhaps the imp of the perverse which excites our delight that the basic concept of American constitutional law was delineated in a controversy over the delivery of a justice of the peace commission. If so, our appetite for irony finds ample fodder in the factual interplay of the *Dartmouth College Case*.[1] An old curmudgeon, intent upon preservation of his prerogatives as president (by inheritance as much as election) of Dartmouth College, quarrels with his board of trustees and after suffering affront to his self-esteem, he resorts to vilification of the board. Prominent Jeffersonians, within and outside the New Hampshire legislature, alert to the possibilities of fomenting discord among the enemy Federalists, take up the cause of the Federalist college president against his Federalist board of trustees. Not so coincidently, these same Jeffersonians note the further opportunity to advance their cherished goal of a public educational system by subverting or capturing a citadel of private education. In response to the initiation of a legislative investigation of the college, the board removes the president from office. Federalists defecting on the issue of college control and conduct help to elect a Jeffersonian governor and legislature, which combine to "reform" the state judiciary in the Jeffersonian image and to amend the charter of the college so as to provide for a larger and Jeffersonian-dominated board of trustees. The new Jeffersonian majority of the newly-designated "Dartmouth University" obligingly re-appoints the enfeebled and dying deposed president, and the issue of state power versus a vested contract right is joined.

Professor Stites has, in his treatment of the *Dartmouth College Case*, provided us with a study which we may savor on many and diverse levels. His work is distinguished as an historical treatment of case law which, while faithful to the historian's discipline, is sympathetic to and appreciative of the legal process, and all the while fully intelligible to the layman. Unwilling to be intimidated by a mystique of the law, he correspondingly distains to despise it. Professor Stites has chosen the demanding path of personal mastery of the esoterica of another profession and the translation of that material for the layman's comprehen-

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1. Trustees of Darmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

sion. His exposition is free of over-simplification but never bogs down in the minutiae of legal detail. I would appraise his achievement as comparable to Professor Schlesinger's superb treatment of the 1937 Supreme Court crisis in Volume 3 of *The Age of Roosevelt.*

The explicit identification of the societal influences at work in constitutional litigation recalls the observation of de Tocqueville:

> The judicial organization of the United States is the institution which a stranger has the greatest difficulty in understanding. He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless, when he examines the nature of the tribunals, they offer nothing which is contrary to the usual habits and privileges of those bodies, and the magistrates seem to him to interfere in public affairs by chance, but by a chance which recurs every day.[2]

Just so, the Chief Justice of the "reformed" Jeffersonian Superior Court of New Hampshire could, speaking for the unanimous court, find no merit in the contention of limitations upon the power of the state legislature to amend the college's charter, characterizing these arguments as questions of "mere constitutional right."[3] Conversely, Chief Justice Marshall, speaking for a Federalist United States Supreme Court majority, found a natural law premise for a constitutional shield afforded contracts.[4] Thus, the private right which vested under the contract advanced the public good and was the consideration which prompted the state action. The concurrent effect of providing a formidable curb upon state authority was certainly other than a fortuitous advancement of Federalist doctrine. In each instance, however, it may be presumed that the judicial pronouncement stemmed from the intellectual and emotional wellsprings which dictated party affiliation rather than from a slavish adherence to partisan programs. Indulging such an assumption, nonetheless, is not inconsistent with a recognition of the significant personal equation and its role in constitutional litigation. One may, in consequence, speculate as to the origins of the cries of outrage from the right regarding the political philosophy of Roosevelt's appointments and from the left respecting the predilections of Nixon's nominees. Depending upon the lamenter's degree of political

2. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 90 (1899).
3. Trustees of Dartmouth College v. Woodward, 1 N.H. 111, 114 (1817).
4. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 630-35 (1819).

sophistication, his distress would seem to stem from either ignorance or hypocrisy.

If the *Dartmouth College* rule of law is today largely a dead letter, its progeny to the third and fourth generation are hale and hearty. Professor Stites notes that the impact of the decision in preserving and extending private education in this country is still felt with full force. Parenthetically, he may observe that if the Jeffersonians of the conflict recognized the opportunity to advance public education, the proprietors of the private colleges were no less alert to the dangers in the offing. The author notes that both Harvard College and Princeton College saw fit to confer honorary degrees on two of the Justices *between the argument and decision of the case.*

If the focal point of individual rights has shifted away from property interests, Professor Stites observes that the underlying concept of limitations upon state power remains a forceful restraint.

