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INTER ALIA

Abortion measure miscarries

To some, Parliament as it debated the Hospitals Amendment Act 1975 was the nation's debating chamber at its best. Emotions were running high, the whips were off, and Members spoke passionately to packed galleries and huge radio audiences.

Some, though, were less impressed. They had actually read the Bill, recognised it for what it was, and analysed its obvious short-comings. Theirs was the voice of reason, but amongst tumult and shouting reason could not be heard.

Instead, the Bill by-passed the customary select committee stage, with its sponsors scenting victory and perhaps unwilling to have the measure subjected to public analysis in another forum.

Denied dispassionate study, and with many Members by their speeches thinking they were amending the Crimes Act, it was wholly predictable that the resulting legislation should miscarry.

In his judgment in *Auckland Medical Aid Trust v Attorney-General,* Mr Justice Speight described the measure as "ill-drafted" and it should be made clear that the fundamental drafting error (namely the reference only to s 182 of the Crimes Act to the exclusion of s 183) was pointed out to the Bill's sponsors. But those were heady times; any critic was suspect, and they were shouted down.

There can be little doubt that had the Bill been referred to a select committee, its drafting would have been tidied up and Parliament would have achieved an effective change to the law.

Whether or not one agrees with the intentions of the Bill, there is little room to disagree with the general proposition that the intentions of Parliament should not be frustrated.

Predictably, some members of the public formed the impression that the Supreme Court had struck the measure down simply because a single Judge disliked it.

Sole responsibility for the fiasco, of course, lies with certain Members of Parliament. It is to be hoped that in future the golden rule of law reform will be followed. To "Make haste, slowly" may be frustrating, but at least, in the end, an effective measure may be enacted.

In search of certainty

Clarity in law is, of course, a considerable virtue. Without it the citizen (and, indeed, his legal adviser) is unable to predict the consequences of his actions. Without it, suggestions that ignorance of the law does not excuse have a very hollow ring.

There is at present a Royal Commission sitting, one of whose tasks will be to try to clarify the law relating to abortion. Nonetheless it is unfortunate that the declaratory judgment procedure was considered inappropriate for resolution of one of the questions raised in *The Auckland Medical Aid Trust* proceedings, namely: Is a non-viable foetus "a child that has not become a human being" within the meaning of s 182 (1) of the Crimes Act 1961?

Thus the meaning of a major penal statute remains clouded, at least until Parliament is minded to revise it or someone is prosecuted for a crime that carries with it liability to imprisonment for up to 14 years.

In Britain there is power for the Attorney-General to refer questions of public importance direct to the Court of Appeal for a ruling. This, of course, has its drawbacks. Counsel, it is said, when arguing a case in a vacuum and with nothing turning on the result may not be at their best; a busy Court with a crowded calen-

dar, too, may be less than enthusiastic when confronted by a hypothetical question. As well, the stating of hypothetical situations can overlook the inclusion of some facts the Court subsequently considers material.

However, where the point *is* one of public importance, is relatively straightforward, and particularly where a quick answer is required, such a reference may be more appropriate than the point being left for individuals (whether funded by legal aid or not) to work through the system in the usual way.

Justices and justice

Dr Finlay has recently admitted to a change of opinion about the desirability of using Justices of the Peace in Court proceedings. He said he has revised his view that their presence is not to be encouraged, and now considers that Justices have a role to play in straightforward cases involving questions of fact alone.

However the problem is to devise a method whereby cases can be divined in advance in which questions of law can be relied upon not to rear their technical heads. Unless one is prepared to accept the possibility of a false start and a commencement afresh before a Magistrate, the lay Justice (not to mention the parties) is placed in an unsatisfactory situation.

It is as well to recall that Justices in England, who bear much of the load of petty crime, have with them a legally qualified clerk to advise on legal points.

It is only if expertise is available in the Courtroom (and not consulted outside it as, it is said, has occasionally occurred in one of our cities) that Justices can fairly be left to preside over defended cases.

However the role of the Justices could well be enlarged by having two sit with a Magistrate as a Bench of three, just as occurs from time to time in England's Crown Court. In this way their role would be restricted to findings of fact.

Certain benefits might follow:

— At least some defendants would elect summary jurisdiction before an enlarged tribunal and so lessen the Supreme Court's criminal jury load;

— More lay people would be brought into the administration of justice to the benefit of the system and the public alike;

— By judicious selection of Justices, leaders of minority groups could be appointed so that groups who have tended to feel excluded from an apparent Anglo-Saxon legal system could actively take part within it;

— In cases where questions of custom are likely to be raised, the Bench could be strengthened by having as one of its three members, a representative of the cultural group in question.

Justices may be potentially too valuable in this way than to be used to dispose of what Dr Finlay has described as "the dross". Further, the traditional view has always been that the high standing of our professional Magistracy should not be eroded by the introduction of a lay Bench.

If there is a burden of minor cases which the full-time magistrates cannot accommodate, it may be that solicitors of suitable experience could be appointed to sit on a daily basis and as required to deal with them.

The problem with any restructuring of the Courts is that any one proposal for change other than a simple increase in Judges or Magistrates, carries with it the need for other changes and, inevitably makes necessary a reappraisal of the complete Court structure.

Now that the need for change is generally accepted, the sooner such a study is initiated the better be it by Green Paper or otherwise.

JEREMY POPE

Mutatis mutandis—"This is yet another case involving the interpretation of the sections of the Transport Act 1962 relating to blood tests taken for the purpose of a prosecution under s 58 (1) (a) of the Act. This appeal has been rendered necessary by the confused drafting of s 58D in 1971 compounded by amendments made in 1972. It is important, particularly in legislation which requires daily application by persons not trained in the law and the interpretation of statutes, that the Legislature should say what it wants to say in simple language. Uncertainty and confusion arise when resort is had to such devices as found in s 58D (6) which applies to certain provisions of s 58B "as far as they are applicable and with the necessary modifications". This is unhelpful draftsmanship, it abrogates the function of Parliament; it transfers to the Courts part of Parliament's legislative function. In this situation the Courts can be excused for adopting an interpretation or application which is favourable to a defendant against whom a prosecution is launched." CHILWELL J in *R v Maughan* [1975] 2 NZLR 385, 386.

