

# HEINONLINE

Citation: 74 Columbia Law Review 131 1974

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Tue Apr 19 14:26:41 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0010-1958](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0010-1958)

## BOOKS

**IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS.** By Raoul Berger. Cambridge: Harvard University Press, 1973. Pp. xii, 345. \$14.95.

The founding fathers did not hastily adopt the impeachment provision<sup>1</sup> of the Constitution. They were fully familiar with the way that the English Parliament had utilized the impeachment process to curb the powers of the monarchy and to establish parliamentary supremacy. And they deemed it essential that the impeachment institution be available to the Congress as an instrument for protecting both constitutional government and the people, in an ultimate showdown, against gross abuse of power by the Chief Executive. The basic English model was therefore incorporated into the Constitution, with the House having the power to move impeachment by majority vote and the Senate to try the issues and convict upon two-thirds vote.

In adapting the impeachment process to the American scene, however, the framers inevitably left certain ambiguities in the final provisions. Some of these arose out of the fact that the founding fathers did not wish to take over the English practice lock, stock and barrel. Impeachment was intended to be applicable only in a narrower set of circumstances and with more limited results. Hence, after some preliminary discussion, the proposal was made that the President could be removed from office by impeachment and conviction "for treason, or bribery." This was deemed too restricted and, after rejecting "maladministration" as a cause for impeachment, on the ground it was too broad, the Convention settled on the addition of "other high crimes and misdemeanors." The grounds for impeachment were thus intended to be limited but, apart from a narrow definition of treason elsewhere in the Constitution,<sup>2</sup> the limits were not precisely delineated.

A further ambiguity arose out of the fact that, at the last minute, the Convention extended the impeachment clause to apply not only to the President but also to "the Vice President and all civil officers of the United States." The principal effect of this extension has been to bring federal judges under the impeachment provision. The removal of lower court judges and minor executive officers, however, raises quite different kinds of problems from the removal of the President, Vice President, or a top executive official. This combination of functions in the impeachment provision has been a source of considerable confusion in the understanding and application of its terms.

Actual operation of the impeachment process over the years has not tended to resolve these and many other problems. There have been twelve

---

1. U.S. CONST. art. II, § 4.

2. *Id.* art. III, § 3.

cases of impeachment voted by the House, of which eleven went to trial in the Senate and four resulted in convictions. Only the impeachment of President Andrew Johnson, and to some extent the impeachment of Supreme Court Justice Samuel Chase, both of which ended in acquittals, have raised broad issues affecting the fundamental balance of power in the government such as the framers of the impeachment provisions originally had in mind. Of the remaining cases, one involved a Senator and resulted in acquittal, apparently on the ground that members of Congress were not "civil officers of the United States" within the meaning of the impeachment provision; one was directed at a cabinet officer, who resigned before trial, and was also acquitted; and the other eight related to lower federal judges, mostly charged with bribery, drunkenness, and similar forms of misconduct. It is in this last category that all four convictions were obtained. In general, no coherent or accepted body of law has grown out of these proceedings.

Raoul Berger's *Impeachment: The Constitutional Issues* is a valuable contribution in this confused state of affairs. Without doubt it is the most useful source of scholarly information on the law of impeachment now available. One cannot refrain from warning the non-legal reader, however, that the book, like most legal writing, is so overloaded with footnote material as to be virtually unreadable. It can be studied, but hardly enjoyed as literature.

The book was conceived, researched and written before the Watergate disclosures brought into public discussion the possibility of impeaching a President. Berger could hardly have foreseen how topical his subject would become shortly after publication date. This accidental timing assures a certain objectivity, views on impeachment tending to shift with political winds. Unfortunately, it also means that the book does not focus squarely upon many of the specific issues that are now of crucial importance to the American people. A large part deals with impeachment problems as they affect the lower federal judiciary, where most of the action has occurred in the past. Nevertheless, the book does throw considerable light upon some questions of presidential impeachment, and it is here that its major current interest is to be found.

One of the most controversial of the present issues is the question of what constitutes an impeachable offense. Berger argues persuasively that impeachment is not limited to conduct that would constitute a crime or an indictable offense. He points out that the term "high crimes and misdemeanors" does not come from the criminal law—indeed was unknown to that law—but derives from impeachment law itself. And he cites numerous cases where conduct that did not constitute violation of law was made the ground for impeachment (though conviction did not necessarily result). Among other examples he finds the term "high crimes and misdemeanors" applied where the accused "appropriated funds to purposes other than those specified";

"procured offices for persons who were unfit and unworthy of them"; "allowed the office of Ordnance to go unrepaired though money was appropriated for that purpose"; and "thwarted Parliament's order to store arms and ammunition in storehouses." (Pp. 67-68.) The phrase "high crimes and misdemeanors," he demonstrates, is not concerned with "high" in the sense of "serious" crimes as such, but with misconduct by officials in high places who are immune to ordinary forms of judicial or political control.

Berger also makes clear that an impeachable offense must be narrower than the definition offered by Gerald Ford (then Congressman) in urging the impeachment of Justice William O. Douglas in 1970:

What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. . . . (P. 53.)

Quite the contrary, Berger notes, the framers expressly rejected the ground of "maladministration" as being too broad and used the phrase "high crimes and misdemeanors" as having a "limited" and "technical" meaning (pp. 86-87).

Where then does Berger suggest that the line be drawn? On this he is somewhat vague. He does clarify the situation somewhat by arguing (a reversal of an earlier position) that the standards for impeachment of a President, Vice President, or high executive official should be different than that for a judge or (presumably) minor executive official. But he does not go much beyond this. He simply states that impeachment lies only for "great injuries," or "great misdemeanors" (p. 88), not for "petty misconduct." (P. 90.) In the end the closest he gets to a definition is a standard of "great offenses." (P. 92.)

One feels, however, that it is possible to do somewhat better on the basis of Berger's materials. The crucial element in formulating standards for impeachment of the President or other high executive official is suggested by language used in some of the English impeachments. In 1642, the Earl of Strafford was impeached because, it was alleged, he had "undermined the immemorial constitution of the kingdom by attacking its free institutions." (P. 33.) And in 1680 the impeachment of Chief Justice Scroggs was based on the charge that he had "wickedly endeavoured to subvert the fundamental laws, and . . . to introduce . . . arbitrary and tyrannical government against law." (P. 47.)

Surely it is this concept that the founding fathers intended to incorporate in our Constitution. The President, Vice President or other high executive officer is to be removed by impeachment when he engages in gross misconduct

that undermines the basic principles of the constitutional order. Plainly the conduct must go substantially beyond mere incorrect application of law, disagreement on policy, or even action based upon a fairly arguable interpretation of the Constitution. Nor would an isolated violation of a constitutional right be sufficient. It would have to be misconduct so egregious as to subvert the very ground rules of a democratic society.

Generally speaking, conduct of such a nature as to be impeachable under this standard would fall into two broad categories. The first is usurpation of power from one of the other branches of government. This would include such matters as infringement upon the war-making powers of Congress, excessive use of executive privilege to withhold information from Congress or the courts, impoundment of funds to a degree that thwarted the expressed policies of Congress, and refusal to carry out decisions of Congress or the courts, thereby failing in his obligation to "take care that the laws be faithfully executed." The second category embraces repeated and serious attacks upon the constitutional rights of individual citizens, so patterned as to threaten the system of individual rights under law. Creation of a special police force, or the use of the Federal Bureau of Investigation or Central Intelligence Agency, to engage in political surveillance or harassment by wiretapping, burglary, forgery and the like—in other words, establishment of a secret political police characteristic of a totalitarian dictatorship—would fall within this category. In either case the impeachment power should be utilized only in the face of conduct that destroys all claim to legitimacy.

Beyond questions of technical standards for impeachment lie difficult political questions concerning the circumstances under which the remedy of impeachment should be invoked. Everyone recognizes that impeachment has a traumatic effect upon the body politic. If impeachment proceedings are brought against the President, even though the bureaucracy may continue to function much the same as before, the leadership operations of the executive branch are seriously impaired. Public attention is concentrated upon an elemental struggle for power rather than on the use of power to solve the nation's problems. As Berger repeatedly points out, it is impossible to eliminate partisan politics from an impeachment proceeding or to conduct such a controversy wholly within the framework of pure principle. When should the political leaders of a nation subject their country to such an ordeal?

Unfortunately Berger does not throw much light upon this question. Our only actual experience with this sort of a problem is the impeachment of Andrew Johnson. Although Berger has a long chapter on the Johnson impeachment proceedings, he does not really elucidate the underlying issues. Berger's view is the orthodox one. He starts with a predisposition to favor Johnson's reconstruction position (pp. 260-61), and envisages the conflict as one involving only a difference of policy between Johnson and his would-be impeachers (pp. 261-62). He conceives the issue at stake to be whether the

President is "impeachable for violating a statute [the Tenure of Office Act<sup>3</sup>] . . . if in his judgment it invades his constitutional prerogatives." (P. 252.) Counsel for the House managers are described as "buzzards" (p. 270), and counsel for Johnson are called "as valiant a group of advocates as can be found in the annals of the American bar . . ." (P. 274.) The whole episode is characterized as "a frightening reminder that in the hands of a passion-driven Congress the process may bring down the very pillars of our constitutional system" (p. 252), and a "gross abuse of the impeachment process . . ." (P. 295.)

