One Justice for All: A Proposal to Establish, by Federal Constitutional Amendment, A National System of Criminal Justice

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ONE JUSTICE FOR ALL: A PROPOSAL TO ESTABLISH, BY FEDERAL CONSTITUTIONAL AMENDMENT, A NATIONAL SYSTEM OF CRIMINAL JUSTICE

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I. INTRODUCTION

At a time when most people are talking about revenue sharing[1] and other schemes by which the administration of government in the United States can be decentralized, it may seem strange even to suggest the possibility of a uniform system of administration of criminal justice by the federal courts.[2] Nevertheless, the time has come to look beyond mere tradition and to ask some pertinent questions, the answers to which logically suggest the desirability of an exclusive, uniform system

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[1]*See, e.g.*, 117 CONG. REC. 167 (1971) (State of the Union Address by President Nixon).

[2]Many persons will not, of course, be sympathetic to the general proposition that the federal government ought to be strengthened in any way. A common attitude has been expressed as follows: "We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity . . . ." Conference of Chief Justices, *Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions*, in WE THE STATES 367, 399 (Va. Comm'n on Constitutional Gov't 1964). *See* Liebmann, *Chartering a National Police Force*, 56 A.B.A.J. 1176, 1180 (1970), in which the author concludes his criticism of the study draft of the proposed new federal criminal code by saying in part: "It cannot be said that the Bar and the public have not been warned. This study draft, if enacted, will be the charter of a national police force, with all that this implies. Members of the Bar, state and local officials and the public cannot make known their views about its provisions too soon." In addition, *see* Armstrong, *The Proposed National Court Assistance Act*, 56 A.B.A.J. 755, 759 (1970), in which Judge Armstrong states:

> I am confident that from a lack of knowledge of our dual system of courts many persons do not realize that the Tydings bill is another step—and a long one—toward a unitary judicial system in America. If that is the ultimate objective, it should be approached openly and constitutionally. The architects of our system of courts were judiciously and bitterly opposed to a unitary system for the same reasons that it should be rejected today. The concentration of excessive power invites corruption and collapse.

If the proposals for recodification of the federal criminal code and for a court assistance act elicit these kinds of responses from Mr. Liebmann and Judge Armstrong, it may be anticipated that the proposal contained in this article will elicit similar but perhaps more vigorous responses.

of federal criminal justice in the United States. While I have no illusions about the force of logic in the development of the law,[3] and, while I realize that as a practical matter there is little likelihood that the proposal contained in this article will have any immediate impact on the administration of justice in the United States, I nonetheless proceed in the hope that some serious consideration will be given to issues that have long been ignored.[4]

At the outset the reader may be tempted to criticize the scope of the proposal. He may find it under-inclusive since most of the civil law is excluded from consideration, or he may find it over-inclusive since the proposal deals with all forms of civil commitment as well as with incarceration under the criminal law.

My response to the criticism of under-inclusiveness is, first, that in some non-criminal areas there is already a measure of uniformity among the states. For example, the Uniform Commercial Code has been enacted in all states except Louisiana.[5] Second, the criminal law and other forms of civil commitment are more important in my estimation than other areas of the civil law because the former endanger the lives and liberty of people.

In response to the criticism of over-inclusiveness, I would point to the interrelationship between the criminal law and civil commitment. Both may result in the deprivation of liberty. Also, persons who have committed criminally proscribed acts may be civilly committed initially through the exercise of discretion by the police or prosecutor,[6] or they may be so committed after an acquittal by reason of insanity.[7] Finally,

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[3]One need only recall the following passage from THE COMMON LAW:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O. W. HOLMES, THE COMMON LAW 1 (1881).

[4]The possibility of central administration of the criminal law has not been totally ignored. *See, e.g.*, R. TUGWELL, MODEL FOR A NEW CONSTITUTION (1970).This proposed comprehensive revision of the Constitution of the United States would create a judicial council at the national level, which "shall examine, and from time to time cause to be revised, civil and criminal codes; these, when approved by the Judicial Assembly, and if not rejected by the Senate, shall be in effect throughout the United Republics." *Id.* at 76.

[5]1 ANDERSON ON THE UNIFORM COMMERCIAL CODE iv (2d ed. 1970).

[6]*See* A. GOLDSTEIN, THE INSANITY DEFENSE 175 (1967).

[7]In some jurisdictions, commitment automatically follows acquittal by reason of insanity. *E.g.*,

juvenile delinquency proceedings are often described as "civil"[8] in spite of their similarity to criminal proceedings.

Conceptually, the criminal law and civil commitment are potentially related because of proposals, offered primarily by those sympathetic to a virtually deterministic view of human behavior, that the criminal law be eliminated as such and replaced by a system of incarceration of dangerous persons.[9] I do not now subscribe to such proposals, but any proposed amendment to the United States Constitution that seeks to transfer the administration of the criminal law to the federal government must take into account the possibility that some states will seek to implement such proposals in the future.

II. JUSTIFICATION FOR CHANGE

There are many ways in which one might approach the problem of administration of justice in the United States today. I prefer to approach it from the standpoint of one who is newly arrived in this country and is unfamiliar with its historical developments. Such an individual observes the administration of justice among the several states and the rather substantial disparities both in the substantive criminal law and

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GA. CODE ANN. § 27-1503 (1953); KAN. STAT. ANN. § 62-1532 (1964). Of course, such provisions for automatic commitment following acquittal by reason of insanity may be constitutionally suspect to the extent that they do not provide the person committed with the same guarantees that are provided to one who is otherwise civilly committed. *See* United States v. Marcey, 440 F.2d 281 (D.C. Cir. 1971); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). *Cf.* McNeil v. Director, Patuxent Institution, 92 S.Ct. 2083 (1972); Jackson v. Indiana, 92 S.Ct. 1845 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

[8]For example, in Texas the Statutory provisions dealing with juvenile delinquency are found in the civil statutes. TEX. REV. CIV. STAT. ANN. art. 2338—1 (1971). Moreover, appeals from decisions of the courts in juvenile delinquency proceedings are taken to a Court of Civil Appeals, rather than to the Court of Criminal Appeals. *Id.* art. 2338—1, § § 21 (1971).