CASE AND COMMENT

New Zealand Cases Contributed by the Faculty of Law, University of Auckland

Criminal law—"usable quantity" of narcotics

The decision of Mahon J in *Emirali v Police* (Supreme Court, Auckland, 17 September 1975) will be of interest to any practitioner who has occasion to do criminal work. The judgment further expands the principle of the "half-way house" first expressed in *R v Strawbridge* [1970] NZLR 909 (CA) and helps to clarify the law concerning possession of drugs.

Appellant had been convicted of violating s 6 (1) of the Narcotics Act 1965 by possessing cannabis. There were six separate exhibits containing various quantities of the drug which could have been the basis of the conviction in Magistrates' Courts, but for a variety of reasons it was held by Mahon J that none of the items were proven to be in appellant's possession and the conviction was therefore quashed.

The cannabis in question was found throughout premises jointly occupied by appellant and his wife which were subject to search by the Auckland Drug Squad. The first exhibit (14 milligrams) was located, not within the custody or control of appellant, but inside his wife's handbag, and since it was never shown that the appellant had custody of the handbag or knew of its contents, he was clearly not in possession of this piece of evidence.

The second finding related to 110 milligrams of cannabis found in a vacuum cleaner owned by appellant's wife and used to clean the premises. Although the same reasoning which applied to the handbag would seem to apply in this instance, Mahon J preferred to discuss this exhibit in relation to the mental element necessary for possession. Both *R v Warner* [1969] 2 AC 256 (HL) and *Police v Rowles* [1974] 2 NZLR 756 (SC) dealt with the situation where the prohibited drug was located inside a container, and these cases made it clear that one could not be held to be in possession of something which was not known by the defendent to be present. In this case, the fact that the vacuum cleaner was used by others to clean other premises and cars created a reasonable doubt about the appellant's awareness of the existence of the cannabis traces in the container.

A similar problem was presented by the third exhibit, 2.6 milligrams of cannabis found on the premises in the fireplace. Because appellant was the joint occupier of the premises, his Honour assumed that he was in physical possession of everything in the fireplace, but once again, the mental element necessary to prove unlawful possession was missing. Applying *R v Strawbridge,* supra, and *Police v Rowles,* supra, possession with guilty knowledge would be presumed until the defendant displaced the inference by pointing to evidence which tended to raise a reasonable doubt as to the existence of guilty knowledge. In this case a doubt was raised by the number of visitors to the flat, a recent party, and the possibility that some third party could have left the drug in the fireplace without appellant's knowledge.

The final three exhibits presented a different sort of problem. These items were traces of cannabis located in the bedroom and living room of the premises. 1.7 milligrams were found on some cigarette papers; 6 milligrams were located amongst innocent debris; and a metal clip holder registered positive on a burned deposit. Due to their location and the absence of evidence to the contrary, Mahon J assumed that these items were in possession with guilty knowledge. Appellant argued, however, that the amount of cannabis ascertained was so miniscule that it was not usable and thus not in his possession within the true intent of the Narcotic Act. In agreeing with appellant's submissions on this point, his Honour reviewed the split of authority which has developed in England over this topic. Some cases (eg *Brocking v Roberts* [1974] 1 QB 307) have held that the drug need only be scientifically detectable to be said to be in possession; other authority (*R v Worsell* [1969] 2 All ER 1183) has required the drug at least to be measurable; still another line of cases has found that the smallness of the quantity went to knowledge of the existence of the drug.

In the case before Mahon J the Crown adopted the view that once the drug was measurable, the only significance the quantity had was in raising a doubt whether the defendant knew of its existence. Although the argument was logical and consistent, according to

his Honour, such a position would lead to some harsh results for those who tried to get rid of drugs or came into possession of some instrument which had handled illicit drugs in the past. He concluded:

> "But what the argument also does, in my opinion, is to invest the noun 'possession' with a quality so absolute as to make it discordant with the practical concept of liability established by the statute. . . . In my opinion possession of a narcotic refers in this statute to possession of a usable quantity. What is usable depends upon the nature of the drug. A speck of lysergide is usable, as also is a drop of hashish oil or a diminutive quantity of heroin or cocaine. What the police found in the appellant's flat were the vestigial traces of cannabis. They only found evidence of past possession. No cannabis was found in the possession of the appellant in any usable quantity, and thus in my opinion he was entitled to be acquitted."

Although the judgment clarifies the quantitative element of possession, there still might be some question over what is meant by "guilty knowledge". Does this refer simply to knowledge of the *presence* of the drug, or will it be a defence to raise a doubt about knowledge as to the *quality* or *character* of the thing in possession? It will be remembered that Lord Pearce in *Warner,* supra at page 305, said he would be guilty of unlawful possession if he made a mistake about pills being aspirin rather than heroin, but is the law different under *R v Strawbridge* where a defence was allowed for an accused who honestly and reasonably believed her act was innocent? Logically, the *Strawbridge* principle should extend to both kinds of knowledge, presence and quality, because a genuine mistake as to either negates any criminal purpose on the part of the accused.

The proposed Misuse of Drugs Bill 1975 specifically created a defence for an accused who was mistaken over what he possessed, but this statutory defence and others were removed in the final version of the Bill. The purpose of this removal, it is submitted, was not to do away with the defences but to leave *Strawbridge* operable. That case places only the evidentiary as opposed to the legal burden on the accused in regards to proving his defence, while the proposed Bill would have required the accused to prove on a balance of probabilities that he was innocent.