It is certainly true that the precise grounds for impeachment alleged by the House—violation of the Tenure of Office Act in dismissing Secretary of War Stanton, and "intemperate, inflammatory, and scandalous harangues" against Congress—were in themselves inadequate grounds for impeachment. Likewise the trial itself was precipitous and in significant respects unfair. Nevertheless, the impeachment proceedings cannot be regarded as merely irresponsible efforts by passionate partisans to drive a hated President out of office. The issues went far deeper and deserve to be studied more fully for the light they throw upon the legitimate use of the impeachment power.

Another view of the situation is possible. The North had won the war, at the cost of tremendous bloodshed and agony, and the question facing the country was what kind of a reconstruction would take place. Although Congress, the basic policy-maker under the Constitution, was divided, a clear majority favored policies that would eliminate the power of the landholding aristocracy that controlled the Southern States before the war, and give substantial support, by way of land, the vote and basic civil rights, to the former slaves. Johnson, who sympathized with the old Southern regime, was President by accident of Lincoln's assassination. In essence, by use of his powers as military chief and by disregard of congressional enactments, Johnson refused to carry out the program of the legislative branch. Congressional leaders were confronted with the fact that, though they had won the war, they were losing the peace. President Johnson's actions could be viewed as a flagrant violation of his constitutional obligations to enforce congressional policies, which policies, not incidentally, concerned momentous issues that would effect the life of the country for generations to come. Under the circumstances the only available constitutional remedy would seem to have been impeachment. Concededly the techniques used in invoking the impeachment power were faulty, and this may well have been the reason that a conviction failed in the Senate by one vote. Yet a strong case can be made for the proposition that use of the impeachment institution was entirely justified and that the country would have been better off in the end had it succeeded.<sup>4</sup>

---

3. Act of March 2, 1867, ch. 154, 14 Stat. 430.

4. The foremost proponent of this view is Professor Benedict of Ohio State University. See M. L. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973).

Another issue that has been raised by recent events is the question whether there is or should be any judicial review of the impeachment proceedings conducted by the legislature. The constitutional provisions that the "House of Representatives shall . . . have the sole Power of Impeachment," and that the "Senate shall have the sole Power to try all Impeachments," suggest that no review by the judicial branch was contemplated. Yet the issue is by no means clear—the power to try does not necessarily exclude the power to review a trial on appeal—and the question is certainly not foreclosed by the language. Berger argues forcefully that judicial review should lie, though he does not clearly explain the scope of review he would advocate. He rests his case for review upon the basic premises of *Marbury v. Madison*<sup>5</sup>—that the Supreme Court is the agency of government given the ultimate power to interpret the Constitution and apply the law—and relies heavily upon *Powell v. McCormack*<sup>6</sup> in which the Supreme Court allowed review over the action of the House of Representatives in refusing Adam Clayton Powell his seat.

Berger's argument is in many ways persuasive but it suffers, I think, from the failure to make a distinction between the impeachment of judges or other minor civil officers, and the impeachment of the President. In the former situation the issues are likely to be of a narrowly factual nature and readily reviewed by a judicial process, and the political forces are more willing to accept the judicial judgment. Moreover, as to federal judges, there is argument for the position that the judicial branch should be able to protect its independence against legislative interference by invoking the general practices of judicial review.

Where the object of the impeachment is the President or Vice President, however, there is grave doubt that judicial review is feasible. As to interlocutory review, the delay factor alone would seem to preclude review. As to review after conviction by the Senate, it seems unlikely that intervention by the courts would add to the justice of the outcome or the stability of the nation. An impeachment proceeding—both in its substantive and procedural aspects—is ultimately a political rather than a judicial process. Not that judicial issues are not present or that judicial procedures are irrelevant. But fundamentally the judgments made are more matters of statesmanship than of the kind of law administered by the courts. Hence there is, as to most issues, insufficient basis for a judicial body to act. More important, the courts would almost certainly be overwhelmed by the political forces unleashed by an impeachment proceeding. It is difficult to visualize the Supreme Court successfully reversing the decision of a majority of the House and two-thirds of the Senate that a President or Vice President should be removed from office. If we cannot trust the political integrity of the members of the legislature in

---

5. 5 U.S. (1 Cranch) 137 (1803).

6. 395 U.S. 486 (1969).

utilizing the extreme sanction of impeachment, we are not likely to find salvation in judicial action. One rather guesses the Supreme Court would itself look on the matter in this light.

Another set of problems relate to questions of procedure in the impeachment process. Here again Berger does not address himself to these issues. Nor is adequate material available from other sources. It is possible to formulate the outlines of the problem, but many details remain to be filled in.

Most observers tend to assume that the impeachment process should adhere as strictly to judicial procedures as possible. This is a dubious starting point. A judicial process involving 435 grand jurors and 100 judges is not a workable model. We are dealing rather with a decision-making process that must rest on debate and vote by a legislative body. Moreover, neither the legislature nor the political system as a whole can afford interminable delay in resolving the issues.

The need to develop a fair, non-judicial, procedure should not alarm us unduly. There is no reason to believe that the judicial method of solving problems is the only proper one. As the operation of legislative investigating committees has begun to demonstrate, other forms of fact-finding proceedings can be made just and workable.

Fortunately, procedural difficulties are minimized by the fact, already noted, that the decision made is not a judicial one, like that in an ordinary criminal trial, but in a broad sense a political one. Thus many of the most troublesome issues of fact-finding, such as those involving the intent with which an act was done, will seldom have to be faced. Likewise issues of personal responsibility for conduct, as distinct from political responsibility, will normally not have to be determined. And much of the evidence will be readily available in the form of public actions or documents. In short, the decision to be made deals in the main with political, not personal, conduct.

The function of the House, of course, is to decide whether impeachment charges are to be preferred and, if so, to formulate them in specific terms with supporting evidence. Obviously the main burden of this task has to be entrusted to a committee, armed with the subpoena power. Much of the relevant evidence will already be in the public domain, or previously will have been brought to light by other legislative committees, and would need only to be assembled and reduced to coherent shape. Surely no requirement exists that the committee obtain such evidence by a *de novo* hearing process. Other issues may need further development and here the committee may have to turn to hearings. A major problem may be to deal with situations where there is a refusal by the executive branch to produce material evidence. Resort to the judicial process for compelling the production of testimony or documents may well prove to be unacceptably time-consuming. The legislative contempt power may be inadequate or may be challenged in a habeas corpus proceeding before

the courts. Under these circumstances, the committee and later the House may be forced, as a way out of the dilemma, to rely upon presumptions as to the existence of certain facts where proof in the possession of the accused is withheld.

Another important issue may be whether the House committee should open its hearings to allow rebuttal or cross-examination by the accused or his representatives. Surely there is no obligation on the committee to do so. Its function is to charge, not to adjudicate. Yet there seems to be good reasons under most circumstances for the committee to hear the other side of the case if the accused elects to present it. Other issues relate to whether the hearings should be open or closed. Normally there would seem to be little justification for secret proceedings.

Trial before the Senate poses another set of problems. Undoubtedly most of the evidence would have to be presented in written form, as copies of documents or transcripts of testimony previously taken. In some instances, direct testimony of witnesses might prove advisable. But ordinary rules of evidence in the judicial process would surely not prevail. In general the basic requirements of fairness would seem to be met if the accused has full opportunity to present rebuttal evidence and such opportunity for cross-examination of prosecution witnesses as is necessary to develop the facts. For the latter purpose, it might be necessary to call some witnesses whose testimony has been submitted by the prosecution in transcript form. It should be noted again, however, that at this point in the proceedings hotly contested issues of specific fact would most likely be of peripheral relevance.

Finally, the ultimate question must be faced: is the impeachment process a viable way of protecting the Constitution against a despotic executive? One would like to think so. Watergate has forced us to confront a stark possibility that we have not faced in modern times, but that the founding fathers were able to visualize. The pressures of present-day society have consistently operated to increase the powers of the executive branch, and particularly the chief executive. Such accretion of power is undoubtedly necessary and must be accommodated. But we have begun to see at first hand the dangers of a twentieth century George III. In such a situation the most effective and appropriate course of action is to revive the institution of impeachment.

No one can ignore the manifest dangers lurking in the impeachment process. There is no way of eliminating all elements of partisan politics, and the process is open to serious abuse. It is not clear that we can make the process work procedurally without unfairness on the one hand or paralyzing delays on the other. There has been little opportunity to experiment with impeachment proceedings, apart from judicial impeachments, or to build up a body of precedent.

Yet there is good reason to believe that the dangers inherent in the

institution of presidential impeachment are not likely to prove disastrous in actual operation. After all it is the legislative branch that wields the power. Modern legislatures have seldom been sufficiently of one mind, or sufficiently coordinated (unless dominated by the executive), to pose the threat of gross abuse of the impeachment power. Moreover, some checks have been built into the institution. It takes a majority of one house to impeach and two-thirds of another to convict. The possibility that a popularly elected Chief Executive will not be able to muster half the House or one-third of the Senate against an unwarranted effort to remove him seems remote. Thus unless we have lost all political morality, in which case we are undone anyway, it appears most unlikely that the impeachment process could be successfully employed except in justified cases of dire emergency.

Rather the real dangers may lie in the opposite direction. The true cause for concern may well be that, even in an extreme situation, the legislature cannot mobilize itself to act with the directness and dispatch necessary to make the impeachment process work. The absence of such capacity has been characteristic of Congress in its recent struggles with encroaching executive power. Like other potential legislative power, exercise of the impeachment power requires a modicum of courage, responsibility and cohesion. Effectively utilized, however, presidential impeachment provides a mode of rededication to constitutional principles without violence.