[9]*See* Katz, *Dangerousness: A Theoretical Reconstruction of the Criminal Law*, 19 BUFFALO L. REV. 1 (1969). In Seney, *The Sibyl at Cumae—Our Criminal Law's Moral Obsolescence*, 17 WAYNE L. REV. 777 (1971), the author rejects both the concept of moral blameworthiness and the concept of mental illness; instead "[w]hat is relevant is identifying those institutions, groups and individuals with strategically placed power to affect the major factors contributing to any identified harm, and the allocation of responsibility to reduce such harm, not only future similar harms but also the current harms." *Id.* at 821 (footnote omitted). Unfortunately the author, though stressing group responsibility, never seems to deal with the problem of the individual who may indeed be a threat to society and whose incarceration may seem imperative. *See also* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 470-471 (1897).

in criminal procedure.[10] He observes also the ease of travel from one state to another and, with the help of a friend learned in the law, discovers the constitutional right to travel freely without interference by the states.[11] Such an individual undoubtedly finds it difficult to understand why the several states should be permitted to enforce their own codes of criminal law and procedure. He finds it difficult to understand why, for example, it is lawful to gamble in Nevada[12] but unlawful to do the same thing in the neighboring state of California[13] or why a first-time possessor of one ounce of marijuana can be imprisoned for life in Texas[14] but only jailed for fifteen days in New Mexico.[15] Can the system be adequately explained to this stranger? Suppose, for example, that the stranger is one who is unimpressed with the force of tradition. Are there other persuasive arguments which can be advanced in support of the present system? As the following discussion indicates, I believe that the answer is "no."

One argument that is sometimes heard in support of the present system is that the criminal law is and should remain a matter of local concern[16]—that is, that the people of any given region know best what

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[10]Regarding the substantive criminal law, *compare, e.g.*, N.H. REV. STAT. ANN. § 583-A:2 (Supp. 1971) (no burglary where actor has permission to enter), *with* ARIZ. REV. STAT. ANN. § 13-302 (Supp. 1971-1972), *construed in* McCreary v. State, 25 Ariz. 1, 212 P. 336 (1923) (burglary conviction proper where actor had permission to enter).

With regard to criminal procedure, *compare, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 1.05 (1966) (accused entitled to indictment in all felony cases), with FLA. R. CRIM. P. 3.140(a)(1), (2) (accused entitled to indictment only in capital cases).

[11]Dunn v. Blumstein, 92 S.Ct. 995 (1972) (alternative holding); Griffin v. Breckenridge, 403 U.S. 88 (1971) (alternative holding); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160, 177, 181 (1941) (Douglas, Black, Murphy & Jackson, JJ., concurring).

[12]NEV. REV. STAT. § 463.010-.670 (1967).

[13]CAL. PENAL CODE § 330 (West 1970).

[14]TEX. PENAL CODE ANN. art. 725b § 1(14), 2(a), 23(a) (Supp. 1972).

[15]N.M. STAT. ANN. § 54-11-23B(1) (Supp. 1972).

[16]This argument is implicit in much recent discussion of problems of federalism. *See, e.g.*, Bell, *Federalism in Current Perspective*, 1 GA. L. REV. 586 (1967); Clark, *Criminal Justice in America*, 46 TEXAS L. REV. 742 (1968).

> It is also interesting to note that many criminal law reformers assume that the criminal law is primarily a matter for the states and that diverse local attitudes should be reflected in the criminal law: "It should be noted, however, that it was not the purpose of the Institute to achieve uniformity in penal law throughout the nation, since it was deemed inevitable that substantial differences of social situation or of point of view among the states should be reflected in substantial variation in their penal laws." Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968).

the content of the criminal law should be. The difficulty with this argument is that it presupposes *both* that there are substantial disagreements about the substantive criminal law *and* that these are organized along state lines. Although much remains to be learned about the attitudes of people across the country regarding crime,[17] the empirical data that are available suggest that the second assumption is not justified. Across the nation, the differences in attitude with respect to some of the traditional common law crimes are apparently not very great.[18] With regard to such controversial issues as the proposal to legalize the use of marijuana, there are significant differences in attitides, but, to the extent that these differences are related to geographical distributions of the population,

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> The new Code will scarcely be considered worthwhile if its enactment requires any place or region unnecessarily to conform to national standards not their own. Recall, too, that experience with the Carolina [*sic*] shows that a humanitarian rule in one region may be baneful in another. To be sure we cannot remain a single nation unless we give due regard, in all places and in all regions, to the fundamental human rights possessed by all our citizens. But standards of personal conduct do vary from region to region. Due attention, therefore, must be given in the process of codification to the legitimate demands of our nation's diversity.

McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 711-12 (1971) (footnotes omitted).

[17]Apparently, no one has attempted to conduct a state-by-state survey of attitudes towards the substantive criminal law. The reason may be the expense; one estimate, made in 1969 by Professor Lloyd Ohlin of the Harvard Law School, was that such a survey would cost about $400,000.

One is left with a number of nationwide surveys that permit only regional comparisons and with a few individual state surveys. These surveys tend to deal with specific, narrow issues, and since they were conducted at different times, using different sampling techniques, and asking questions in different forms, it is difficult to compare the results of one survey with another.

Portions of five public opinion surveys were analyzed statistically in connection with the writing of this article. The responses to four questions relating to unlawful homicide, larceny of five dollars, larceny of fifty dollars, and racial discrimination in the sale of a home were taken from National Opinion Research Center, Victimization Study, summer 1966 (unpublished data at Univ. of Chicago). The responses to a question relating to the possible legalization of the use of marijuana were taken from Gallup International, Inc., Poll on Legalization of Marijuana Use, November 1969 (unpublished data in Roper Public Opinion Research Center, Williamston, Mass.). The responses to a question regarding legal penalties for possession of marijuana were in a telephone conversation with Robert D. Coursen, Research Manager, *Minneapolis Tribune*, Feb. 1972. The responses to a question regarding penalties for possession and use of marijuana were taken from Belden Associates, Report No. 784, Nov. 23, 1969 (unpublished material on file at Belden Associates, Dallas, Tex.). Finally, the responses to a question relating to possible penalties for the possession and use of marijuana were taken from Field Research Corp., California Poll, January, 1971 (unpublished data at Institute of Governmental Studies, Univ. of California at Berkeley).