It could be that after *Emirali* the Crown will have four elements to prove against an accused who contests his alleged possession: (1) the accused had a right of custody or control over the drug; (2) it was a usable quantity; (3) guilty knowledge as to presence; and (4) guilty knowledge as to the character of the thing possessed.

M W D

English Cases Contributed by the Faculty of Law, University of Canterbury

Secondary parties and the drinking driver

It seems that in England it has become common for a defendant convicted of driving with an excess quantity of alcohol in his body to seek to establish a special reason for not disqualifying him from driving by asserting that, unknown to him, his drink had been "laced" by someone else.

In *Attorney-General's Reference (No 1 of 1975)* [1975] 2 All ER 684 the Court of Appeal was asked to rule whether the person who thus added the alcohol, realising the drinker would soon be driving, can be convicted as a secondary party to the offence, notwithstanding the ignorance of the driver and even though he did not positively encourage the act of driving.

The short answer of the Court was that a conviction is possible in such a case, but the brief oral judgment raises two or three points of rather more general interest.

The trial Judge appears to have taken the view that the ignorance of the person taking the drink provided the person lacing it with a defence "that in the absence of some sort of meeting of minds, some sort of mental link between the secondary party and the principal, there could be no aiding, abetting or counselling of the offence . . ." [1975] 2 All ER 684, 686, per Lord Widgery CJ. The Court of Appeal were inclined to think that this could be right as far as "aiding, abetting and counselling" are concerned, because it was thought to be difficult to imagine a case where there could be liability on such a basis when the parties "have not met and have not discussed in some respects" the proposed offence. But the Court held that no such principle applies

to the notion of "procuring" an offence, which, of course, is also sufficient to render a person a secondary party to it. "To procure," it was said, "means to produce by endeavour", and the Court had no difficulty imagining "plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take." ibid, per Lord Widgery CJ. Indeed, in the context of this class of offence, the Court thought a charge of procuring was even stronger when the driver was ignorant of the "lacing", because in such a case the driver "would have no means of preventing the offence . . . he will not be taking precautions".

The decision that a person may be a secondary party to an offence even though the principal has no knowledge of his activities seems, with respect, eminently sensible. It is also consistent with what little authority there is which, moreover, indicates that the principle is not confined to allegations of "procuring" but may also extend to "aiding". Thus, in *Kupferberg* (1918) 13 Cr App R 166, 168 it was said that: "It is true that in many cases aiding and abetting is done by the mutual consent of the criminals, but it is not essential that it should be"; it was quite unnecessary to prove a conspiracy, it sufficing that the secondary party knew 'what was going on and did something to further it' ". A good example of "aiding" without conspiracy is found in the American case of *State v Tally* 102 Ala 25 (1894). E was hunting V with intent to kill him and D, in order to facilitate the killing but without E's knowledge, took steps to prevent V being warned. It was held that this sufficed to constitute D an accomplice in the murder of E, although there could be no question of any conspiracy on such facts because there was never any kind of an agreement between D and E.

There is nothing in the wording of section 66 (1) of the Crimes Act 1961 justifying a different conclusion in New Zealand.

Having decided that the ignorance of the driver provided the secondary party with no defence, the Court of Appeal went on to emphasise that the defendant could only be guilty of procuring the offence if there was a "causal link" between what he did and the commission of the offence; it was essential to prove that the offence was committed "in consequence of the introduction of the extra alcohol". This seems to mean that the prosecution must establish that the concentration of alcohol was above the permitted level as a result of the "lacing" of the drink (cf the need for "actual encouragement" in *Clarkson* [1971] 3 All ER 344). If this level was exceeded independently of the additional alcohol it seems impossible to say that the defendant has assisted or encouraged or procured the offence, unless he positively encouraged the act of driving (which is not required when he causes the maximum alcohol level to be exceeded). When the "lacing" of a drink is put forward as a "special reason", the convicted driver has the burden of proving that the additional alcohol was responsible for the excessive level of alcohol (*Pugsley v Hunter* [1973] 1 WLR 578; *Weatherson v Connop* [1975] Crim LR 239), but, of course, when this forms an essential element of the prosecution's case the prosecution must prove it beyond a reasonable doubt. This need for a causal link will almost certainly apply in New Zealand, although the wording of s 66 (1) does not make this explicit. No doubt in practice it will often be impossible to prove this causal link, and the practical utility of the decision in this area is further weakened by the fact that, as the Court of Appeal recognised, the prosecution will also have to prove that the defendant knew that "the ordinary and natural result" of the additional alcohol would be the exceeding of the statutory level (although it is submitted that it may well suffice that this is foreseen as a reasonable possibility: cf [1973] NZLJ 365). Of course, it will suffice that the defendant realised that the statutory level would be exceeded, and he need not foresee the precise quantity of alcohol in the driver's blood—that would be impossible: *Crampton v Fish* [1970] Crim. LR 235; *Carter v Richardson* [1974] Crim LR 190. The requirement of such knowledge on the part of the defendant is consistent with the orthodox view that mens rea must be proved against a secondary party even though the offence is one of strict liability in the principal offender (as the offence in question is): eg *Callow v Tillstone* (1900) 83 LT 411; *R v FW Woolworth & Coy* (1974) 46 DLR (3d) 345; Adams, *Criminal Law and Practice in New Zealand* (2nd ed), paras 657-659. Cf *Tinsley* [1963] Crim LR 520.

The Court of Appeal discussed one final point of some interest.

It had been argued that a decision that the "lacer" of a drink could be convicted as a secondary party to the offence in question could have unreasonable consequences in that it could

follow that "the generous host with somewhat bibulous friends" could be held similarly liable simply because he served them with drinks knowing they would soon be driving home. One might add that other contentious cases can be imagined. What of the publican? Or the publican who knowingly serves a driving minor, or knowingly serves a driver after hours?