*William A. Donaher**

JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES. By *Lewis R. Katz*,† with *Lawrence B. Litwin*†† and *Richard H. Bamberger*.††† Cleveland: Case Western Reserve University Press, 1972. Pp. 386. $6.95.

There is little problem in recognizing that serious defects inhere in a criminal justice system in which all too frequently defendants are detained or released, tried or not tried, imprisoned or placed on probation, all for the wrong reasons. Defendants who enjoy pretrial release generally do so because they have money rather than because they present no danger to the community. Defendants who are tried, often those who have no leverage to utilize in plea bargaining, may have to wait six to twelve months, sometimes behind bars, before their cases are heard. That the American public has lost confidence in the criminal justice system is a facile observation.

This is a situation with which Professor Katz and his colleagues

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†† Member of the New Jersey Bar.
††† J.D., Case Western Reserve University School of Law.

clearly are not satisfied. Their research presents an analysis—statistically detailed but philosophically superficial—of those pretrial criminal procedures which contribute to delay in felony cases. The first of the book's five chapters examines the origins of the American version of criminal justice, presumably with an eye toward determining where and how extraordinary delays crept into the process. Although interesting from an historical viewpoint, the origins of the writ of habeas corpus, and the fact that two grand juries refused to indict John Peter Zenger before the Crown's prosecutor charged him by information, provide absolutely no insight into the causes of pretrial delay. Moreover, even if some connection were ascribed between these historical bases and court congestion, this first chapter simply is not comprehensive enough to be useful.

The more relevant analysis begins in chapter two where the authors observe that the average urban court takes about three times longer to dispose of a criminal case than the length of time recommended by the President's Commission on Law Enforcement and Administration of Justice. The Commission proposed that the trial of a jailed defendant be completed within a maximum of ninety-two days following arrest, while the case of a defendant who is free on bail should be disposed of within one hundred and two days of his arrest. Some of the problems contributing to the existing delay include the time lapse between arrest and the preliminary hearing, and between preliminary hearing and indictment by grand jury. Even greater delay occurs between arraignment and trial. This delay obstructs one of the primary goals of the criminal process because the authors realize that it is not necessarily the severity of punishment, but rather its swiftness and certainty which deter. Moreover, rehabilitation proves more effective when it begins soon after the criminal activity. Thus, "[w]hether the emphasis is on protecting society, discouraging others from committing criminal acts, or restoring the offender, all are rendered of negligible value when inordinately delayed."[1]

To shorten the protracted pretrial period, the authors suggest the adoption of legislation requiring that defendants who are detained come to trial within sixty days of arrest, while the trial of an individual free on bail should commence within one hundred and twenty days of arrest. This time requirement would not be excused even when the

1. L. KATZ, L. LITWIN, & R. BAMBERGER, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 56 (1972).

delay is caused by the defendant. Among the sanctions suggested for recalcitrant defense attorneys is a greater use of the court's contempt power, and, where delay is the fault of the state, dismissal of the charges.

The third chapter, itself a masterpiece of protraction and repetition, blasts the duplications of the charging process. Essentially, the authors contend that a lack of effective screening in determining who should be charged, coupled with the sheer volume of potential criminal cases, leads to a plethora of minor cases or matters which should be dealt with outside the courtroom, contributing to clogged dockets. The initial decision to charge, which rests with the police, screens out few of those cases which do not belong in the courts because, as the authors observe, the only way to vindicate the policeman's decision to arrest is through conviction of the offender. Theoretically, there is some screening by the detective who determines whether to book the suspect, but this screening proves ineffective because generally the booking officer will want to endorse the decision of the officer to arrest. Some screening occurs in the prosecutor's office, but few processes are as effective as that in Los Angeles where, in 1967, more than 64,000 felony arrests were reduced to only 24,505 felony prosecutions. The quality of additional screening at the preliminary hearing, which should interpose an independent evaluation of the decisions to arrest and charge, is in direct proportion to the quality of the judge. Then, "[e]ven though the police have screened and decided to charge, the prosecutor has screened and filed charges, and the municipal court judge has screened and found probable cause,"[2] a final opportunity for screening rests with the grand jury. Predictably, however, the authors characterize the grand jury as a rubber stamp for prosecutors, which has totally failed its traditional task of filtering baseless cases out of the courts.