[18]An analysis of the 1966 Victimization Study, *supra* note 17, shows no statistically significant differences, either within regions or among regions, regarding attitudes towards the seriousness of an unlawful homicide.

the most significant common factor seems to be the size of the community rather than state boundaries. In other words, persons who live in large urban areas in one part of the country seem to have more in common with urban dwellers in other parts of the country regarding attitudes toward the criminal law than they have with people in the rural areas of the states in which they live.[19] The majority of the inhabitants of Minneapolis, St. Paul, and Duluth, Minnesota, for example, seem to have attitudes toward the legal status of marijuana which are more similar to the attitudes of most persons in other large cities than to the attitudes of most persons in rural Minnesota.[20]

Opposition to the centralization of the control of the criminal law based on a desire to protect local interests thus makes little sense. Even under the present system of criminal justice there are many local com-

[19]With the exception of the California Poll (Field Research Corp., *supra* note 17), all of the surveys analyzed show differences in attitudes, to the extent that differences exist, according to size of community. This is most pronounced with regard to large cities. For example, an analysis of the responses to the four questions from the 1966 Victimization Study, *supra* note 17, shows no statistically significant differences in attitudes of persons in the ten largest Standard Metropolitan Statistical Areas. Also, the analysis of the 1969 Gallup Poll (Gallup International, Inc., *supra* note 17) regarding legalization of marijuana shows no significant differences in attitudes among inhabitants of cities over 500,000 population.

[20]An analysis of the Minnesota Poll of January 1972 (Minneapolis Tribune, *supra* note 17) regarding attitudes toward penalties for possession of marijuana shows a highly significant difference among the attitudes of persons in communities of three different sizes in Minnesota. Similarly, an analysis of the 1969 Texas Poll (Belden Associates, *supra* note 17) regarding attitudes towards legalization of marijuana shows a highly significant difference among the attitudes of persons in communities of four different sizes. The Gallup Poll analysis (Gallup International, Inc., *supra* note 17) shows a significant difference in attitudes among different-size communities in the East, Mid-West, and South. No such difference appears in the West.

Ignoring for the moment the results of the California Poll (Field Research Corp., *supra* note 17), one may try to explain this apparent discrepancy between the West and the rest of the country in the Gallup Poll by reference to the greater net migration to the West. Between 1960 and 1970 the West had a net gain in population by migration of 10.2%, whereas the Northeast gained only 0.7%, the North Central lost 1.5%, and the South gained 1.1%. UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 35 (1971). In other words, the migration to the West may have led to greater mixing of persons with different attitudes and backgrounds in many communities, regardless of size. Moreover, if the West provides a clue to the general effect of migration on distribution of attitudes, it would seem that as more and more people in our society migrate to other parts of the country, regional differences in attitude will become even smaller. Increased travel and the mass media may also contribute to a lessening of regional differences in attitudes.

The results of the analysis of the California Poll are inconsistent with the results of the other four analyses and are difficult to summarize. There is no discernible pattern in the results. However, there are significant differences among regions and counties within California, and therefore there is nothing in the California results that is inconsistent with the proposition that differences in attitudes towards crime do not follow state boundaries.

munities in which most of the adults have attitudes towards the criminal law that are probably not going to be reflected in the laws of the states in which they live, because persons in other communities (larger and smaller) have different views which claim the support of a majority of the adults in the state.[21] This situation is no different from that which would prevail if a uniform, exclusive federal criminal code were adopted. The views of a majority in some communities would be reflected in the federal law and, of necessity, the views of a majority in some other communities would not be so reflected.

Another argument that has been raised in support of the present system is the desirability of experimentation by the states. It is true that the states have experimented not only in the field of the substantive criminal law, but also in the area of criminal procedure, but whether these experiments on balance have been helpful rather than harmful is debatable. For example, some persons may applaud experiments in the area of abortion laws,[22] but these same persons may not be thrilled at the prospect of the imposition of capital punishment for the offense of rape.[23] In the field of criminal procedure, some persons may be impressed with the state experimentation that led to the adoption of prosecution by information,[24] but they may not be happy with the extension of that system in Florida. (In Florida not only has the grand jury indictment become unnecessary in non-capital cases, but also the process of information has made it possible for the state attorney to bring a case to trial without the intervention of anyone—grand jury, magistrate, or anyone else.[25] Whether this Florida procedure represents true improvement is questionable.)

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[21]This presupposes that community attitudes will be reflected in the actions of those who represent these communities in the state legislatures. Some contend that this is not what happens—that special interest groups actually determine the actions of representatives in the legislature. *See Quinney, The Social Reality of Crime*, in CRIME AND JUSTICE IN AMERICAN SOCIETY 119, 135 (J. Douglas ed. 1971). Even if the latter contention is correct, the situation is not likely to be worse under a federal system of criminal law. At the national level public attention may be focused on the actions of special interest groups, and those seeking to minimize the influence of such groups may be able more effectively to organize opposition.

[22]*E.g.*, N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971).

[23]*E.g.*, FLA. STAT. ANN. § 794.01 (Supp. 1972). *But see* Furman v. Georgia, 92 S. Ct. 2726 (1972).

[24]California's system of prosecution by information was upheld against constitutional attack in Hurtado v. California, 110 U.S. 516 (1884).

[25]Under Florida statutes an arresting officer must bring the arrested person before a magistrate without unnecessary delay. FLA. STAT. ANN. §§ 901.06, .23 (Supp. 1972). Under FLA. R.

In addition, it is possible to argue that experiments by the federal government on the national level are likely to be superior in operation to state experiments. If an experiment is a success at the national level, the whole country can benefit from it immediately. However, if the experiment turns out to be an unhappy one, this fact will be forcefully brought home to all in the country, and the likelihood is that remedial legislation will be enacted speedily.

Even if it were decided that some form of local experimentation were still necessary in the context of the uniform federal system, it would still be possible for the federal government to experiment. An appropriate place, for example, would be in the District of Columbia. Such experimentation would be subject to the scrutiny of Congress and could be controlled rather closely by that body.

On the other hand, experiments within a state, even if successful, will not immediately affect jurisdictions in which the experiments are not tried. If the experiment turns out to be unwise, however, it is possible that little pressure will be applied to the state legislators to remedy the situation because of the inability of the voters to focus their attention on numerous governmental units at the same time. Thus it is possible that the experiment in one state may be ignored because of more pressing difficulties at the national level and elsewhere. Unfortunately legislation, such as the Texas peace bond,[26] may remain on the books for some time.

CRIM. P. 3.122 the magistrate before whom an arrested person is brought must advise the arrested person of his right to a preliminary hearing; the arrested person may waive the preliminary hearing in writing. It would thus seem that an arrested person in Florida has a right to a preliminary hearing. However, in the case of Palmieri v. State, 198 So. 2d 633 (Fla. 1967), the Supreme Court of Florida affirmed a conviction despite the failure of the police to take the defendant before a magistrate. In affirming the conviction the court said:

> It (the preliminary hearing) is not an indispensable prerequisite to the filing of an information . . . and is not a necessary step in criminal proceedings . . . . "A prosecution may be instituted and maintained regardless of whether such a hearing is or is not held, and regardless of whether probable cause to hold the accused for trial is or is not found."