The Court suggested two ways in which the liability of the generous host might be avoided. One is obscure. It was said that such a case would have to be treated as analogous to cases where a person has "supplied the tool with which the offence is committed". Such cases, it was said, are governed by "ample and clear authority", and there was a reference *R v Bainbridge* [1959] 3 All ER 200. But that is merely a decision that a jury were properly directed when told that a person who supplied equipment used to break into a bank could be convicted if he knew the type of offence intended, even though he did not know what premises were to be broken into. This hardly seems to help the generous host.

The other suggested method of distinguishing the host's case is more illuminating. The Court said: "That is a case in which the driver knows perfectly well how much he has to drink and where to a large extent it is perfectly right and proper to leave him to make his own decision" [1975] 2 All ER 684, 687 per Lord Widgery CJ. This suggests that the mere supply of liquor will not render one a party when the driver knows what he is being supplied with, even though the supplier's action contributes to the offence and was thought by the Court to be somewhat analogous to the supply of tools used to commit an offence. If this is correct it may be that it is a result which follows from a more general principle to the effect that conduct which assists or facilitates the commission of an offence will not render a person a secondary party to the offence if the act of assistance was a reasonable thing to do, in view of the nature of the offence, the nature of the act of assistance, and the likelihood that the offence would in fact result from it. If some such general principle exists it would seem to explain why the return of a burglar's own jemmy does not render one a party to the subsequent burglary (*Lomas* (1913) 9 Cr App R 220), and why the vendor of a hotel is presumably not a party to subsequent illegal trading which he foresaw, although the vendor of a gun to a would-be murderer might conceivably be regarded as a party to the later homicide (see Smith and Hogan, *Criminal Law* (3rd ed) 97-100). In some cases social attitudes to the act of assistance and to the offence may be such that the act of assistance will be regarded as "perfectly right and proper", even though the actor realises he is facilitating an offence, and in such a case he should not be regarded as a secondary party to the offence. There seems to be no reason why the concepts of "aiding", "abetting", "counselling", and "procuring" in s 66 (1) of the Crimes Act 1961 should not be interpreted to exclude such cases. To this extent it is submitted that these should be regarded as terms of art and need not be given their "ordinary meaning". (pace Lord Widgery CJ [1975] 2 All ER 684, 686-687).

G F O

COURTS MARTIAL APPEAL COURT JUDGE RETIRES

After nine years' service Mr E T Pleasants MBE, ED recently retired as a Judge on the Courts' Martial Appeal Court.

A senior partner in the Auckland law firm of Towle and Cooper and a past president of the Auckland District Law Society, Mr Pleasants has ended a long association with the New Zealand Armed Services.

Joining the Army as a Territorial in 1922, Mr Pleasants served during the Second World War with 2 NZEF, first as a General Staff Officer and later as a legal staff officer. He was mentioned in Despatches and in 1943 was posted to Tripoli as a military Judge. On his return to New Zealand he was posted to the Reserve of Officers and was awarded the Efficiency Decoration in 1945.

From 1949 to 1955, Mr Pleasants, then a major, was the legal staff officer for the Northern Military District. On being posted to the Retired List in 1955 he was appointed a Judge Advocate, a position he held with distinction until being appointed to the Courts' Martial Appeal Court in 1966. Mr Pleasants was awarded the MBE in 1964.

The Courts' Martial Appeal Court was established under the Courts' Martial Appeals Act of 1953 and provided a Court to which a person convicted by Court Martial could appeal against his or her conviction. An appeal to the Court is allowed or dismissed by a majority decision; during the appeal the Court consists of an uneven number of Judges but never less than three. At least one must be a Judge of the Supreme Court and there must also be at least one appointed Judge.

PRIVACY AND THE LAW

A Public Lecture delivered recently by PROFESSOR GEOFFREY PALMER *to a seminar on privacy at Victoria University.*

I What is privacy?

Some believe that the values of our civilisation are imperilled by an inexorable march beyond freedom and dignity upon which we have unwisely embarked(*a*). Respect for individualism will decline giving way to the managed society which pursues its goals through collective action. Prime among the candidates for destruction is privacy, it is said. The increased amount of planning in our sort of society requires limitless quantities of data of all types and from many sources to be collected, to be instantly accessible to be used by the State for many different purposes. We will live under the remorseless threat of injury by computer. It is feared that police and other investigators will follow people around, snoop on them, tap their telephones, and employ electronic listening devices to monitor their conversations and compile secret dossiers. The mass media, some say, will be engaged even more than they are now on a ruthless mission of exposing people's lives and affairs for the delectation of a public which has no legitimate interest whatever in the material purveyed. People who want jobs may have to take personality tests which ask them to reveal intimate details concerning their religious beliefs and sexual habits.

Such are the menaces to our privacy, whether real or imagined, of which we are becoming fearful. The examples can be expanded almost without limit. The natural reaction to these widespread invasions of privacy is to frame a law to protect privacy. There are indications that we in New Zealand are reaching the stage where we would like to pass a privacy law or laws. After all, more than most societies, we try to exorcise our devils by passing laws. We enjoy a touching fundamentalist faith in the efficacy of the legislative process with the result that we freight it with responsibility it cannot reasonably be expected to carry out. On questions of privacy we should be cautious about passing broadly framed laws for reasons which will be developed in this paper.

Privacy as a legal issue arrived in New Zealand by osmosis. We have contributed little of significance to either legislative or judicial initiatives upon the subject. The amount of New Zealand legal scholarship in the field has been slender indeed. Our present concern, I suspect, stems more from the avalanche of publication overseas on the topic than from any systematic and principled examination of our own condition(*b*). No doubt the dramatic abuses of privacy which occur overseas could happen in New Zealand. But we should look and see if they have happened rather than assume that they have. It is true that many of the developments of Western democracies arrive here in the end. But many of the issues in privacy law involve questions of size and scale met with only in the "mass society". With a population of three million we may be able to aspire to something quite different, a Greek city state where the distinction between the public and private realms can be upheld(*c*). Whether we really hanker after such a noble and classical position I am not sure. If we do, our Pericles is unlikely to be passing large privacy bills. Our observance of the privacy value will flow from our way of life not our laws.