The authors' treatment of pretrial release, in chapter four, easily is the most well researched section of the book, but the resulting direction is aimless and totally unimaginative. Only a fair analysis is given to preventive detention, a concept with which the authors note various problems, most importantly that the future conduct of an individual is simply not susceptible to sufficiently accurate prediction to justify incarcerating him prior to a judicial determination of guilt. Nevertheless, they conclude that if "preventive detention is wisely administered and limited to those few cases where the government is able to demonstrate

2. *Id.* at 120-21.

on the basis of past convictions for violent crimes that the individual does, in fact, represent a predictable threat . . . [p]reventive detention, not disguised as high bail, promises far fewer cases of injustice than the bail system that exists in the vast majority of cities and towns of the United States."[3]

Although undoubtedly the American bail structure is a system in need of reform, and a few of the authors' suggestions are salutary, one must wonder why a study of the causes of pretrial delay in felony cases requires such a thorough analysis of bail. Assuredly, the authors assert that "[d]elay in trial is directly tied to the bail system,"[4] but neglect to inform precisely how pretrial detention or the restriction of money bail will decrease the time from arrest to trial. Indeed, the primary connection made between the two problems speaks highly to the authors' sense of timing, but harshly to their sense of justice; that is, that the entire criminal process is speeded because defendants who are denied bail or who cannot make bail are far more likely to "cop a plea" to a lesser charge, and receive probation, or gain immediate release as a result of the "good time" already spent in jail awaiting trial. "Defendants who are free on bail are under no pressure whatever to agree to a plea of guilty."[5] Such thinking is brutal, and Professor Katz and his colleagues must have intended something better.

However, much like the good samaritan who voluntarily undertakes the performance of a duty, the authors must be held accountable for the performance of that duty, in this case, their treatment of pretrial release. The authors hardly acquit themselves. They assume that certain offenses are non-bailable, settle for pretrial release systems "that retain monetary bail but keep its discriminatory effects to a minimum,"[6] and—blunder of blunders—advocate that the policeman who books the suspect expedite the pretrial process by making the initial bail determination. Only if "this determination results in a denial of release to the suspect, either because of the threat he poses to the community or the inability of assuring his presence for trial, then a thorough judicial review of the station-house bail determination shall be held within forty-eight hours of the defendant's arrest."[7] This fast-and-loose approach to the civil rights of an individual who spends two days in jail because the

3. *Id.* at 174.
4. *Id.* at 147.
5. *Id.*
6. *Id.* at 168.
7. *Id.* at 173.

booking police officer determined that he was "dangerous" is astonishing.

Obviously, police who risk their lives to apprehend suspects are more likely than not to want to keep the accused off the streets. Indeed, the proposal becomes even more incredible in light of the fact that the authors themselves, in a previous chapter, indicated that it is imperative that suspects gain pretrial release as quickly as possible, before witnesses and exculpatory evidence disappear. That the authors countenance a non-judicially imposed delay of two days or more before obtaining pretrial release demonstrates a thoughtless insensitivity to the plight of the detained accused.

Finally, the authors treat delay between indictment and trial, which is often caused by defense attorneys filing isolated motions which range from challenges to the sufficiency of the charging instrument or motions to suppress evidence, to general discovery. Here, and during the plea bargaining stage, huge blocks of time are wasted primarily because of the absolute deference paid by judges to the convenience of lawyers, a practice the authors expect to diminish with the institution of a structured post-indictment period, tightly governed by formal court rules for discovery and motions practice.

In all, the authors advance twenty-five suggestions,[8] some of which are excellent, and all of which deserve mention:

1. Establish a speedy trial time limit applicable to *all* felony cases. Defendants who are detained in jail would be brought to trial within sixty days of their arrest and defendants who are free on bail would be brought to trial within one hundred and twenty days. Since a tremendous percentage of cases are delayed because a defendant and his attorney believe that delay is in their best interest, provisions must be included to guarantee a speedy trial to the state.

2. Reevaluate substantive criminal statutes to eliminate those matters that are not properly subject to criminal sanction and those which the courts are not equipped or trained to handle.

3. Expand the booking procedure for felony cases and eliminate the preliminary court appearance or arraignment. The booking officer would advise the defendant of his constitutional rights and make a preliminary determination of bail.

8. *See* UNITED STATES JUSTICE DEPARTMENT, ANALYSIS OF PRETRIAL DELAY IN FELONY CASES—A SUMMARY REPORT 11-13 (1972).

4. Adopt a bail program comparable to that used in the District of Columbia, but which permits a preliminary bail determination during the booking procedure.