198 So. 2d at 634-35 (citations omitted).

[26]TEX. CODE CRIM. PROC. ANN. art. 7.01-.17 (1966). For a discussion of the constitutionality of the Texas peace bond procedure see Davidow, *The Texas Peace Bond—Can It Withstand Constitutional Attack?*, 3 TEX. TECH. L. REV. 265 (1972).

Another example of a questionable state procedure which has remained on the statute books for years is the Michigan "one-man grand jury." MICH. STAT. ANN. § 28.943-.946(2) (Supp. 1972). For a discussion of this "one-man grand jury," see R. Davidow, Exclusive, Uniform Federal Justice 39, April, 1969 (unpublished paper in Harvard Law School Library).

Still another argument that may be advanced in support of the present system of state administration of criminal justice is the fear that concentration of power over the criminal law in the federal government will result in tyranny.[27] However, the fear of federal tyranny is not a sufficient reason for avoidance of a uniform system of federal criminal law. First, there is the historical question whether the United States Government has been more guilty of tyranny than the individual states. One cannot answer this question without making certain assumptions about what constitutes tyranny in the context of the criminal law, but if one accepts John Stuart Mill's thesis,[28] the enforcement of laws against prostitution,[29] possession and use of marijuana,[30] and vagrancy[31] are examples of state action that may be characterized as tyrannous. Although there have been similar instances of enforcement of questionable laws by the federal government,[32] it is still difficult to say that the federal government has been worse than the states.

There is perhaps a more fundamental question with respect to the fear of federal tyranny; this relates to the question of checks and bal-

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[27]Fear of concentration of power in the federal government goes back, of course, to the original debates over ratification of the Constitution. For example, during the debates, some persons expressed fear that the federal courts would entirely supplant the state courts. *See* Mason, *Objections*, in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 882 (S. Scott ed. 1898); Letter by James Winthrop, Dec. 11, 1787, in *id.* at 518.

[28]J.S. MILL, ON LIBERTY 23 (2d ed. 1863). Mill's thesis was essentially that the government should not interfere with the individual unless the individual's conduct is likely to harm the rest of society.

[29]*E.g.*, N.Y. PENAL LAW § 230.00 (McKinney Supp. 1971).

[30]*E.g.*, FLA. STAT. ANN. §§ 398.02(12) (1960); *id.* § 398.22 (Supp. 1972).

[31]*E.g.*, *id.* § 856.02 (1965), which was, in effect, declared unconstitutional by the United States Supreme Court in Smith v. Florida, 92 S. Ct. 848 (1972). The decision of the Florida Supreme Court was vacated and remanded in the light of Papachristou v. City of Jacksonville, 92 S. Ct. 839 (1972), in which the Supreme Court declared unconstitutional, on grounds of vagueness, a Jacksonville city ordinance which was very similar to the Florida statute. It is interesting to note that in *Smith*, the Florida Supreme Court had chosen to ignore a finding of unconstitutionality by a United States district court in Lazarus v. Faircloth, 301 F. Supp. 266 (S.D. Fla. 1969), *vacated on other grounds sub nom.* Shevin v. Lazarus, 401 U.S. 987 (1971).

[32]The Smith Act, 18 U.S.C. § 2385 (1970), is an example of an act of Congress which interferes with the rights of individual citizens—in this case the right of free speech under the first amendment. Another federal statute which intrudes upon the rights of individuals is Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (1970), which criminally proscribes "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Apart from questions of vagueness, this section may be construed to reach conduct which, under Mill's thesis, should remain free of governmental control. *E.g.*, United States v. Mueller, 40 C.M.R. 862 (1969) (possession and transfer of marijuana, off post, off duty).

ances.[33] The argument in the context of the criminal law is that since neither the federal government nor the states have total control over the criminal law, each may exercise a check upon the other. It is true that the federal government has exercised some control over the states in the area of the criminal law. The fourteenth amendment of the United States Constitution has restrained the states in the development of criminal procedure[34] and, through the first amendment rights of free speech,[35] press,[36] and association,[37] has limited the enforcement of their substantive criminal laws. The presumption that the field of criminal law is primarily within the states' domain has served as a restraining influence upon the exercise of federal power in the area of substantive criminal law.[38] However, if it is assumed that there is a need to provide a system of checks and balances in the field of criminal law, it does not follow that the present system should be maintained. It is possible to conceive of a federal system of criminal law in which checks and balances are maintained—checks and balances in addition to those which

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[33]The theory of separation of powers—or checks and balances—was certainly thought to be incorporated into the Constitution by those who argued for its ratification. *See* THE FEDERALIST No. 57, at 299 (H. Lodge ed. 1899) (J. Madison).

[34]A majority of the United States Supreme Court has apparently adopted the "selective incorporation" theory of interpretation of the fourteenth amendment and has in effect applied most of the restrictions found in the Bill of Rights to the states through the due process clause of the fourteenth amendment. *See* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for the production of witnesses for the defendant); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (freedom from self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel); Robinson v. California, 370 U.S. 660 (1962) (proscription of cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained in violation of the fourth amendment); Wolf v. Colorado, 338 U.S. 25 (1949) (dictum) (prohibition of unreasonable searches and seizures); In re Oliver, 333 U.S. 257 (1948) (alternative holding) (public trial and notice of charges); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial tribunal). That the "selective incorporation" theory still commands the support of a majority of the members of the United States Supreme Court in spite of four new justices is illustrated by the concurring opinion of Justice Powell in Johnson v. Louisiana, 92 S. Ct. 1620, 1635 (1972).

[35]*E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ohio Criminal Syndicalism Act unconstitutional because in conflict with first amendment, as made applicable to states through fourteenth amendment).

[36]*E.g.*, Wood v. Georgia, 370 U.S. 375 (1962) (contempt conviction of sheriff for issuing news release critical of judge's action regarding grand jury unconstitutional).

[37]*E.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960) (municipal ordinance requiring organizations in city to file list of names of members unconstitutional).

[38]*See* H. Hart & A. Sacks, The Legal Process 1241, 1958 (unpublished materials, in Harvard Law School Library).

exist by virtue of a tripartite government consisting of the executive, the legislature, and the judiciary. For example, it would be possible to provide a council of representatives whose sole responsibility would be the criminal law. Such a council might make recommendations to the Congress concerning the need for amendments in the fields of criminal law, criminal procedure, and civil commitment and might also be given the authority to veto the criminal laws passed by Congress if the vast majority of council members were convinced of the desirability of the veto. It might also be given the power to require the Congress to vote on a proposal if a great majority of the council members believed that Congress was not properly taking the initiative in bringing about needed reforms of the law in this area.