THOMAS I. EMERSON

*Lines Professor of Law  
Yale Law School*

**THE ADMINISTRATION OF PUBLICLY-AIDED HOUSING.** Charles S. Ascher, General Reporter. The Hague: International Institute of Administration Sciences. 1971. Pp. 215 & Annex I-II. \$8.00.\*

Open my ears to music; let  
Me thrill with Spring's first flutes and drums—  
But never let me dare forget  
The bitter ballads of the slums.<sup>1</sup>

President Nixon's moratorium on new commitments of federal funds for housing<sup>2</sup> has given the poor more cause to sing "the bitter ballads of the slums." It is now clear that the President would like to terminate the conventional public housing program as well as other construction-oriented

---

\* *The Administration of Publicly-Aided Housing* is distributed in the United States and Canada by the National Association of Housing Officials, 2600 Virginia Avenue, Washington, D.C. 20027.

1. L. Untermeyer, *Prayer*, quoted in R. FISHER, *TWENTY YEARS OF PUBLIC HOUSING* 24 (1959).

2. See N.Y. Times, Jan. 9, 1973, at 1, col. 1.

housing subsidies.<sup>3</sup> But termination, modification or continuation of conventional public housing will not diminish the need for information on the administration of all types of government-aided housing.<sup>4</sup> First, the 700,000 units of public housing currently operative will have to be administered,<sup>5</sup> as will those projects approved prior to the moratorium and yet to be completed.<sup>6</sup> Second, the due process revolution in public housing inevitably will spread to all government subsidized housing.<sup>7</sup> Finally, the administration of admissions, occupancy and evictions are problems which affect all housing, subsidized or not.<sup>8</sup> Federal law has already intruded into the domain of the private property owner<sup>9</sup> and a "quiet revolution" has generated increased state and local regulation of land use.<sup>10</sup> It would be consistent with these developments for admissions, occupancy and eviction standards similar to those extant in conventional public housing to be imposed upon private rentals.<sup>11</sup>

### I. THE NATURE OF THE IIAS REPORT

*The Administration of Publicly-Aided Housing* is a report of administrative procedures employed in public housing programs of fourteen countries.<sup>12</sup> The report, sponsored by the International Institute of Administrative Sciences (hereinafter IIAS), is divided into two parts: Charles Ascher's General Report, a descriptive analysis of the various programs, and Yves Chapel's summary of national monographs. This summary is a condensation

3. Fried, *Lynn Details Housing-Subsidy Plans*, N.Y. Times, Oct. 28, 1973, at 12, col. 3.

4. See Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 881 n.8 (1973).

5. Approximately 2,200 local housing authorities operate 700,000 units of federally aided low-rent public housing. Hartman & Carr, *Housing Authorities Reconsidered*, 35 J. AM. INST. PLANNERS 10, 11 (1969).

6. Construction of pre-moratorium approved housing is expected to continue until June, 1974. N.Y. Times, Jan. 9, 1973, at 1, col. 1.

7. Note, *supra* note 4.

8. Cf. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966); Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 401 (1969).

9. See 42 U.S.C. § 3604 (1970), which prohibits private landlords from discriminating on the basis of race in the sale and rental of housing.

10. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROLS* (1971).

11. Note, *supra* note 4.

12. They are: Belgium, Federal Republic of Germany, Finland, France, Hungary, Ireland, Poland, Portugal, Spain, Sweden, United Kingdom, United States of America, Venezuela, and Yugoslavia. Although the participating countries are diverse economically and politically, each has an administrative network for the distribution of housing to segments of its public. Africa and Asia are not represented in the IIAS report. Obviously, monographs from African and Asian countries would have given the report a great deal of cosmetic appeal and substantive enrichment. Nonetheless, one of the weaknesses of the methodology of this study may well be its ambitious attempt to cover as many countries as it did. Perhaps a more concerted effort to examine and compare current procedures in a few countries, say five, carefully selected to represent diversity in economic, social and political conditions, would have been more useful. A smaller universe for examination may also have enabled Ascher to undertake direct observation of procedures and to meet and interview administrators, tenants, and applicants for admission to public housing.

of the responses to a written questionnaire of national reporters who describe the following aspects of government-aided housing: (1) the forms of state involvement in the provision of housing; (2) admission to government housing; (3) occupancy; (4) eviction; (5) common administrative procedures; (6) due process; and (7) general assessment of the practical effectiveness of formal administrative procedures.

The IIAS study of public housing is one volume of the IIAS series of Comparative Studies of Administrative Procedures and Processes. The series deals with "the conflicts which frequently oppose the Administration, acting on behalf of the general interest for which it is responsible, and the Citizen, legitimately defending his private interests, and with the manner in which such conflicts should be dealt with." (P. 1.) Such a concern would rarely be voiced in a world in which government's sole function was to preserve law and order. But where government assumes as well the task of promoting the social and economic welfare of its people, the conflict between individual liberty and government action is frequently felt.<sup>13</sup> Now that polemics over the desirability of the welfare state have subsided and the need for state involvement in the social and economic order recognized, it is quite appropriate for a distinguished colloquium of scholars to examine the impact of administrative agencies upon the rights of individuals.

But the study is not an academic exercise for academia's sake. Rather, it endeavors to assist administrators in promoting the general purposes of public housing programs while protecting the rights of individuals. "The purpose of our work," states André Heilbrunner in his Préface, "is to help the Administration to define a course of action, i.e., a procedure, such that no greater harm than is strictly necessary should be caused to the interests of the individual." (P. 2.)

The IIAS survey was carefully designed to avoid dangers inherent in sole reliance upon written questionnaires. National reporters were selected from each of the participating countries. Ascher prepared a draft questionnaire, tested it in a preliminary survey, and then modified it. He supplemented this method by adding information gained by direct observation in some countries. It is unfortunate, however, that Ascher was unable to travel to all of the countries studied for the report would have benefited from systematic visits to all the reporting countries for independent observation and consultation.

## II. GOALS OF PUBLIC HOUSING PROGRAMS

Ascher opens his first chapter by stating that "no nation in the world is fulfilling a goal of decent, sanitary housing for every family." (P. 9.) The United States is certainly no exception to this observation. Although the

---

13. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 153-56 (1958).

National Housing Act of 1949 calls for "the realization as soon as feasible of a decent home and a suitable living environment for every American family,"<sup>14</sup> the administration of the urban renewal program has not been quite so egalitarian. Projects have consumed an inordinate amount of time between approval, implementation and completion, and have been relatively oblivious of the housing needs of the poor.<sup>15</sup> Many people cynically believe that only developers and administrators have benefited from federally funded construction projects. One congressional committee concluded:

Instead of a grand assault on slums and blight as an integral part of a campaign for a "decent home and a suitable living environment for every American family," urban renewal was and is too often looked upon as a federally financed gimmick to provide relatively cheap land for a miscellany of profitable or prestigious enterprises.<sup>16</sup>

One of the problems with seeking universal decent, sanitary housing is that the goal itself is phrased in such loose and general verbiage that it allows administrators too much room for invention. What is "a decent home?" What is "a suitable living environment?" To many Americans, a decent home is two baths, a two-car garage, modern electrical appliances, and a swimming pool. A suitable living environment is rolling hills and four-acre lots. Millions of the world's poor would not dare dream of such decency. They reside in one-room shacks built of adobe and scrap in Latin America, tin-can towns in Havana, tin and rag shanties in India, and in many countries, including the United States, thousands sleep in the streets, stairways or any place they can find space.<sup>17</sup>

Even if national governments agreed to seek actively "decent, sanitary housing for every family," that pursuit, by its terms, ignores the needs of homeless millions who are not members of family units. The poor single individual may find shelter only on the skid rows of large cities. The experience of the United States is probably representative. A national skid row survey here found a polyglot group of predominantly male individuals residing in deteriorating or dilapidated hotels.<sup>18</sup> Many of these individuals are unemployed, many have been displaced from migrant farm labor by mechanization. Yet as former farm workers, they are ineligible for unemployment insurance; as single, able-bodied men, they are ineligible for welfare benefits; as singles who lack "proper" identification and cooking facilities, they are ineligible for the food stamps program; as singles who have not had the

---

14. Housing Act of 1949, 42 U.S.C. § 1441 (1970); Housing and Urban Development Act of 1968, 12 U.S.C. § 1701t (1970) & 42 U.S.C. § 1441a (1970). Cf. The Department of Housing and Urban Development Act, 5 U.S.C. § 624 (1966).

15. See *Building the American City*: Rep. of the Nat'l Comm'n on Urban Problems, 91st Cong., 1st Sess. 152-69 (1968).

16. *Id.* at 153.

17. 2 HUMAN SETTLEMENTS 45 (1972).

18. D. BOGUE, *SKID ROW IN AMERICAN CITIES* (1963).

same address for ninety days, they are ineligible for urban renewal relocation assistance; and as able-bodied singles who are not elderly and are not formally displaced, they are not eligible for public housing.<sup>19</sup>

Thus, insofar as the United States is concerned, the goal of "decent, sanitary housing for every family" does not enjoy the specificity and scope necessary to serve as a meaningful guide. Instead of briefly asserting that all countries have failed to achieve this broad goal, the IIAS report should have presented the more specific housing goals and objectives of each national program. One cannot safely conclude from Ascher's brief statement that no nation is fulfilling any goals of its housing programs, since these goals—e.g., revitalization of the credit industry, employment, slum clearance, and aesthetics—may well involve an array of political, social and economic objectives.

### III. UNIVERSAL SHORTAGE, FINANCIAL CRISIS AND CONSTRUCTION-ORIENTED STRATEGIES

A two-sentence paragraph bearing the title "Universal Shortage" begins the first chapter of the IIAS report. Indeed, a shortage of decent shelter cripples the lives of millions from New York and Rome to the dark corners of Ahmedabad, Cawnpore and Nagpur.<sup>20</sup> But the brevity of the paragraph marks the complexity of the issue. Emphasis must be placed on the adjective "decent," for whether a shortage of shelter alone is the problem is more questionable.