Put that way privacy sounds a fastidious value—and it is. Until you have food in your belly and a roof over your head privacy is not something which worries you a great deal. One might even go so far as to say that preoccupation with questions of privacy is confined to the higher socioeconomic stratum of society, or at least those whose circumstances do not rivet their minds exclusively on survival.

To most New Zealanders, I suspect, privacy is not one of those issues which flashes into their consciousness as a topic of burning social concern. Not that the subject should be regarded as unimportant on that account, although it

(*a*) Some believe the journey to be inevitable, see B F Skinner, *Beyond Freedom and Dignity* (1972).

(*b*) Some of the prominent works published overseas are A Westin, *Privacy and Freedom* (1967); *Privacy and the Law, A Report of the British Section of the International Commission of Jurists* (1970); *Report of the Committee on Privacy,* (Cmnd 5012) (UK, 1972) AR Miller, *The Assault on Privacy* (1971); A Westin and M Baker, *Databanks in a Free Society* (1972).

(*c*) For the importance of the distinction to man as a political animal, see H Arendt, *The Human Condition* 23-69 (Anchor ed, 1959).

does indicate something about privacy. It indicates that the word is too abstract to have much meaning to most people. The truth is that privacy as a concept, if it can be graced with that description (which I doubt), is unmanageable and to a large extent unintelligible. It has been suggested that privacy is about as useful as happiness or fear as a policy foundation for law. That view contains some exaggeration but it also contains an uncomfortable degree of truth. As an ordering principle in the law privacy embraces so much that our law would have to be fundamentally restructured to accommodate it. Such a restructuring would sacrifice other aims and values which we might wish to preserve. Isolating one value like privacy and discussing it separately from the other competing aims and values in the law is fundamentally unsound. All legislative and judicial decisions represent a balance between competing values and objectives. On some occasions privacy should weigh heavily in the balance, on other occasions there will be more important countervailing values. I am saying nothing more profound than that our approach to privacy should be piecemeal.

Unfortunately privacy has some unruly qualities. There is a tendency for people to rush about all over the place and raise the privacy flag, saying you must not do this and you must not do that or you will be invading privacy. The very vagueness of the idea is of considerable advantage in these missionary activities. To sum up, privacy is both rich and poverty-stricken; rich because it potentially encompasses an enormous amount of law; poverty-stricken because once the width of privacy is admitted it is difficult to say in policy terms what should be done in order to be faithful to it. The literature contains a number of definitions of privacy which are useful to the extent that they reveal the many layers of ambiguity and uncertainty surrounding the idea. According to the various statements of the writers privacy is:

(1) The right to be let alone(*d*); (2) a psychological state of being apart from others (*e*); (3) the individual's ability to control the circulation of information relating to him(*f*); (4) the claim of individuals, groups or institutions, to determine for themselves when, how and to what extent information about them is communicated to others(*g*); (5) freedom not to participate in the activities of others(*h*); (6) the absence of interaction or communication or perception within contexts in which such interaction, communication or perception is practicable(*i*); (7) the control over when and by whom the physical parts of us as identifiable persons can be seen or heard, touched, smelled or tasted by others(*j*); (8) the right to emotional security and the ability to exploit one's own personality(*k*); (9) the right of the individual not to have his personal affairs laid bare to the world and discussed by strangers(*l*); (10) not a single value, claim or interest. It is a constellation of values, claims and interests in the universe of concurring and competing values, of supporting and antagonistic claims, of allied and adverse interests(*m*).

I will not pause to dwell upon the deficiencies of these statements. But they do serve to illustrate the futility of questing after a general privacy law. Imagine instructing a law draftsman to place into legislative form any or all of those definitions. We simply cannot frame a law of general application to protect privacy and if we could we should not.

Before you all get the impression that I am impervious to your Orwellian neuroses, let me assure you that I am quite disposed to see legislation to protect a privacy value in specific areas if there is a need. But it must be a need which has been clearly demonstrated by the empirical examination of facts arising out of our circumstances in New Zealand and not based primarily on analogical applications of experience overseas. If we eschew a holistic approach and are both rigorous and specific we may be able to salvage some issues for a privacy analysis.

II The right to privacy: what can we learn from the American tort?

Among common law countries, and my inquiry has not extended to other systems, privacy as an independent legal principle has had an uncertain past and has an unpre-

(*d*) Cooley on Torts, 29 (2nd ed, 1888).
(*e*) Weinstein, "The Uses of Privacy in the Good Life" in *Privacy, Nomos XIII* 88 (1971).
(*f*) AR Miller, *The Assault on Privacy* 25 (1971).
(*g*) A Westin, *Privacy and Freedom* 7 (1967).
(*h*) Van Den Haag, "On Privacy" in *Privacy, Nomos XIII* 149 (1971).
(*i*) Shils, "Privacy: Its Constitution and Vicissitudes" in *Privacy* 31 Law and Contemporary Problems 281 (1966).
(*j*) Parker, "A Definition of Privacy" 27 Rutgers Law Review 275, 283 (1974).
(*k*) Swanton, "Protection of Privacy" 48 ALJ 91, 93 (1974).
(*l*) Pound, "Interests of Personality" 28 Harvard Law Review 343, 362 (1915).
(*m*) Report of a Task Force of the Departments of Communications and Justice, *Privacy and Computers* 11 (Canada, 1972).

possessing present. Most of the cases and most of the scholarship come from the United States. Where there has developed an independent tort of privacy. No such principle of civil liability has developed in our law although many of the matters covered by the American tort are protected by other remedies.