5. Authorize booking officer to appoint counsel for indigent defendants. Initial meeting between counsel would take place within twenty-four hours if the defendant is detained and within five days if the defendant is released on bail.

6. Adopt a unified prosecutor system and eliminate any dual responsibility for felonies between city and county prosecutors. The prosecutor should commit human resources to the screening and charging phases of felony prosecutions in order to sift cases and to arrive at realistic and convictable charges.

7. Require a mandatory pre-charging conference between the prosecutor and defense attorney in an effort to eliminate and settle a case prior to the preliminary hearing, which will be the first court appearance.

8. Require a mandatory preliminary hearing in all felony cases. Exceptions to this rule would be permitted only where the defendant agrees in writing to plead guilty to a charge arrived at during the prosecutor-defense attorney mandatory conference; or the prosecutor dismisses the charge, or the prosecutor refers the case for handling as a misdemeanor or to a court diversionary program.

9. Schedule the preliminary hearing within forty-eight hours of the arrest if the defendant has not been released by the booking officer or within seven days if the defendant has been released on bail. No more than one continuance of forty-eight hours would be permitted, and then only if a showing of *good cause* is made prior to the scheduled hearing. No delay of the preliminary hearing would be granted if the defendant has been detained by the booking officer, irrespective of whether the request for delay emanates from the prosecution or defense.

10. Provide that, at the preliminary hearing, after a determination of probable cause, the judge review the bail conditions set by the booking officer.

11. Eliminate money as the standard of release wherever possible. Even in the case of transients, money bail would be used as a last resort only if it is established that the defendant's ties to his home community would not satisfy the standards for release.

12. Permit pretrial detention, based upon standards more clearly

and narrowly defined than those enacted in the District of Columbia Court Reform and Criminal Procedure Act of 1970, only in extreme instances where danger to the community can be firmly established.

13. Eliminate indictment by grand jury where the defendant has been arrested. Grand jury activity would be restricted to investigation in cases where there is no prior arrest.

14. Eliminate arraignment, after an indictment.

15. Specify that the original affidavit filed by the prosecutor, as amended by the findings of the preliminary hearing, become the formal charging document.

16. Require by statute two-way discovery in felony cases.

17. Require that a bill of particulars be filed within seven days of the preliminary hearing.

18. Provide that theory of prosecution, special defenses, names of witnesses to be called at trial, statements of expert witnesses, and access to witnesses be available from both the prosecution and the defense. Informal, rather than the more formal and expensive methods of discovery such as depositions, should be encouraged.

19. Consolidate motions practice so that all motions are raised and disposed of at one time. If necessary, a hearing on questions of discovery and motions should be held within twenty days of the preliminary hearing. Decisions on motions would be binding at trial.

20. Educate the public that pleas of guilty to reduced charges or in return for reduced sentences may be in the best interests of the defendant and the community. Plea bargaining standards should be established to insure that those best interests are served.

21. Allow a fourteen-day period, after the discovery and motions stage, for plea bargaining. If no agreement has been reached, or if the judge has not approved the terms of an agreement, no further leeway for bargaining would be permitted after the fourteen-day period, and the trial would be scheduled.

22. Arrange for prosecutors and judges to set uniform guidelines for negotiated pleas to assure that defendants charged with the same offense and having comparable criminal records are treated alike. To insure protection of the community interest, offers of reduced pleas and sentences should appear in the record.

23. Consolidate felony cases within one court with original and final jurisdiction. Adopt the personal docket system whereby a judge is

assigned a case from the initial appearance to its disposition. Assign the judge personal responsibility to insure that a case, and each of its stages, is disposed of within the established time period.

24. Provide that judges exercise the same authority in ruling on continuances as they do when ruling on evidentiary questions, and permit continuances only upon a showing of necessity and when it is in the best interests of justice.

25. Adopt computerized and central scheduling for all courts within a community to eliminate scheduling conflicts as an excuse for delay.

In conclusion, this study recognizes that time is of the essence during the period between arrest and trial, and advances a number of excellent suggestions, implementation of which will accelerate considerably the criminal process. Yet, in their efforts to secure the reality of a speedy trial for felony defendants, the authors tend to cast recklessly in areas —particularly bail reform—where their suggestions can only do more harm than good. For example, adoption of their version of station-house bail would prove disastrous. In general, however, *Justice is the Crime* will serve as a useful primer for anyone who wishes to pinpoint specific causes of pretrial delay, and constitutes another step demonstrating that in the realm of the sixth amendment, much needs to be done.

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