This question is currently the subject of debate in the United States. If shortage is the problem, production is obviously the solution. Some contend, however, that the housing crisis in United States cities results from under-maintenance of the existing supply rather than from shortage.<sup>21</sup> Unlike cities in the developing countries, large cities in the United States either stopped growing or lost population during the decade of the sixties.<sup>22</sup> New York

19. See Note, *No Room for Singles: A Gap in the Housing Law*, 80 YALE L.J. 395 (1970).

20. It has been estimated that before the end of this century between 1,100 million and 1,400 million new dwelling units must be constructed in the world. Assuming a medium estimate of 1,250 million, an average annual output of more than 40 million new dwellings is required; about 10 million in the more developed areas and 30 million in the less developed areas.

21. HUMAN SETTLEMENTS 42 (1972); Problems and Priorities in Human Settlements, United Nations, Rep. of the Secretary General, 25th Sess., General Assembly, A/8037 (1970).

22. See, e.g., I. LOWRY, HOUSING ASSISTANCE FOR LOW-INCOME URBAN FAMILIES: A FRESH APPROACH (1971).

22. A large number of cities in the United States have ceased to grow; many are losing population. Of the largest cities in the United States, 111 had a population increase of 10 percent; 51 had a population increase of less than 10 percent; and 130 had a decrease in population, losing an aggregate of 2.25 million persons. See *id.* at 2; U.S. Bureau of the Census, "Projections of the Number of Households and Families, 1967 to 1985," Current Population Reports, Series P-25, No. 394, June 6, 1968. This phenomenon in the United States is certainly not typical. The rapid growth of cities in developing countries is unprecedented.

A comparison of the urban population living in cities of 500,000 or more shows

City's experience is typical. The population of New York City has not changed significantly in size since 1950; yet it has changed radically in composition. The steady out-migration of whites since 1955 has been balanced by an equally steady in-migration of blacks and Puerto Ricans. In-migration and natural reproduction have combined to increase the city's minority profile from 13 percent of the total population in 1950 to more than 30 percent in 1970.<sup>23</sup> The change in composition has caused a concomitant change in the ability of tenants to pay rents high enough to keep pace with spiraling costs of operation and maintenance. The result, according to Ira Lowry, is that "[l]andlords, unable to earn a competitive rate of return on their investments, simply disinvested by undermaintenance."<sup>24</sup>

But financial problems are not confined to the private housing market; in fact, a major financial crisis threatens the very survival of public housing in the United States.<sup>25</sup> The problem arises from the inability of local housing authorities to pay maintenance and operating costs in the face of low rent rolls and rampant inflation. Consequently, local housing authorities (LHAs) have incurred large operating deficits. LHAs have responded to this crisis, as have private landlords, by undermaintaining their dwellings or by assessing higher rents. In *Fletcher v. Housing Authority*,<sup>26</sup> an LHA was allowed to exclude low income families from vacant public housing units because of the severity of its financial problems. Undesirable as this result may be, it is predictable given the fact that maintenance and operating costs are to be paid from rents. The congressional limitation of rents to 25 percent of the tenant's income produces a situation in which LHAs have to restrict admission to tenants whose incomes are high enough to support maintenance and operating payments.<sup>27</sup> Alternatively, LHAs could openly disobey the congressional mandate and charge rents higher than 25 percent of income. In *Barber v. White*,<sup>28</sup> the New Haven Housing Authority adopted the latter approach. When the tenants challenged assessments that exceeded one-fourth of their income, the NHHA asserted that application of the 25 percent rent ceiling without federal reimbursement for the resulting deficit

---

that in 1920 the ratio was 20% in developing regions and 47% in the developed ones, while in 1960 this ratio rose to 43% in the developing regions and to only 49% in the developed ones.

2 HUMAN SETTLEMENTS 36 (1972).

23. LOWRY, *supra* note 21, at 9.

24. *Id.*

25. See King, *Cities Losing on Aid for Housing Poor*, N.Y. Times, Nov. 25, 1972, at 17, cols. 2-3; The Public Housing Financial Crisis: Cause and Effect, NAHRO Bulletin, Sept. 29, 1972.

26. Memorandum Opinion, Order and Judgment, Civ. Act. No. 7399-g (W.D. Ky., filed March 9, 1973).

27. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 213(a), 42 U.S.C. § 1402(1) (1970), *as amended*, 42 U.S.C. § 1402(1) (Supp. I, 1971). Congress authorized funds for the inevitable deficits; however, Congress has failed to appropriate enough funds for this purpose and the Department of Housing and Urban Development has not applied other available funds to this problem.

28. 351 F. Supp. 1091 (D. Conn. 1972).

constituted a taking of property without just compensation or due process of law. Although the court rejected this argument, the court's response is a shocking reminder of public housing's plight. Judge Newman stated:

The unappealing but blunt fact is that nothing in the Act nor any judgment of this Court enforcing the Act requires the NHHA to continue in operation. Of course there would be a serious frustration of Congressional policy and a devastating impact upon innocent families if a housing authority were forced to close for lack of funds. But if such a disastrous result should occur, the responsibility lies with the Executive and Legislative Branches of the federal government.<sup>29</sup>

The financial crisis, accentuated by the general state of alarm over the impoundment of funds appropriated for housing subsidy programs,<sup>30</sup> has sent policy makers back to the drafting tables to consider alternative approaches. Yet quickly drawn new proposals would probably add only slight variations to existing themes. If new strategies for government involvement in the provision of shelter must be devised, then there should be a necessary period of reevaluation to leave some time for a comparison of experiences in this country with experiences in others.<sup>31</sup> Shelter is, after all, a universal human need.

Unfortunately, the IIAS study did not provide information on the extent and degree to which finance affects administrative decisions. While this study was designed to focus solely on questions of process rather than fiscal and social problems, fiscal ability often affects the process that an agency dispenses. A local housing authority burdened with a tremendous deficit is likely to adopt a tougher eviction policy and afford less due process than one that is financially secure. An admission policy that had been based on need or first-come-first-served may change to rigorous credit and character examinations.

Given the severe financial problems caused by low rents and high maintenance and operating costs, the IIAS report questions whether construction of new buildings—the approach adopted by most nations—is in fact feasible. Some economists have proposed that a rent certificate program designed to enable low-income families to afford well-maintained older housing be substituted for programs based on the construction of new housing,<sup>32</sup> various

---

29. *Id.* at 1096.

30. *See* Housing Authority of San Francisco v. HUD, 340 F. Supp. 654 (N.D. Calif. 1972) where the court dismissed an action in which the LHA in San Francisco sought release of one hundred and fifty million dollars appropriated for housing subsidy programs. *Cf.* Commonwealth of Pennsylvania v. Lynn, Civ. Act. No. 990-73 (D.D.C. filed July 23, 1973).

31. *See* D. MANDELKER, HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND (1973) for a comparative analysis of housing subsidy systems. Exchanges between universities and agencies and grants for study in foreign countries may help law professors gather first-hand information on foreign subsidy systems.

32. *See* LOWRY, *supra* note 21, at 26-31.

proposed incentives would encourage local governments to enforce local housing codes. An obvious danger of such a program is that it would reduce the construction of new units for the poor in central cities. Barriers erected by exclusionary zoning ordinances already often effectively bar such building programs from the suburbs. Thus, the bifurcation between poor and rich in city and suburb now maintained by exclusionary land use devices may be exacerbated. In any case, few countries have the requisite housing stock to consider the efficacy of a cash certificate approach to provide shelter for low-income persons. Only Sweden, the Netherlands, West Germany, Great Britain and France are thought to have a sufficient superabundance of older housing.<sup>33</sup>

A subsidy systems analysis would have given readers an opportunity to compare the subsidy approach and the conventional public housing approach. Increasingly, researchers are concluding that, standing alone, public construction and rehabilitation of housing is insufficient.<sup>34</sup> Indeed, if the government merely constructs housing and offers it for sale without subsidy, the poor would be unable to afford public housing as well as privately-produced housing. The "subsidy gap" between the cost of housing and the ability of the poor to afford it is not closed by the mere fact of government construction.

The IIAS report might also have profitably included information on the full circle of government involvement in housing. For example, the report limited its discussion of the forms of state action to the participation of national governments, provincial or state governments, and municipalities in the construction of public housing units for rent. No question was raised, however, about other forms of government action, such as the construction of ownership housing as opposed to rental housing and other direct and indirect subsidies. One can only guess at the kind of information that would have been conveyed if the reporters had undertaken a deeper search. That the information is there is clear. For instance, the national reporter for Spain advised the IIAS:

There is a great variety of housing agencies whose legal status differs . . . . [T]hough there are municipal housing agencies, they are

---

33. Moskof, *Foreign Housing Subsidy Systems: Alternative Approaches*, Papers Submitted to Subcommittee on Housing Panels on Housing Production, Housing Demand, and Developing a Suitable Living Environment, pt. 2, at 627, Comm. on Banking and Currency, H. Rep., 92d Cong., 1st Sess. (1971).

34. E. OLSEN, *CAN PUBLIC CONSTRUCTION INCREASE THE QUANTITY OF HOUSING SERVICE CONSUMED BY LOW-INCOME FAMILIES?* at 1 (1969). Olsen states that: the most rigorously developed and thoroughly tested theory of the housing market implies that public construction and rehabilitation have no effect on the long run equilibrium quantity of housing service. This theory makes clear that it is the subsidy which accompanies public construction and rehabilitation that results in greater consumption of housing service. The subsidy without direct public construction or rehabilitation will result in greater consumption of housing service. Public construction and rehabilitation without the subsidy will not result in greater consumption of housing service.