Another aspect of the fear of federal tyranny is the fear that extension of the exercise of federal power in the criminal law field would produce a national police force[39] that would endanger the freedom of all. Even if it is assumed that a national police force would pose a serious threat to individual liberty, the creation of an exclusive, uniform system of criminal justice would not necessarily lead to the creation of a national police force, since the enforcement of the federal law could be accomplished by an act of Congress authorizing and requiring local police to enforce it. A federal ombudsman might be created to insure compliance by the local police.

Thus far it appears that there are many logical reasons for the adoption of a uniform system of federal criminal justice, whereas mere tradition is the primary basis of the present system.[40] However, I believe that there is another important reason for the adoption of a federal system: the discrepancy between theory and practice in the present system of criminal justice. While there has always been, and always will be, some difference between practice and theory, there is considerable room for improvement. For example, although the presumption that everyone knows the law is necessary to avoid encouraging people to be ignorant of the law,[41] it is an extremely unrealistic presumption when

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[39]*See* Liebmann, *supra* note 2, at 1180.

[40]One should keep in mind Holmes' famous statement regarding the limitations of history in the development of judge-made law: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *supra* note 9, at 469. If this is true of judicial action, it is even more true of legislatures, which have a greater duty to keep abreast of current needs.

[41]R. PERKINS, CRIMINAL LAW 925 (2d ed. 1969).

there are some fifty-one different codes of criminal law and procedure. The presumption would be much more realistic if there were only one system of criminal law and procedure. Moreover, it would be somewhat easier for the Supreme Court to bring about uniformity in the interpretation of the law if it were dealing with a single jurisdiction over which it could exercise its supervisory powers.[42]

This is not to suggest that establishment of an exclusive, uniform system of criminal justice at the national level would be a panacea. In particular, such a system would be no better than the persons entrusted with the responsibility of making it work. Perhaps, therefore, attention should also be given to the possibility of change in the mode of selection (and perhaps training) of federal judges. In any event, recognition that perfection is not likely to result from implementation of this proposal should not lead to its rejection.

III. Some Specifics of Change

Thus far an attempt has been made to show, in a general way, the desirability of a uniform system of criminal justice at the federal level. There cannot be a complete discussion of the broad issue of the desirability of such a system, however, without some consideration of what such a system might look like. What follows, therefore, is an example of the kind of constitutional amendment that could bring about the change discussed above. Although it is merely illustrative, it does deal with some specific issues; hence it is necessary to state here the assumptions on which this particular proposal is based.

Assumptions

One assumption is that the criminal law is distinguished from other forms of social control by the moral condemnation of society that accompanies conviction and by the notion that the criminal law ought not

[42] *See, e.g.*, Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). Both of these decisions have been modified by 18 U.S.C. § 3501(c) (1970).

Of course the fact that the Supreme Court exercises supervisory jurisdiction over the federal courts does not mean that there is total uniformity. For example, in the area of the insanity "defense" the circuits have indeed developed their own tests. Compare, *e.g.*, United States v. Currens, 290 F.2d 751 (3d Cir. 1961) (modified Model Penal Code), *with* United States v. Brawner, ___ F.2d ___ (D.C. Cir. 1972) (Model Penal Code,) *and* Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (M'Naghten and "irresistible impulse" tests), *vacated on other grounds*, 392 U.S. 651 (1968).

to be applied to one who is not morally blameworthy.[43] Another assumption is that one of the highest values that a society can protect is freedom from unwarranted conviction of crime and its concomitant stigmatization. It is also assumed that deprivation of physical liberty —whether it be in the form of incarceration in a prison, hospital, training school, or other confinement facility (however euphemistically described)—is as serious a consequence for the individual as incarceration based on conviction of crime and that the same standards of due process that protect the individual when the government seeks to convict him ought to apply when an attempt is made to incarcerate him civilly.[44]

Some of the implications of these assumptions will now be explored. The criminal law would have no reason to exist if man did not have, *to some extent,* the capacity to make choices and to act upon them. Extreme determinism would remove any notion of moral blameworthiness and would make the criminal law obsolete. I do not subscribe to that theory, believing, as others have suggested,[45] that one can accept the findings of modern psychiatry, psychology, and sociology without giving up the notion that man can control his actions to some degree. Even if evidence is some day gathered to show that the determinists are right, there will still be a need to incarcerate some very dangerous persons even if the process is described as "civil."[46] Therefore, the proposal relates to civil commitment as well as to conviction of crime. Indeed the problems of lack of uniformity discussed above would be

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[43]*See* Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401, 404-05 (1958). In addition, *see* P. BRETT, AN INQUIRY INTO CRIMINAL GUILT (1963), in which the author states: "In support of my view I urge that crime and punishment are concepts which in our ordinary thinking are inextricably intertwined with the notion of guilt or blame." *Id.* at 70.

[44]*See* Davidow, *supra* note 26.

[45]*E.g.,* S. GLUECK, LAW AND PSYCHIATRY—COLD WAR OR ENTENTE CORDIALE? 14-15 (1962). In addition, *see* P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 62 (1963):

> Yet the reverse side of the coin of guilt is that of merit. And it is a curious fact that the psychiatrists who preach so loudly that there is no such thing as guilt are not heard to say that there is no such thing as merit. Rather do they seek and enjoy recognition of their special insights. I am not criticising them for this. But I urge that such an attitude is quite inconsistent with a genuine belief that all mental processes are the product of inescapable and inexorable forces. The same attitude is reflected in the more technical psychiatric writings. Here eminent psychiatrists discuss their cases and develop their reasons for preferring one mode of diagnosis and treatment to another. They explain why they made a particular choice, but they never offer an explanation suggesting that they were driven to the choice by a combination of their own hereditary and environmental influences.

[46]*See* Katz, *supra* note 9.

reproduced in a much worse form (despite uniformity of the criminal law) if some but not all states decided to process through the civil courts those who are now prosecuted criminally.

Moreover, while the criminal law continues to exist there will continue to be a need for the civil commitment of some persons acquitted on the ground of insanity. Indeed, the jury's assumptions regarding initiation of civil commitment proceedings upon acquittal by reason of insanity may affect the jury's decision to acquit a defendant in a case in which the defendant obviously has substantial problems of control and in which the jury believes that the defendant is a danger to society.[47] Thus the problems of conviction and civil commitment are very substantially intertwined, and any scheme that alters the allocation of powers in the federal system with respect to one but not the other is bound to create great difficulties.