The American tort of privacy began with an article entitled "The Right to Privacy" which appeared in the Harvard Law Review of 1890(*n*). It was written by Louis D Brandeis, later to become a distinguished member of the United States Supreme Court and his law partner Samuel Warren. Warren belonged to the social elite of Boston and had been annoyed with the way in which the yellow press had treated the wedding of his daughter. Rather than dwelling on the specific complaint, the law review article went for high ground and developed a general theory of privacy as a ground for civil action.

The authors went back into the English common law and examined separate strands of civil liability which protected the value in which they were interested. They found decisions which gave recovery for invasion of property rights, breaches of confidence or trade secrets were protected in certain circumstances, defamation allowed recovery in situations which could be said to amount to an invasion of privacy. Copyright law could be said to protect privacy in other situations. The general right being argued for was the right to be let alone. But the argument was pitched at a high, almost spiritual, level which gave it great attraction to common lawyers used to wallowing in material questions. They could see the ambit of their concerns being enlarged. Let me quote a paragraph of the article to indicate the flavour of the argument:

> "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespassed vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible"(*o*).

The Warren and Brandeis thesis was first judicially considered in New York in 1902, when it was rejected(*p*). The legislature almost immediately passed a privacy statute which prohibited the use "for advertising purposes or for the purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person . . ."(*q*). The statute remains on the books and there have been more than one hundred reported decisions on it. Many other states accepted the Warren and Brandeis position as stating the common law without any intervention from the legislature. In one form or another privacy has been rejected outright only in four of the state jurisdictions(*r*).

There are more than four hundred reported decisions, and the pattern of the decisions has been analysed by Professor William Prosser(*s*). They have strayed into areas a good deal broader than those envisaged by Warren and Brandeis.

(1) *Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs*—Relief has been given against invasion of the plaintiff's home, peeping toms, persistent and unwanted telephone calls, and unauthorised prying into the plaintiff's bank account. English and New Zealand Courts, having no general right to privacy principle, are restricted to traditional tort categories but these are quite robust. Damages for trespass can be awarded against

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(*n*) Warren and Brandeis, "The Right to Privacy" 4 Harvard Law Review 193 (1890).

(*o*) Ibid.

(*p*) *Roberson v Rochester Folding-Box Company* 71 NY 876, 64 NE 442 (1902).

(*q*) McKinney's Consolidated Laws, c 6: New York Civil Rights Law, sections 50-51.

For a view on the application of such a statute to New Zealand see Farquhar, "The Statutory Right of Privacy in the State of New York and its Importance for New Zealand" 5 Victoria University of Wellington Law Review 277 (1968-70).

(*r*) W Prosser, *Law of Torts* 804 (1971).

(*s*) Prosser, "Privacy" 48 California Law Review 383 (1960), see also Prosser, *The Law of Torts* 802 et seq (1971).

a defendant who has secretly installed a microphone over the plaintiff's marital bed(*t*). The law of nuisance protects in certain circumstances against serious interference with quietness and solitude of the home(*u*). Our law gives a remedy for the intentional infliction of emotional distress(*v*). In a New Zealand case the defendant visited a house occupied by the plaintiffs and demanded possession of the premises, telling the man of the house, "I'll have you out within 24 hours. If I can't get you out I'll burn you out". The man's wife was ill in bed but she heard the conversation and became seriously upset. She was pregnant and miscarried. Damages were awarded(*w*).

In the intrusion area our law does not seem to be seriously deficient despite the lack of an explicitly labelled privacy tort.

(2) *Public disclosure of embarrassing private facts about the plaintiff*—The leading American case involved a prostitute who in 1918 had been tried for murder and acquitted(*x*). In the words of the pleadings ". . . she abandoned her life of shame and became entirely rehabilitated" and married into respectability. Some years later the defendants made a movie based on her earlier life. There was publicity that the picture represented her true life story. It was held that the plaintiff had a good cause for action. The highwater mark of English and New Zealand law was a case between the Duke and Duchess of Argyll where the Court prevented one of the parties publishing confidential facts about their marriage in a newspaper article(*y*).

In the old case of *Prince Albert v Strange*, the Prince and Queen Victoria were granted an injunction against the defendant who had obtained by surreptitious means etchings the parents had made of their children(*z*). The defendant proposed to exhibit and publish the etchings. Copyright law can be a useful protection in such cases(*a*). The tort of negligence may also be used on occasion. In one New Zealand case damages were awarded against a doctor who had given his patient's husband a certificate as to the patient's paranoia(*b*). The patient suffered mental shock when the certificate was produced in separation proceedings. It was held that the doctor should have foreseen that the certificate was likely to come to his patient's notice and she was likely to suffer injury as a result. The protection offered by our law is spotty but capable of expansion.

(3) *Publicity which places the plaintiff in a false light in the public eye*—Inclusion of the plaintiff's name or picture in a list of convicted criminals would be an example, or making a public statement in the plaintiff's name without his consent.

Our own law protects similar interests to some degree. In 1816 Lord Byron succeeded in obtaining an injunction against the circulation of a bad poem attributed to him(*c*). Defamation will sometimes be available in New Zealand in a false light situation. In one case a defendant asked the plaintiff to pose for a photograph saying he was a tourist and wanted a typical New Zealand scene for personal reasons. Later a book, *The New Zealanders in Colour* appeared picturing the plaintiff dressed in Saturday morning clothes holding a flagon of beer and a bottle of wine or beer leaning up against a rubbish receptacle. Under the photograph a caption appeared: "Christmas beer. A reveller with his Christmas beer supply waits for the bus at High Street, Lower Hutt." It was held that it would be open to a jury to hold such a publication defamatory(*d*). Obviously, the false light category of privacy overlaps to a considerable extent with defamation.

(4) *Appropriation for the defendant's advantage, of the plaintiff's name or likeness*—It is to this area that the New York Privacy Statute is directed. In our own law, defamation gives a measure of protection as in the case where an amateur golfer was awarded damages against a chocolate company who used his name

(*t*) *Sheen v Clegg*, "Daily Telegraph", 22 June, 1961 cited in R F V Heuston, *Salmond on the Law of Torts* 35 (16th ed, 1973).