*Id.*

not so important . . . as in many other countries. *Besides, the question is limited to housing for rent or lease, while, in spite of the government's efforts, most public housing in Spain is built for sale.* (P. 85.) (Emphasis added.)

#### IV. ADMINISTRATION AND DUE PROCESS

The full panoply of administrative problems was not canvassed by the IIAS reporters. One wonders, for example, whether there were disparities within the countries surveyed between the economic and social status of the housing administrators and their tenants. A recent study of public housing authorities in the United States found that the background of public housing commissioners and public housing tenants differed substantially.

[Twenty-six] percent of all public housing families lack a male head of household, yet few women serve as housing authority commissioners. Over 55 percent of all households in public housing are non-white—a proportion which is steadily increasing—yet only six percent of the commissioners are nonwhite. Only 11 percent of public housing commissioners have incomes anywhere near the public housing range (and most of these have incomes so low only because they are retired): the median annual income in public housing nationally is \$3,132 for nonelderly households and \$1,468 for elderly households compared with \$11,700 for the commissioners.<sup>35</sup>

This study raises some difficult questions. Should public housing policy be made by persons who are on economic and social parity with public housing tenants? If so, what procedures should be established to provide for tenant representatives to serve on local boards? The present practice in the United States would not satisfy the goal of tenant representation, since municipal mayors and county commissioners appoint persons to the city or county boards.

While efforts should be made to provide tenants and their representatives with access to the decision-making process, are public housing tenants the only persons who have a stake in public housing? What about representation for those low-income families who are eligible for public housing but who have not received dwellings due to inadequate supply? If representation on the policy-making board is limited to tenants, then the interests of eligible non-tenants may not be protected. What about representation for residents of those sections of the municipality where public housing projects are located? Do they have a stake in the administration of admissions to and eviction from public housing projects located in their neighborhoods? What about those tenants who live in sections of town that are potential sites for public housing projects? Should they be represented on the policy-making board? Obviously, the problem is access to and participation in the decision-

---

35. Hartman & Carr, *supra* note 5, at 11-12. For a criticism of this study, see Cohen, *Comment on "Housing Authorities Reconsidered,"* 35 J. AM. INST. PLANNERS 432 (1969); Hartman & Carr's rejoinder appears at 35 J. AM. INST. PLANNERS 434 (1969).

making process as opposed to actual representation on the commission. A fair procedure for electing representatives to local boards would be a partial though imperfect response to the problem of representation, and access to meetings and hearings would be a method for asserting community interests.

Nevertheless, popular vote on public housing matters may serve as an effective barrier to the implementation of public housing projects. In *James v. Valtierra*,<sup>36</sup> for example, the Supreme Court upheld Article 34 of the California Constitution which provided that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election. The difficulty was that the poor, invariably a minority of those voting, almost always lost in their efforts to obtain public housing.<sup>37</sup> Yet Mr. Justice Black, writing for a 5-3 majority, stated:

The people of California have also decided by their own vote to require referendum approval of low-rent housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."<sup>38</sup>

Such decisions have forced civil rights organizations to begin seeking alternatives to integration strategies. One such alternative is the improvement of the environment of the ghetto by equalizing municipal services and by improving the quality and quantity of maintenance services in ghetto neighborhoods. Precedents developed in the administration of public housing—such as rules on admission occupancy, and eviction—could play an important part in the success of ghetto enrichment strategies.<sup>39</sup>

The IIAS reporters capture and record the myriad procedures employed by governments in the administration of public housing. Their object was to report the alternative procedures rather than to evaluate them. Spotlighting process in agencies that distribute government largesse is essential if we are to solve the inefficiency that often belies administrative agencies and to understand the dynamics of distributing largesse.

Ascher's summary of admissions criteria is a brief but comprehensive encyclopedia, including income, size of family in relation to size of dwelling, housing conditions, reference to public agencies, social factors, moral recti-

---

36. 402 U.S. 137 (1971).

37. Statistics on the impact of Article 34 are presented in Note, *California's Low-Income Housing Referendum: Equal Protection and the Problem of Economic Discrimination*, 8 COLUM. J. LAW & SOC. PROB. 135, 140 (1972).

38. 402 U.S. at 142-43.

39. *Colon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134 (S.D.N.Y. 1968); Note, *supra* note 4.

tude, residence, "tied" housing, and discrimination. The IIAS reporters also provide data on the tenor of priorities for admission to public housing as well as the procedures employed in establishing priorities. Accordingly, Ascher reports that the following standards are used to establish priorities: displacement, disabled veterans, chronological order of application (some countries publish waiting lists), and gravity of need. The report reveals a wide disparity in the standards and procedures employed by housing authorities in the reporting countries. In Portugal, for example, an applicant for public housing must be the "head of a family and not over 45 years of age." (P. 95.) Hungary excludes from public housing any person who "has been banished from a town or area." (P. 93.) And in Yugoslavia, "applicants for admission must be working people of the corresponding organization, working community or interest community." (P. 100.)

The IIAS survey also reveals that many of the problems encountered in the administration of public housing programs in this country have been encountered elsewhere as well. For example, most of the countries surveyed have general legislation that fails to define in clear and definite terms who is and is not eligible for public housing and instead delegates the authority to prescribe admission criteria to local administrative agencies (p. 18). Without more specific direction, local agencies have imposed admissions requirements that often exclude those persons most in need of government assistance. In the United Kingdom, "unmarried mothers, cohabittees, dirty families and transients" are excluded (p. 24). Under such a policy, a mother could be denied admission to public housing because she "smelled bad," or was otherwise obnoxious to the local administrator. Until recently, similar policies were promulgated by some local housing authorities in the United States.<sup>40</sup> In 1969, however, the Department of Housing and Urban Development issued a circular that banned

the establishment of policies by the local housing authority for the "automatic" denial of admission or eviction "to a particular class, such as unmarried mothers, families having one or more children born out of wedlock, families having police records or poor paying habits, etc."<sup>41</sup>

(P. 24.) Governments too often appear more concerned with the morality than the needs of individual tenants. Exclusion for the reason that tenants are obnoxious to administrators or have different life styles may exacerbate the social problems that public housing should alleviate.

---

40. See Rosen, *Tenant's Rights in Public Housing*, in *Housing for the Poor: Rights and Remedies* 154 (N.Y.U. School of Law Project of Social Welfare, Supp. I, 1967); Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, *supra*, note 8; Note, *Public Housing*, 22 VAND. L. REV. 875 (1969); Note, *Nonfinancial Eligibility and Eviction Standards in Public Housing—The Problem Family in the Great Society*, 53 CORNELL L. REV. 1122 (1968).

41. U.S. DEP'T HOUSING AND URBAN DEVELOPMENT, *LOW-RENT MANAGEMENT MANUAL* (1968).

One advantage of the IIAS report is that it includes data on tenant organizations. In Belgium, we learn, membership in a tenant cooperative association is a prerequisite for admission to government-sponsored housing (p. 90). Perhaps such a procedure would be useful in the United States. Since 1963, tenant unions in the United States have had a telling impact on landlord-tenant relations.<sup>42</sup> Organized rent strikes, like labor strikes, have produced collective bargaining agreements that have attempted to balance power between tenants and landlord. These agreements define tenants' rights, establish programs to train tenants in property management, prescribe grievance procedures, and oblige landlords to recognize tenant unions as bargaining agents of the tenants in all matters. Tenant unions have also begun to exercise authority in the delicate area of admission. In Michigan, for example, local public housing projects are managed by a board of tenant affairs, which has the power to review and veto rules of local housing authorities, including eligibility requirements for admission.<sup>43</sup>

The IIAS reporters did not examine the Belgium experience in administering such a program. Nonetheless, reporting the program alone should inspire policy makers and administrators to reevaluate the role of tenant unions in the governance of multiple dwelling units. The applicability of the labor union model to property transactions should be given thought. While it may appear that collective bargaining deprives the individual tenant and landlord of the freedom to bargain for terms and conditions of the tenancy, most poor tenants, at least, never enjoyed such a freedom if they ever had it. Absentee slumlords used contracts of adhesion to keep the pendulum of power swung to their side. But is the situation improved by shifting one contract of adhesion for another? A closed shop would require tenants to join a tenant association in order to obtain needed shelter. Such a condition on the admission of tenants to public housing may be contrary to the purposes of the public housing program, and may be unconstitutional as well.<sup>44</sup>

The IIAS reporters are at their best in describing the administrative procedures employed by the various governments, and this effort is both summarized and supplemented by Charles Ascher's general report. Ascher describes, with careful elaboration, the organs for administrative hearing and presents valuable information on the conduct of hearings, the procedural

---

42. T. FLAUM & E. SALZMAN, *URBAN RESEARCH CORPORATION REPORT: THE TENANT'S RIGHTS MOVEMENT* (1969).

43. Note, *Tenant Unions Growth of a Vehicle for Change in Low-Income Housing*, 3 U. CAL. DAVIS L. REV. 1 (1971).

44. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966). Tenant unions may provide some solutions to many of the social problems which now plague multiple dwelling units. Peer pressures and cooperative ventures may improve the care and maintenance of the dwellings, protect tenants from consumer pitfalls by organizing buyers clubs, provide a source of emotional strength by minimizing fear, suspicion and mistrust among tenants, and give each tenant a role in the making of decisions that affect the quality of the environment.

requirements of administrative hearings, judicial review and the ombudsman.