Another assumption relates to the matter of distribution of powers within the federal system and the need for checks and balances. Those who assembled in Philadelphia in 1787 to draft the Constitution assumed that Montesquieu was correct in suggesting a division of powers within the government.[48] They believed that unrestrained power could lead to tyranny. (They also probably assumed that the general government would not become involved in providing an exclusive, uniform criminal code.[49] This was very likely the product of another assumption, that the criminal law was a matter of purely local concern. That latter assumption may no longer be valid.) Like the Founding Fathers, I assume that the exercise of unrestrained power will lead to tyranny; this assumption explains in part the restrictions placed upon the Congress in the proposed constitutional amendment.[50]

Another assumption is that an exclusive, uniform federal criminal and civil commitment code would work. (The question of political acceptability is another matter.) Some assurance of the feasibility of the proposal is provided by the successful Canadian experience. The British

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[47]*See* R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 94 (1967).

[48]*See* THE FEDERALIST No. 57, at 299 (H. Lodge ed. 1899) (J. Madison).

[49]*See id.* No. 82, at 512 (A. Hamilton).

[50]Although I would thus continue and perhaps extend the system of checks and balances, I nevertheless believe that the policy decisions regarding the criminal law and incarceration generally ought to be made by a publicly elected body. I therefore disagree with the basic approach taken in R. TUGWELL, *supra* note 4, which provides for enactment of criminal codes by a Judicial Council appointed by the Principal Justice of the United Republics.

North America Act of 1867[51] gives the Canadian government the power to provide a criminal code for the entire dominion;[52] that government also has the power to appoint and to pay the salaries of some of the judges who try cases under the code.[53] Certain difficulties have arisen, but they can be traced to the failure to give to the central government the entire power over criminal law.[54] The Canadian experience thus reinforces the arguments for uniformity.

A final assumption relates to the method of change. Although a strong argument can be made that Congress now possesses the power to create a uniform system of criminal justice at the national level,[55]

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[51]30 & 31 Vict., c. 3.

[52]The central government has the power to make laws with respect to "Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." *Id.* § 91(27).

[53]"The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." *Id.* § 96. "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada." *Id.* § 100.

[54]*See* Leigh, The *Criminal Law Power: A Move Towards Functional Concurrency?*, 5 ALBERTA L. REV. 237 (1967).

The provinces have the power to deal, for example, with problems of property and civil rights (30-31 Vict., c. 3, § 92(13)), and more specifically, highways (O'Brien v. Allen, 30 Can. S. Ct. 340, 342-43 (1900) (dictum); *see* Mann v. The Queen, 56 D.L.R.2d 1 (1966); O'Grady v. Sparling, 25 D.L.R.2d 145 (1960)), they also have the power to enforce their legislation in these areas with fines and imprisonment. 30-31 Vict., c. 3, § 92(15). The result is that the provinces have involved themselves to some extent in the criminal law through the exercise of this regulatory power and, of course, diversity among the provinces has developed. Melnik, *Provincial 'Supplementary' Legislation*, 15 FAC. L. REV. 48, 53 (1957). Moreover, the Supreme Court of Canada has been forced to devote some of its time to such nice questions of constitutional interpretation as whether the central government, in enacting some obstensibly criminal statute, is really trying to usurp the power of the provinces over property. *See* Murray, *Economic Activity Under Criminal Law*, 15 FAC. L. REV. 25 (1957).

[55]The argument that Congress now possesses the power to provide a uniform system of criminal justice to be administered at the national level is presumably based on the commerce clause, U.S. CONST. art. I, § 8, and the fourteenth amendment. U.S. CONST. amend. XIV, § 5.

The arguments based on the commerce clause are best summarized in the recent case of Perez v. United States, 402 U.S. 146 (1971). In *Perez* the Court, with only Justice Stewart dissenting, held that Title II of the Consumer Credit Protection Act, 18 U.S.C. § 891-96 (1970), is constitutional. The Court concluded that petitioner's "loan sharking" activities could be criminally proscribed by Congress because Congress had found that such activities affected interstate commerce, even though there was apparently no evidence that the activities of petitioner in this particular case affected commerce. The Court stated that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to 'excise, as trivial, individual instances' of the class." 402 U.S. at 154 (emphasis in original). Awareness of the implications of the decision is illustrated by the Court's inclusion of a statement made during the debates over the

there are at least two reasons for preferring a constitutional amendment. First, a constitutional amendment could institutionalize an additional check on congressional authority in this area and thus provide protection against federal tyranny. Second, unlike a mere act of Congress, a proposed amendment would not be subject to the criticism that it is inconsistent with the "intent" of the Founding Fathers (unless one assumes, as a matter of policy, that what occurred in 1787 is incapable of improvement and ought never to be changed—an assumption upon which the Founding Fathers themselves did not proceed).[56] In other words, potential adversaries of the proposed amendment could not simply rely on the similar criticism that has been often leveled at the Supreme Court—that the Court has engaged in "judicial legislation" when it has upheld acts of Congress that arguably exceed Congress'

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bill: 'Should it become law, the amendment would take a long stride by the Federal Government toward occupying the field of general criminal law and toward exercising a general Federal police power; and it would permit prosecution in Federal as well as State courts of a typically State offense.' *Id.* at 149. In addition, *see* the dissenting opinion of Justice Stewart:

> But under the statute before us a man can be convicted without any proof of interstate movement, of the use of facilities in interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.
>
> In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes which distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting.

Id. at 157. If Congress has the power under the commerce clause to provide a uniform substantive criminal code, it must also have the power to provide a code of criminal procedure. *See* U.S. CONST. art. I § 8, cl. 18.

Principal support for the argument that section 5 of the fourteenth amendment authorizes Congress to enact a uniform criminal code, or at least a uniform code of criminal procedure, is found in Katzenbach v. Morgan, 384 U.S. 641 (1966), in which the Supreme Court upheld a federal statute that invalidated a New York statute that had required persons to be literate in English before they were entitled to vote. The Court upheld the act of Congress without a finding that the New York act was itself violative of the equal protection clause. In doing so, the Court deferred to the judgment of Congress that this was essential to the enforcement of the equal protection clause. Immediately after the case was decided, a leading scholar suggested that "[l]ogical pursuit of the reasoning in *Morgan v. Katzenbach* leads to the conclusion that Congress can constitutionally adopt a comprehensive code of criminal procedure applicable to prosecutions in state courts." Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 108 (1966) (footnote omitted).

However, the recent case of Oregon v. Mitchell, 400 U.S. 112 (1970), may cast some doubt on the breadth of the principle ennunciated in *Katzenbach v. Morgan.*

[56]M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 207-08 (1913).

constitutional powers.[57] A constitutional amendment is, by definition, legislation by the ultimate authority, the people.