(*u*) *Bloodworth et ux v Cormack* [1949] NZLR 1058.

(*v*) *Wilkinson v Downton* [1897] 2 QB 57.

(*w*) *Stevenson v Basham and Another* [1922] NZLR 225.

(*x*) *Melvin v Reid* 112 Cal App 285, 297, p 91 (1931).

(*y*) *Argyll v Argyll* [1967] Ch 302. See also *Pollard v Photographic Company* (1888) 40 Ch D 345 (1848).

(*z*) *Prince Albert v Strange* (1849) 2 DeG & Sm 652; 64 ER 293.

(*a*) *Williams v Settle* [1960] 1 WLR 1072.

(*b*) *Furniss v Fitchett* [1958] NZLR 396.

(*c*) *Lord Byron v Johnston* (1816) 2 Mer 29; 35 ER 851.

(*d*) *Kirk v A H & A W Reed* [1968] NZLR 801.

(*e*) *Tolley v Fry* [1931] AC 333. For lengthy descriptions comparing the protection offered under our law and the American law of privacy see Dworkin, "The Common Law Protection of Privacy" 2 University of Tasmania Law Review 418 (1967), and Flitton and Palmer, "The Right to Privacy: A Comparison of New Zealand and American Law" 3 Recent Law 86, 149.

without authorisation in an advertisement(*e*). The tort of passing-off is of some assistance in such cases but there are gaps in our law(*f*).

The American law of privacy got into difficulties quite early with what became known as the newsworthiness exception. The case which illustrates the defence most piquantly is *Sidis v F-R Publicity Corporation* 113 F 2d 806 (2nd Cir, 1940). The plaintiff had been a wellknown child prodigy who had lectured distinguished mathematicians on four dimensional bodies at the age of 11, and graduated from Harvard at the age of 16. His success had been the subject of considerable publicity. In later years he had become reclusive and had avoided all publicity. The *New Yorker,* in its "Where are they now" section, published an article which dealt at length with Sidis's previous career contrasting it with his present personal habits and eccentricities. The Court, while admitting that the article was "merciless in its dissection of intimate details of its subject's life" and that the plaintiff had gone to "pitiable lengths . . . to avoid public scrutiny", denied recovery (at p 807). The result was reached on the ground that the plaintiff had once been a public figure and his subsequent departure from public life was itself a matter of legitimate public interest.

The newsworthiness exception tends to be "so overpowering as virtually to swallow the tort"(*g*). Not only that, but the defence now has constitutional significance. In 1964 the Supreme Court of the United States held that much of the common law of defamation was unconstitutional because it unduly restricted the freedom of speech and the press guaranteed by the First Amendment to the United States Constitution(*h*). In 1967 it was held that the tort of privacy is also subject to First Amendment controls(*i*). In addition, complaints have been made that the tort is petty, in that it attracts the wrong sort of gold-digging plaintiffs; that it is hard to discern its legal profile. In the public disclosure of private facts area it is hard to say what allows a plaintiff to recover if it is not every unconsented reference to him in the media(*j*). And the tort is to quite a large extent unconstitutional.

From the American experience with the tort of privacy a number of conclusions can be reached. The tort or torts have been unsatisfactory. The operation of the law has been unpredictable, the complications with freedom of expression have raised constitutional difficulties. Overall, it could not be said that the protection now offered in the United States is substantially better than our own law. For these reasons we should avoid developing an independent common law tort of privacy although the Courts should be encouraged to be bold in their extension of existing heads of liability which could be expanded to protect a privacy value. Such an incremental development, however, is unlikely to be sufficient to deal with the problem. The common law in New Zealand is as eternally youthful as some would wish, and development on a case-by-case basis takes a long time. In any event I am not at all convinced that a civil remedy is the most appropriate. The question of how to measure the damages is a bothersome one.

Furthermore, the Prosser analysis, which divided privacy into four separate classifications, caused dissent in the American journals(*k*). Prosser was accused of suggesting that privacy was not an independent value but a mixture of interests in reputation, emotional tranquillity and intangible property. It was protested that to divide into four a unitary concept designed to make personality inviolate was a serious misunderstanding of the Warren and Brandeis position(*l*). That such a controversy should develop 80 years after the seeds of the tort were sown demonstrates the insecure nature of its foundations.

III Privacy particularised

On the analysis so far privacy issues are best approached on the basis of problems in specific functional areas where the privacy value may not have been taken into account sufficiently. An ennumeration of these areas may be of some assistance in deciding where and to what extent legislation is needed. I hasten to add that there is no effort to assemble the New Zealand evidence which may exist on these matters. The generation of New Zealand data on these questions is a necessary prelude to legislative initiatives.

(*f*) *Sim v Heinz* [1959] 1 WLR 313; *Henderson v Radio Corporation Pty Ltd* [1960] SR (NSW) 576. See Note, DL Mathieson, 39 Can Bar Rev 409 (1961).

(*g*) Kalven, "Privacy in Tort Law—Were Warren and Brandeis Wrong?" in *Privacy* 31 Law and Contemporary Problems 326, 336 (1966).

(*h*) *New York Times v Sullivan* 376 US 967 (1964).

(*i*) *Time, Inc v Hill* 385 US 374 (1966).

(*j*) Kalven, supra n (*g*).

(*k*) Prosser, "Privacy" 48 California Law Review 383 (1960).

(*l*) Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" 39 New York University Law Review 962 (1964).

(1) *Physical surveillance*—This includes locating an individual, following him about, photographing him, tapping his telephone, keeping him under observation by optical or electronic means, and recording his speech. Obviously modern electronic technology has increased the risk of abuses from this mode of invading privacy(*m*).