In the United States, a due process revolution has imposed constraints on the dispensation of government benefits. The revolution commenced in 1970 when the Supreme Court held in *Goldberg v. Kelly*<sup>45</sup> that due process requires a hearing prior to the termination of welfare benefits. The *Goldberg* decision has been expanded to cover public housing.<sup>46</sup> Courts have required notice and hearing prior to denial of applications for admission,<sup>47</sup> rent increases<sup>48</sup> and evictions.<sup>49</sup> The proliferation of due process requirements in the public housing arena has forced their adoption in the area of subsidized housing as well.<sup>50</sup> If the federal government adopts the housing allowance approach, the need for all housing to be governed by due process standards for admission, occupancy and evictions will be even more compelling. The increase in landlords who operate housing units for recipients of federal subsidies will enhance the need for adequate uniform standards for tenants' rights. The experience gleaned from due process precedents in public housing will thus be vital to the efficient administration of all government housing subsidies.

Administrators, practitioners, teachers and students whose interests lie in housing will welcome the IIAS report. Although it does not contain enough information on any one program to offer workable blueprints for materially altering operating programs, the discussion of various procedures employed may generate new ideas about program administration.

Academicians hold a particular responsibility for the failure to devise appropriate responses to provide the basic necessities of life to all humans; they should singularly applaud the IIAS for this study. First, it provides scholars with a substantial base for developing a comparative analysis of human settlements and the problem of government response to the universal shortage of adequate shelter. Courses on housing are characteristically provincial and ethnocentric. Rarely do they include the problems and approaches of other countries. Yet, land use and the need for shelter are problems that extend from pole to pole. The IIAS housing report could serve as the launching pad for a globally-oriented course on human shelter. Perhaps, the development of such courses in universities around the world will elicit new ideas and approaches; perhaps these ideas will lead to a sane approach to the

---

45. 397 U.S. 254 (1970).

46. *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

47. *Neddo v. Housing Authority*, 335 F. Supp. 1397 (E.D. Wis. 1971); *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795 (N.D. Ohio 1970); *Sumpter v. White Plains Housing Authority*, 29 N.Y.2d 420, 278 N.E.2d 892, 328 N.Y.S.2d 649, *cert. denied*, 406 U.S. 928 (1972).

48. *Burr v. New Rochelle Municipal Housing Authority*, 347 F. Supp. 1202 (S.D.N.Y. 1972). *But cf.* *McKinney v. Washington*, 442 F.2d 726 (D.C. Cir. 1970).

49. Note 58 *supra*.

50. Note, *supra* note 4, at 894-913.

provision of shelter and to the development of human settlements. Second, the report provides the opportunity to inspect the operations of administrative agencies that dispense government largesse. Too often administrative agencies are studied by an examination of the judicial review of agency action or inaction. Consequently, the science of administrative practice remains undeveloped. Too little is known about administrative agencies, particularly non-regulatory agencies. The IIAS study illuminates this dark corner so that others may find the switch to turn on the light.

KELLIS E. PARKER

*Associate Professor of Law  
Columbia University School of Law*

**CRIMINAL SENTENCES: LAW WITHOUT ORDER.** By Marvin E. Frankel. New York: Hill and Wang, 1972. Pp. x, 124. \$5.95.

"Anyone can try a criminal case," said Mr. Justice McCardie. "The real problem arises when the judge has to decide what punishment to award."<sup>1</sup> Different judges' individualized, subjective solutions to the difficult problem of sentencing criminals based upon their personal attitudes toward penology and politics have created a highly criticized disparity in sentencing.<sup>2</sup> In *Criminal Sentences: Law Without Order*,<sup>3</sup> Federal District Judge Marvin E. Frankel directly confronts the basic problems inherent in our sentencing system. Judge Frankel believes that no matter how conscientiously a judge performs his duties, "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." (P. 5.)

Since the judge performs the most readily visible role in the sentencing process, he is the first to be criticized when the system falls into disarray. Conceding the fallibility of judges as human beings, Judge Frankel views the problem from a larger perspective. The sentencing process is necessarily arbitrary because irrational penalty provisions prescribed by legislatures,<sup>4</sup>

1. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291 (1952), quoting A. GOODHART, ENGLISH CONTRIBUTIONS TO THE PHILOSOPHY OF LAW 14 (1949) (statement of Mr. Justice McCardie).

2. See, e.g., Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966); Note, *Criminal Sentence Revision—A Necessity*, 49 IOWA L. REV. 499 (1964).

3. Judge Frankel's book is an elaboration of his contribution to the 1971 Marx lectures at the University of Cincinnati Law School. See Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

4. That statutes in virtually every jurisdiction either provide no sentencing guidance or manifest an incoherent penalty structure has been recognized in the literature. See, e.g., Alexander, *A Hopeful View of the Sentencing Process*, 3 AM. CRIM. L.Q. 189

coupled with the absence of recognized legal standards for sentencing, invite, if not compel, arbitrariness. Yet although the legal profession is trained in remedying defects of this nature, it has by and large ignored sentencing problems. As Judge Frankel notes, "The problem has been too little law, not too much." (P. 58.) In pursuit of rationality in sentencing, Judge Frankel devotes the bulk of his thin volume to a survey of existing and potential methods for remedying abuses in the sentencing process.

While the word "thin" describes the physical dimensions of the book, it by no means indicates the magnitude and pervasiveness of the ideas that are set forth. Significant of itself is the fact that a noted federal judge has recognized monumental difficulties in a task he performs as a matter of daily routine. Of larger importance, however, is the commendable attempt he makes to canvass the "palliatives, remedies, and directions of hope" in an area that has not been treated in a manner commensurate with its overall importance to the administration of criminal justice.

The first step towards rectification of the sentencing process must be undertaken by judges themselves. On that score, Judge Frankel explores several existing ideas for judicial self-improvement. One idea, the sentencing institute, was statutorily designed to promote uniformity in sentencing by formulating, with the combined wisdom of judges, attorneys and experts in penology, uniform policies and objectives for sentencing in federal cases.<sup>5</sup> Notwithstanding these benevolent ideals, however, in practice sentencing institutes have developed into a forum for advocating set ideas rather than interchanging new ones. In no small part this is due to the fact that "an absence of adequate law" precludes the meaningful discussion of sentencing guidelines and forces the institutes to "function in a vacuum." (P. 67.) Nevertheless, while Judge Frankel does not view the institutes as a panacea for judicial self-improvement, he concludes that they should be maintained and developed as an adjunct to more penetrating changes.

The suggested penetrating changes in the sentencing process are limitations on the trial judge's exercise of broad discretion. Implicit within our constitutional system of checks and balances is the notion underlying Lord Acton's dictum that power tends to corrupt.<sup>6</sup> Discretion is not, of course, tantamount to tyranny. But Judge Frankel believes that sentencing discretion should be exercised within the structure of concrete legal standards. Thus,

---

(1965); cf. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 483 (1961).

5. 28 U.S.C. § 334 (1970). See generally Youngdahl, *Development and Accomplishments of Sentencing Institutes in the Federal Judicial System*, 45 NEB. L. REV. 513 (1966).

6. *But cf. In re Groban*, 352 U.S. 330, 335 (1957) (Frankfurter, J., concurring) ("To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt, such a doctrine of fear can hardly serve as a test, under the Due Process Clause . . .").

he proposes checks on the sweeping power by compulsory use of sentencing councils and appellate review of sentences.<sup>7</sup>

As constituted, sentencing councils are generally composed of the sentencing judge and two of his brethren. The council members meet with the probation officer to review the presentence report and share their individual views on the appropriate sentence. While the advice is not binding upon the sentencing judge, the opportunity to reflect upon a consensus view tends to reduce disparity in the sentences actually imposed. But the councils have not become engrained upon the fabric of our criminal procedure.<sup>8</sup> Their failure to take hold results from the traditional concern with the preservation of judicial resources and independence, plus the fear of procedural irregularity stemming from the influence upon sentences exerted by judges whom the defendant has not personally confronted. Judge Frankel, believing "that the sentencing council is superior to the orthodox technique of decision by a single judge" (p. 71), squarely challenges these arguments.

First, when compared to the hours consumed with minutiae resulting in civil damages, the additional time invested in sentencing councils is a trivial concern. On balance, it is wiser to increase the number of judges if necessary than to create legal doctrines that inhibit the effectiveness of the existing judiciary. Second, even if judicial independence is a valuable adjunct of sentencing,<sup>9</sup> the councils do not overly impinge upon that independence because the sentencing judge remains free to ignore the opinions of his brothers on the council. Finally, assuming that an exchange of views has a beneficial impact on sentencing, it is a legal fiction to hold, as a policy matter, that sentencing councils are prejudicial to a defendant.<sup>10</sup>

7. As a third means for limiting trial judges, Judge Frankel recalls, without extended discussion, the old idea of mixed sentencing tribunals. That concept, suggesting that sentences be imposed by a panel composed of a judge, psychiatrist and sociologist, has not been seriously advanced for forty years. See S. GLUECK, *CRIME AND JUSTICE* 225-26 (1936). Perhaps the total rejection of this idea is due to the fact that some judges view themselves as both psychiatrists and sociologists, while others totally distrust members of both professions.

8. The practice is in effect in only three federal jurisdictions. See Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966) (Eastern District of Michigan); Parsons, *Aids in Sentencing*, 35 F.R.D. 423 (1964) (Northern District of Illinois); Zavatt, *Sentencing Procedure in the United States District Court for the Eastern District of New York*, 41 F.R.D. 469 (1966); Zavatt, *Sentencing Procedure in the United States District Court for the Eastern District of New York*, 54 F.R.D. 327 (1968).