Proposed Constitutional Amendment

> *Section 1.* Congress shall have the power to provide a uniform code for criminal law, all forms of incarceration (however denominated), and for the procedures relating thereto, for the United States. [However, Congress may, in its discretion, apply special criminal law, criminal procedure, and incarceration provisions to the District of Columbia, so long as such special provisions do not make possible longer incarceration or otherwise more severe punishment than would be possible under the laws applying generally to the United States.] No law enacted pursuant to this section shall create criminal liability without fault.

The portion of the section enclosed in brackets is thought to be optional. My personal view is that it would be unnecessary since Congress would be able to experiment without it, and any serious mistakes would become quickly evident because of the wide geographical application of the federal code. Nevertheless, if it is concluded that some method of experimentation is needed that does not affect the entire United States, then this bracketed material would be useful. The District of Columbia seems an appropriate place to experiment because any experiments could be closely scrutinized by Congress and because it would be relatively easy to publicize the differences between the law applicable to the District of Columbia and that applicable to the rest of the United States.

The last sentence of this section incorporates the moral blameworthiness theory of criminal law and thus would prohibit conviction where there is no element of fault. This does not mean that ignorance of the criminal law would be excused, since persons would still be expected to inform themselves of the content of the law through the exercise of due diligence. Presumably Congress would be required to take reasonable steps to publicize the content of this law.[58]

> *Section 2.* All criminal law and incarceration proceedings shall be in the courts of the United States.

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[57] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[58] *See* Lambert v. California, 355 U.S. 225 (1957).

This section would insure application of uniform criminal and incarceration procedures and would result in a uniform method for the selection of the judges who would try criminal and incarceration cases.

> *Section 3.* Review of all criminal law and incarceration proceedings shall include review by a United States Court of Criminal Appeals of questions of constitutional law and, if Congress so provides, of statutory interpretation. The Court shall be constituted by the Congress. There shall be discretionary review of the decisions of the Court of Criminal Appeals by the United States Supreme Court in cases involving questions of constitutional law and, if Congress so provides, of statutory interpretation.

A major shift in the responsibilities of the states and the federal government in the area of criminal law and civil commitment would require an increase in the number of federal judges. It would seem desirable not only to increase the total number of judges, but also to add a new appellate court that could devote its entire attention to the criminal law and civil commitment. This section is merely illustrative of the manner in which this might be done and hopefully is flexible enough to satisfy those interested in reform of the appellate process.[59]

> *Section 4.* (A) There is hereby created a National Criminal Law Council composed of one hundred members. Each member shall be elected from a separate district inhabited by approximately 1/100 of the population of the United States. The boundaries of each district shall be determined by the Congress.
>
> Members shall serve a term of eight years and shall be eligible for re-election. Their salaries shall equal those of the members of the United States House of Representatives and shall be paid by the United States Government.
>
> (B) The National Criminal Law Council shall provide the Congress of the United States with advice and proposals regarding the criminal law, all forms of incarceration (however denominated), and the procedures relating thereto.
>
> (C) No bill relating to the subjects referred to in subsection (B) shall become law unless it satisfies the requirements of article I, § 7 of the Constitution and is not disapproved by two-thirds of the Criminal Law Council within ten days after it is passed by the Congress.

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[59] *See* Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 So. CAL. L. REV. 901 (1971); Strong, *The Time Has Come to Talk of Major Curtailment in the Supreme Court's Jurisdiction*, 48 N.C.L. REV. 1 (1968).

(D) The National Criminal Law Council shall have the power, with the concurrence of two-thirds of its members, to require the Congress to vote on any proposal relating to the subjects referred to in subsection (B). Such vote shall be taken no later than sixty days after the members of the Council have concurred in the proposal.

The National Criminal Law Council would lighten the additional burden placed on Congress by providing recommendations and serving as a source of information. However, in the context of a constitutional amendment the Council could be much more. It could be the means by which the power of Congress could be formally restrained. Much of this section is merely illustrative of the restraints that might be imposed on Congress if it were given the power to enact an exclusive criminal-incarceration code.

There is nothing sacrosanct about the provisions of subsection (A) relating to the selection and composition of the Council; these provisions are merely designed to create a relatively simple method for the selection of members of the Council, embodying the one-man-one-vote principle.

The provisions of subsection (B) delineate the duties of the Council. It is intended that the Council become the primary forum for the development of the uniform code and that the role of Congress be that of ratifying the decisions of the Council.

The provisions of subsection (C) give the Council the power to veto those acts of Congress that are considered not to be in the national interest. Because a large number of votes are necessary for an exercise of such power, it is unlikely that the Council would act except under extreme circumstances. Consequently, the veto of the Council is final.

The language of this subsection is designed to make clear that a bill must not only have the approval of the President, but also not be disproved by the Criminal Law Council. At first the language referring to Article 1, § 7 of the Constitution may seem superfluous; however without such language it would not be clear whether a bill that was immediately signed by the President but vetoed by the Council within, for example, five days after the President's approval was law during the five days between the President's action and the Council's veto. To avoid unnecessary confusion such a bill would not become law until the ten days had passed during which the Council had an opportunity to decide whether to veto the bill.

It would not be enough to give the Council power to prevent the passage of unwise legislation, however. Such prevention would not pro-

vide a remedy if the law remaining after the exercise of a Council veto were obsolete. Therefore, subsection (D) would permit the Council to force Congress to act on a specific proposal.

> *Section 5.* Two years after the effective date of this constitutional amendment, no state, except as it acts as agent for the United States Government or punishes for contempt committed in open court in the presence of the presiding judge, shall incarcerate any individual in any facility, whether the facility be described as a jail, prison, hospital, training school, or otherwise.

The prohibition contained in this section reflects my presumptions regarding the importance of personal liberty and the freedom from the stigmatization associated with criminal incarceration. To protect both values it is necessary specifically to proscribe all types of incarceration by the states, however euphemistically described. To those who object that this prohibition would preclude the enforcement of many regulatory laws, such as liquor laws, my reply is that this result might not be as bad as imagined.[60] The proposed amendment would not preclude fines for the violation of state regulations. Certainly if one accepts the proposition that the criminal law should be a means of imposing social controls only with respect to morally condemnable conduct, it becomes questionable whether many of such basically regulatory laws ought to be enforced through the criminal law.