9. Judge Frankel firmly believes that the concept of "judicial independence" is no more than a euphemistic acceptance of sentences that reflect "the frightening chanciness of judicial tempers and reactions." (P. 19.) Consequently, one of his major theses involves the restriction of a judge's power to impose sentences on the subjective basis of his personal values.

10. In *United States v. Brown*, 470 F.2d 285 (2d Cir. 1972), *aff'd after remand*, 479 F.2d 1170 (2d Cir. 1973), the Second Circuit, citing Judge Frankel's views, rejected a challenge to the denial of a motion for reduction of sentence without first submitting newly discovered data to the sentencing panel assigned to the case. More than tacitly approving of sentencing councils on principle, the court said:

[W]e regard the operation of the sentencing panel as a sensible and imaginative approach to the problems of sentencing in the district court, and we would be

While these answers to the various objections raised by the opponents of sentencing councils are, perhaps, somewhat oversimplified and facile, correlation of the factors relied upon by individual judges before determining an appropriate sentence is clearly both a valuable educational tool and a mechanism for reducing disparity. Recognizing the law of inertia, however, the probability of attaining these advancements is slim unless sentencing councils are legally required. And this is precisely Judge Frankel's point: "The decision on whether to use sentencing councils ought to be a matter of law, applicable alike to all objectively similar situations." (P. 73.)<sup>11</sup>

Even if legally compelled, sentencing councils provide no more than a forum for the exchange of nonbinding views by fellow trial judges. Because the sentencing judge remains free to reject outright any mediating influences, the check on sweeping discretion, although existent, is substantively minimal. Thus, Judge Frankel recommends that appellate courts review the propriety of criminal sentences.

The Supreme Court recently enunciated the general rule that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."<sup>12</sup> A rare exception is recognized where the trial judge relies upon—and articulates—a forbidden ground for increasing a sentence.<sup>13</sup> But even then, the appellate court does not reduce the sentence, but remands for reconsideration.<sup>14</sup> Judge Frankel asserts that "our rule of non-appealability of sentences is maintained at some uncertain cost in hypocrisy and evasion." (P. 81.)<sup>15</sup> Consequently, he urges that appellate review be made available both to combat capriciousness in the sentencing process and to gen-

---

reluctant at this time to encumber this informal process with mandatory procedures.

470 F.2d at 289.

11. While the American Bar Association subscribes to the same view on the desirability of sentencing councils, its standards are couched in the permissive term "desirable" and, therefore, fail to serve as a clear cut mandate. See ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 7.1 (Approved Draft 1968).

12. *United States v. Tucker*, 404 U.S. 443, 447 (1973) (dictum). See also *United States v. McCord*, 466 F.2d 17 (2d Cir. 1972); *United States v. Martell*, 335 F.2d 764 (4th Cir. 1964); cf. Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521, 522 (1937). Contempt cases are exempted from the operation of the rule because of the unique sensitivity toward abuse of the contempt power. *Yates v. United States*, 356 U.S. 363 (1958); *United States v. Bukowski*, 435 F.2d 1094, 1110 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971).

13. See, e.g., *United States v. Tucker*, 404 U.S. 443 (1973) (prior convictions secured in the absence of counsel); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969) (post-conviction refusal to admit crime); *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1960) (standing policy to impose greater sentences after trial on the merits than after guilty plea).

14. *But see United States v. McKinney*, 466 F.2d 1403 (6th Cir. 1972) (appellate court reduced sentence where district judge failed to do so upon two prior remands for reconsideration).

15. Some emasculation of the rule has emerged in selective service cases where appellate courts are reducing sentences when trial judges, as a policy matter, impose substantial uniform sentences upon defendants who claim to be conscientious objectors. See, e.g., *Woodsley v. United States*, 478 F.2d 139 (8th Cir. 1973) (en banc); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1972); cf. *United States v. Falk*, 479 F.2d 616, 625 (7th Cir. 1973) (en banc) (Fairchild, J., concurring). *But see United States v. McCord*, 466 F.2d 17 (2d Cir. 1972).

erate a body of law governing the practice.<sup>16</sup> Nevertheless, although appellate review of possible abuses of sentencing discretion appears superficially plausible in theory, a number of practical impediments exist.

Appellate courts are generally reluctant to interfere with decisions of trial judges in areas in which the law recognizes a wide breadth of discretion. The appellate litany is that discretion must be exercised within a defined set of legal perimeters; where a trial judge fails to heed the applicable legal principles governing his exercise of discretion, the exercise is viewed as a reviewable abuse. However, where an appellate court reverses for "abuse of discretion," it too often appears merely to be substituting its own subjective determination of the manner in which a given debatable decision should be resolved. Unlike other areas in which discretion may be reviewed, no express guidelines have been established to govern the imposition of criminal sentences. Judge Frankel optimistically suggests that appellate examination of sentences will force reviewing courts to establish such guidelines; but the cases that have thus far recognized appellate power to review sentences have furnished no standards.<sup>17</sup> Consequently, the substitution of the judgment of a three-judge reviewing court probably would do no more than establish mandatory sentencing councils on an appellate level. If appellate judges are better equipped than trial judges to make the sentencing decision—a highly debatable proposition—the concept of review is desirable. Otherwise, only if sentencing standards are clearly articulated by the legislature does appellate review make any sense.

While both sentencing councils and appellate review of sentences limit the power of a single trial judge by authorizing participation in the sentencing decision by other members of the judiciary, such limitation may also be accomplished by deferring the ultimate sentencing decision to an executive agency. This self-imposed limitation, reflecting "a genuine distaste for the grim responsibility of sentencing" (p. 87), allows the judge to impose an indeterminate sentence and leave the actual term of incarceration up to the parole board. While reformers extolled indeterminate sentencing in its early stages of development,<sup>18</sup> Judge Frankel has come to believe that the device "has produced more cruelty and injustice than the benefits its supporters envisage." (P. 88.)

The concept of indeterminate sentencing stems from recognition that "the punishment should fit the offender and not merely the crime."<sup>19</sup> Since it is

---

16. *Accord*, ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved draft 1968); Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671 (1962).

17. See authorities cited in note 15 *supra*.

18. See Note, *The Indeterminate Sentence Laws—The Adolescence of Peno-Correctional Legislation*, 50 HARV. L. REV. 677, 686-87 (1937); cf. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 407 (1958).

19. *Williams v. New York*, 337 U.S. 241, 247 (1949). See also *United States v. Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968); *Genet v. United States*, 375 F.2d 960, 962 (10th Cir. 1967).

entirely treatment-oriented, it serves the goal of rehabilitation to the virtual exclusion of deterrence and retribution. The rehabilitative ideal, however, rests on the unfounded assumption that all criminal offenders either need to be, or can be, rehabilitated. But those to whom this assumption is inapplicable run across the gamut of criminals. For example, there is a class of "normal criminals,"<sup>20</sup> epitomized by most white collar offenders, organized crime figures and, most particularly, corrupt politicians, who deliberately measure the chance of being caught against the rewards of the crime and willingly accept the risk. At the other extreme, there are those who are so severely disturbed that no amount of existing treatment can effectively achieve their rehabilitation. When indeterminate sentences are imposed upon offenders who are not likely to benefit from rehabilitative efforts, parole boards have no available standards for determining a suitable release date. With vaguely defined roles and little guidance, parole boards are compelled to operate in a standardless environment.<sup>21</sup> Since their decisions are generally given without either explanation or uniformity, prisoners who are denied parole become increasingly frustrated and hostile. As Judge Frankel observes, "The silence surrounding parole-board decisions nurtures cynicism among the prisoners—a belief in the arbitrariness and essential corruption of those in power. A pervasive sense of helplessness generates frustration and rage." (P. 97.)

Given the inherent defects in the indeterminate sentencing doctrine, Judge Frankel concludes that, except in those instances in which a concrete program of rehabilitation can be fashioned, a definite, justifiable sentence should be imposed based upon an "objective, equal and 'impersonal' evaluation of the relevant qualities of both the criminal and the crime." (Pp. 101-02.) Admittedly, these criteria merely define, rather than answer, the sentencing problem. It is in the final and most important chapter that Judge Frankel proposes an answer.

The kind of change that will ultimately promote fairness and consistency in sentencing cannot be effected without appropriate legislative guidelines. Recognizing this, Judge Frankel proposes the enactment of a somewhat unique statutory provision to define the accepted purposes of criminal penalties and to require judges to identify the specific purposes relied upon in imposing a particular sentence. This requirement would compel the judge to focus upon the relationship of the purposes of punishment to the specific offender, promote consistency by reducing the broad range of factors that can properly be relied upon, and facilitate intelligent scrutiny on appeal. By formulating

---

20. Judge Frankel borrows the term from F. ALEXANDER & H. STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 81-82 (1956).

21. Because parole boards operate "with no directions or means of achievement," Judge Frankel, although critical of the system in which they operate, defends the hard-working United States parole officials against Professor Davis' allegation that "[t]he performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the federal government." K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 133 (1969).

a set of acceptable sentencing purposes, the legislature could move toward a rational classification of sentences. Judge Frankel expands these ideas into a proposed codified sentencing matrix. A systematic and detailed rating of the various elements that make up the sentencing decision would generate a numerical profile for measuring the gravity of a particular sentence. While Judge Frankel recognizes that many sentencing factors are largely non-quantifiable and that a "perfect" sentence cannot be reached by plugging one independent variable into a set formula, a substantial degree of agreement on concrete factors would promote rationality in the sentencing process.

To administer the disconnected and diverse aspects of the entire sentencing and corrections process, Judge Frankel proposes the creation of a "Commission on Sentencing." (P. 118.) This commission would study improvements to the system of sentencing and correction, formulate rules on the basis of its studies, and enact those rules. Staffed by people of stature and credibility, the commission would test its innovations on an experimental basis in selected courts and serve as an ingrained "lobby" for beneficial change. While the workings of his proposed commission are necessarily sketchy in details, Judge Frankel is simply pleading for an instrumentality of change in a process beset with problems and lacking in legal standards.

The scholarly views advanced by Judge Frankel have found immediate citation in the courts.<sup>22</sup> Nonetheless, the nature of the appellate court as an institution will most likely prevent the kind of activism that is necessary to effect the changes that he envisions.<sup>23</sup> Consequently it is incumbent upon the legislators and the citizens whom they represent to bear the cudgel born by the eloquent ideas succinctly outlined in this book. Although scientific knowledge has not yet yielded "objective" sentencing decisions,<sup>24</sup> Judge Frankel's effort marks a giant stride toward fulfillment of that goal.

JAMES R. THOMPSON\*

*United States Attorney  
Northern District of Illinois*

GARY L. STARKMAN\*

*Assistant United States Attorney  
Chief, Appellate Division  
Northern District of Illinois*

22. See, e.g., *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States v. Manuella*, 478 F.2d 440, 442 (2d Cir. 1973); cf. *United States v. Brown*, 470 F.2d 285, 289 (2d Cir. 1972).

23. But see *United States v. Brown*, 479 F.2d 1170, 1175-76 (2d Cir. 1973) (Feinberg, J., dissenting) (trial judge should sometimes be required to state reasons for sentence imposed); *United States v. McCord*, 466 F.2d 17, 24 (2d Cir. 1972) (Feinberg, J., dissenting) (appellate court should use supervisory powers to correct apparent sentencing abuses).

24. See Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 825 (1968).

\* The views expressed herein are the authors' own and do not necessarily reflect those of the United States Department of Justice.

**THE SOCIOLOGY OF SOVIET LAW.** By James L. Hildebrand. Buffalo, N.Y.: William S. Hein & Co., Inc., 1972. Pp. 227. \$15.00.

What makes Soviet law unique? For decades Harold J. Berman of Harvard University has been asserting that the key element of Soviet law is an educational function that he calls "parentalism."<sup>1</sup> He has seized upon a characteristic first enunciated but not so labelled by Karl Llewellyn in his study of the Cheyenne Indians<sup>2</sup> as the feature of prime importance in assessing the public order system of the Soviet Union. The concept of "parentalism" is so important to Berman that he has expressed impatience with authors who disagree with him.<sup>3</sup> But just what Berman means by "parentalism" has seemed obscure to at least one critic who thought that some of the features Berman identifies as parental are more likely the extension of pre-revolutionary Russian legal procedures than the contribution of socialism.<sup>4</sup>

Berman has an enthusiastic disciple in James L. Hildebrand. Approaching the subject from a sociological viewpoint, Hildebrand is enamored by the parental concept. His book is a brief written in support of Berman's idea. Hildebrand defines parentalism to mean that judges, whether in the formal general courts or the informal comrades' courts, have their eyes focused primarily on the general public, both in the courtroom and beyond, and not on the accused before them. Consequently, the severity of their sentence is based not only upon factors involving the citizen standing before them, but also on the lesson they want to teach the general public. "Justice" is not, therefore, tailored to the deviant alone, but to what the Communist Party's policy makers wish to instill in the mind of the public as a code of morals suitable to the Party's needs.

This argument leads Hildebrand to a point that he finds crucial to discerning the novelty in the Soviet public order system: law does not conform to the crowd's values, it leads the crowd in the direction plotted by a small elite. Law is not following; it is leading. Hildebrand is right in this conclusion to a degree, for Soviet law has a leadership function more sharply pronounced than in non-communist systems. The task of Soviet law is to remold society so that a new Soviet man will emerge. The legal system is not to enforce a public order system fashioned by the masses for themselves.

But Hildebrand does more than support a thesis; he hypothesizes what results are to be expected from the emphasis upon parentalism and concludes that the end will not be what the policy makers profess as their goal. There will be no "withering away" of legal coercion, as Marx and Engels had

---

1. H. BERMAN, *JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW* 3-4, 199-291 (1950).

2. K. LLEWELLYN AND E. HOEBEL, *THE CHEYENNE WAY* (1941).

3. Berman, *What Makes "Socialist Law" Socialist?*, 20 *PROBLEMS OF COMMUNISM* 24, 30. (No. 5, Sept.-Oct., 1971).

4. Timasheff, *Is Soviet Law a Challenge to American Law?*, 19 *FORDHAM L. REV.* 182, 188-89 (1950).

predicted, because a legal system that emphasizes education cannot create the basis for evolution of such a phenomenon. On the contrary, Hildebrand believes that as a new morality is inculcated, an educational bias will lead away from a rule of law principle. Without devotion to the rule of law, citizens will never achieve a self-centered system of social control capable of succeeding the contemporary state-centered system of coercion. Hildebrand believes that the post-Stalin emphasis upon development of societal controls—characterized by a voluntary militia to supplement the work of the professional police and an informal comrades' court system to supplement the work of the general courts—cannot but lead to reverence for *ad hoc* decisions. These controls do not, he says, "educate." Education can flow only from adherence to general rules of law, embodied in published decisions that create a predictable pattern that can guide would-be deviants. Without predictability, the citizen will adhere to no norms and consequently, will never be "educated" by the law.

Is Hildebrand's thesis sound? I recall the criticism of Soviet teachers while I was an exchange student in Moscow decades ago. I, too, was impressed by the educational function of Soviet law and tended to emphasize it as of first concern in considering Soviet law's uniqueness. But my Soviet critics, while admitting that education was a component of Soviet law, placed it last, not first, in the hierarchy of goals. They argued that education serves no purpose unless the citizenry is first placed in an economic and political situation that has prepared the ground for new seed. Only after revolution and reconstruction can education be effective. Law must first smash the bourgeoisie by expropriating their property; then it must create a social and economic structure that will facilitate production and provide abundance. Finally, law will educate those who fail to see the advantages of the new system so that they can wholeheartedly support it.<sup>5</sup>

But even assuming, with Hildebrand, that education is in a primary position, one must quarrel with his reading of the evidence. He sees the educational function as being performed primarily by comrades' courts; however, these courts have been given far less emphasis since Nikita Khrushchev's ouster in 1964. The general courts are the current focus of concern. Furthermore, judges in the general courts do consider the "whole man" in determining sentences; they try to devise punishments that concern him individually. To be sure, his colleagues and those who know about his case will be educated, often through the demonstration trials in public places which Hildebrand finds educational of the masses, but this educational function is

---

5. In this series of steps law will nationalize means of production; then it will provide the legal foundation for Communist Party monopoly leadership—the elite presumed to know desirable directions because of their study of Marxism—and the state structure necessary to administer the great fund of state owned property. Law will provide for popular participation in the making of operating (not policy) decisions, and exclude even from that function those presumed to be hostile because of their social origin, namely those who are not workers or peasants. Thereafter, law will have a "mopping up" function in educating those peasants and workers who remain recalcitrant.

secondary in the court's consideration. Of major concern is the accused; the punishment is designed for him. Admittedly, there is a fine line between education of the individual and those who follow the proceedings, but there is a difference in degree, and it is critical. Also, there is an increasing emphasis upon conformity to procedural rules (with the exception of some politically oriented trials). This turn toward adherence to a rule of law might have been considered by Hildebrand as a step toward achieving a condition likely to lead to a "withering away" of law, contrary to his conclusion of the unlikelihood of that result.

This type of evidence weakens Hildebrand's thesis, both as to the predominance of the general educational role of law and as to its dysfunctional character. Of course, the tide may turn, as it has often in the fifty-five year history of Soviet law, but as of this moment, there is no indication of a turn back to Khrushchev's emphasis upon informal tribunals and *ad hoc* decisions. This aspect of the Soviet public order system has definitely been placed in a secondary position.

Finally, reference must be made to Hildebrand's discussion of the growing use of sociological techniques to study Soviet society and the role of law. He correctly recognizes the new interest in sociology since Stalin's death. For instance, Soviet lawyers now reject the thesis that crime is the result of the relics of capitalism and have begun to study social conditions; they are asking why crime persists in Soviet society. Hildebrand also recognizes that these studies still overlook participatory interaction between citizens and their legal institutions. In contemporary verbiage, they fail to investigate "feed-back." Nevertheless, I wish that Hildebrand had analyzed some of these studies in some detail.<sup>6</sup>

*The Sociology of Soviet Law* has value as a resume of Harold J. Berman's work on "parentalism,"<sup>7</sup> as a discussion of the dysfunctional nature of the informal comrades' courts and voluntary militia, and also as an attempt to apply the methods of the sociologist to examine the goals and achievements of Soviet lawyers. The book does not, however, pretend to be a general introduction to Soviet law. Within the limits set by the author, he has provoked thought from a discipline that has given little attention to this subject. Would that more sociologists actually investigate Soviet law, and not content themselves with saying that it is beyond investigation because of inadequate empirical data and the impossibility of gathering such data through field research within the Soviet Union itself.

JOHN N. HAZARD

*Professor of Public Law  
Columbia University*

---

6. For such an analysis, see W. CONNOR, *DEVIANCY IN SOVIET SOCIETY: CRIME, DELINQUENCY AND ALCOHOLISM* (1972).

7. The book contains long quotations from Berman's studies.