There are two exceptions to the prohibition against incarceration explicitly provided for in Section 5. The first would permit the states to incarcerate individuals if the states acted as agents of the federal government. As a matter of convenience, the federal government might want the states to continue to operate some or all of the correctional facilities which the states now operate; this might be particularly true in the transitional period during which the federal government would have to adjust to its new responsibilities. The United States Government would still be able to set standards for the states in the administration of such facilities.

The second exception relates to the maintenance of order in, and respect for, the state courts. Contempts committed in open court require immediate attention if order is to be preserved;[61] therefore the state courts would be permitted to continue to exercise this aspect of con-

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[60] *See* U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 107 (1967).

[61] Johnson v. Mississippi, 403 U.S. 212, 214 (1971) (dictum); *see* Illinois v. Allen, 397 U.S. 337 (1970).

tempt power. Federal writs of habeas corpus would still be available to persons incarcerated in this fashion to protect against abuse of this power.

> *Section 6.* Nothing contained in this constitutional amendment shall be construed to deprive the states of their power to levy reasonable fines against individuals or other legal entities for the violation of regulatory statutes not superceded by the uniform code, so long as there is no concomitant deprivation of any civil right or liberty, including but not limited to the right to vote, the right to hold public office, and the liberty to hold private office. In any action to collect a fine permitted by this section, if lack of knowledge of the regulation allegedly violated is reasonably raised by the evidence, the state must assume the burden of persuasion with respect to that issue.

This section would insure that the states have sufficient power to enforce their regulatory statutes through the levying of fines. However, to insure that the states would not attempt indirectly to punish individuals other than by way of fine, it would be necessary to attempt to place some additional restrictions on the states. The states would not be allowed to attach employment disqualifications to the violations of their laws, since such disqualifications so frequently amount to serious punishment. If a person is to be denied a means of livelihood, the matter is sufficiently serious to be adjudicated by the government which has the responsibility for enforcement of the criminal laws—the federal government.

The states would also not be permitted to determine the circumstances under which a person could lose the right to vote, the right to hold public office, or other civil rights or liberties. It is hoped that the language employed here would be sufficiently flexible to permit the courts to deal with ingenious devices intended to subvert the principle announced in this section.

The last sentence of this section draws a distinction which initially may seem hard to justify. It would permit, in effect, the defense of lack of knowledge of state law, but would not permit the defendant to escape the payment of a fine if he knew the law but was nevertheless unable to adhere to it. Such a distinction is justified because defense of lack of knowledge is necessary if transients are to be protected against laws which they could not reasonably be expected to know.[62] However, since

[62] *See* Lambert v. California, 355 U.S. 225 (1957).

imprisonment would not be involved, it might be desirable to permit the states to encourage the greatest degree of care in certain areas by imposing a form of strict liability on those who have advance warning of the regulations to which they are expected to adhere. This is analogous to the imposition of fines on railroads under the Federal Safety Appliance Acts.[63]

One may ask whether a requirement that the state prove knowledge of the regulations allegedly violated when lack of knowledge is raised imposes too great a burden on the state. Here it is necessary to balance the additional burden placed on the states with the lack of fairness to the defendant that would result from the imposition of monetary penalties without knowledge of a regulation. Knowledge could be established, in the absence of an admission by the defendant, by adducing evidence from which one could reasonably infer such knowledge. The extent of the burden on the state would depend on the degree to which the state had publicized the regulations which people were expected to observe. For example, in the area of traffic regulations, if such regulations were posted on traffic signs, published in books widely distributed, published in newspapers, or publicized on television, the burden on the state would not be great. Lack of knowledge would always be available as a defense, but a jury or judge would not readily accept a defendant's denial of knowledge in the face of evidence of such wide publication. Nevertheless, the existence of such a defense would serve as substantial encouragement to the states to publicize widely laws that differed from those enforced in other states.

Section 7. [Insert here a provision incorporating some form of merit system for the selection of all federal judges.]

The problem of judicial selection and training deserves fuller consideration than can be given in this article. Perhaps it is sufficient here to raise the issue and to suggest consideration of some form of merit selection—perhaps patterned after the "Missouri Plan"[64]—for the federal system.

Section 8. Two years after the effective date of this constitutional amendment, if Congress shall have failed to adopt a uniform code for criminal law, all forms of incarceration (however denominated), and

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[63]45 U.S.C. § 18 (1970).

[64]Mo. CONST. art. 5, §§ 29(a)-(g), 30, 31; *see* Allard, *Application of the Missouri Court Plan to Judicial Selection and Tenure in America Today*, 15 BUFFALO L. REV. 378 (1965).

> for procedures relating thereto, the law of the District of Columbia dealing with these matters shall become operative throughout the United States and shall remain so operative until Congress shall adopt such a uniform code.

Since it is possible that Congress would not succeed in enacting a federal code during the two-year interval between adoption of the amendment and the effective date of the prohibitions of state action contained in Section 5, some provision would have to be made for this contingency. The simplest method seems to be to provide for the application of the relevant laws of the District of Columbia to the rest of the country until such laws were amended or repealed by the Congress.

> *Section 9.* Congress shall have the power to enforce this amendment by appropriate legislation.

Although one can argue that this section would be unnecessary in the light of the necessary and proper clause of article one, section eight of the Constitution, it might be wise to include this express grant of power; otherwise, someone might maintain that since such language has been used in other amendments, the failure to use such language is legally significant.

IV. Conclusion

If one looks to the current literature dealing with problems of federalism, he may gain the impression that despite the effects of travel, migration, and the mass media on the American people, the criminal law is the last area in which many persons would advocate enforced uniformity among the states; the predominant feeling still seems to be that the criminal law is largely a matter of local concern, despite the apparent absence of significant relationship between attitudes towards crime and state boundaries. Nevertheless, as one who values physical liberty as well as freedom from unwarranted moral condemnation by society and would place those liberties toward the top of any hierarchy of values, I believe that uniformity in the laws dealing with crime and incarceration must be achieved. Only through uniformity of such laws can the evils of lack of fair notice of the criminal laws and arbitrary application of different criminal and civil commitment laws be eliminated.

I believe also that the attempt to bring about uniformity should be made only through a constitutional amendment and not through an act

of Congress. Even though the idea of uniformity may not be popular now, I believe that people will respond more favorably to it if the attempt to change the system is made forthrightly in the manner constitutionally prescribed for constitutional change.

The problem is one of convincing most Americans of the validity of the conclusions set forth above regarding the need for uniformity. In view of present attitudes, the possibility that most Americans will be thus convinced in the near future seems slight. But if this proposal has merit, if it or a more refined one would make possible a better system of criminal law, then I believe that eventually it will be possible to persuade the American people that such changes ought to be made. The American system of government is based on the assumption that such changes are possible.