(2) *Psychological surveillance*—This consists of the use of various techniques for probing the mind. Personality testing for employment and other purposes is one means. Educational testing raises similar issues. The use of polygraphs or lie-detectors, common in the United States, is another. Drug can also be used to explore people's subconsciousness(*n*).

(3) *Data surveillance*—The revolution information processing brought about by the computer has increased our ability to store vast amounts of information and to rapidly retrieve it. We have records about birth, death, marriage, electoral records, school records, census data, military records, employment records, passport records, motor drivers' licence records, local government records, welfare eligibility records, taxation records, criminal conviction records, prison records, post office records, insurance records, housing and land transaction records, credit records, and sales records. The list is endless. All these records are capable of being put on computers. Some of them already are. The questions of the accuracy of such information, and who has access to it, under what conditions, and for what purposes are important. The unrest in New Zealand about the Law Enforcement Information System has been considerable but the problem extends much further than that system(*o*).

(4) *Media surveillance*—The activities of newspapers and the electronic media in using peoples' names, exposing personal details to public view and prying into affairs which might be considered private raises analytically distinct issues. Likened to a goldfish bowl some believe "the daily record of press and television activities disclosed appalling, tasteless intrusions into private life and private grief and misery, and for this the public has an insatiable appetite"(*p*).

(5) *Professional confidences*—The disclosure of information given or received in circumstances of professional confidence raises a myriad of problems in many different professional settings. Medical information is perhaps the most sensitive of these areas(*q*).

(6) *Credit reports*—The growing practice of credit reporting which calls for the gathering of information about the earnings of an individual, marital status, records concerning prompt payment of accounts and other information related to capacity to pay raises privacy issues.

(7) *Privacy in welfare*—The administration of our social welfare laws is replete with privacy questions. Examples are the income test and inquiries which must be made in its administration, eligibility for supplementary assistance, questions of dependency, maintenance and inquiries which are made about the care of children(*r*).

(8) *Family relationships*—A great deal of our family law consists of legislatively approved and judicially executed intrusions into privacy. Questions like adultery, cruelty, and other questions which arise on divorce involve weighty privacy issues. But there are other areas of invasion. In the United States a personality test is in use which asks intimate questions about family relationships in order to identify potential drug abuses. The use of this test was held unlawful without parental consent(*s*). The punishment by the criminal law of homosexuality between consenting adult males could also be analysed in privacy terms.

(9) *Privacy and criminal procedure*—The questions here overlap with those raised by the new electronic surveillance technology. But issues such as the ambit of permissible search and seizure, the admissibility of confessions secured by coercive methods, and the gathering of evidence by means of telephone tapping and electronic eavesdropping raise issues at the heart of privacy.

(10) *Privacy and employment*—Some employers, including the state, "make searching inquiries into the actions, habits, associations,

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(*m*) A Westin, *Privacy and Freedom* 69 et seq (1967).

(*n*) Ibid at 133 et seq.

(*o*) Ibid at 158 et seq.

(*p*) Z Cowen, "The Private Man", Boyer Lectures 1969, quoted in Storey, "Infringement of Privacy and its Remedies" 47 ALJ 498, 502 (1973).

(*q*) Boyle, "Medical Confidence—Civil Liability for Breach" 24 Northern Ireland Legal Quarterly 19 (1973).

(*r*) Handler and Rosenheim, "Privacy in Welfare: Public Assistance and Juvenile Justice" in *Privacy* 31 Law and Contemporary Problem 377 (1966).

(*s*) *Merriken v Cressman* 364 F Supp 913 (1973). See on family relationships and privacy, Brodie, "Privacy: The Family and the State" [1972] University of Illinois Law Forum 743.

(*t*) Creech, "The Privacy of Government Employees" in *Privacy* 31 Law and Contemporary Problems 413 (1966).

and thoughts of their employees"(*t*). Security questions, ranging from detection of pilfering to state secrets, are one element of these inquiries but there are many others. Psychological testing for employment can invade privacy as can personnel performance reports and files.

(11) *Intrusion on home life*—As one Australian writer has put it:

> "The place where people most expect to find solitude is in their own homes. Yet today homes are besieged by a host of invaders who come in ever-increasing numbers. Private persons come onto people's land uninvited seeking donations, collecting their empty bottles and rags, soliciting their custom for a wide range of goods and services, seeking their adherence to various religious and other organisations, wanting their opinions on issues large and small, and for a host of other purposes. Public officials come onto their land to read their water meters, inspect their gas fittings, test their electrical wiring, spray their fruit trees, examine their telephone or search for unregistered television sets . . ."(*u*).

(12) *Privacy in hospitals and custodial situations*—The treatment of people in medical and mental hospitals, prisons and other places of detention involves privacy questions of a particularly delicate type. An American who made a film concerning the inmates of a Massachusetts institution to which insane persons charged with crime and defective delinquents could be committed was prevented by Court order from showing it except to specially designated audiences. "The completed film showed an apparently random series of grim vignettes, without narration or sub-titles, ranging from forced nose-feedings to masturbation to 'skin-searches' for contraband"(*v*). The irony of the restraint was that the film was so powerful that it might well have resulted in improving the conditions at the institution had it been shown commercially.

(13) *Privacy and research*—With the trend towards survey research in the social sciences more and more data is collected from individuals and may be subsequently disclosed in published work. Market research involves similar processes. The circumstances under which information obtained by researchers should be disclosed involves privacy issues.

(14) *Privacy and the post*—Misuse of private communications whether written or oral and interference with correspondence involves important privacy considerations for which there is already some protection in New Zealand(*w*). Perhaps protection against being pestered by advertisers who have bought lists of mailing addressees comes into this category.

It would be possible to go on isolating functional categories where privacy is a value to be weighed—the judicial process, financial information about ownership of assets, contents of wills, private contracts, membership of organisations or clubs. What has been said in the foregoing paragraphs is not an argument in favour of legislation; it is a suggestion that they are areas in which research should be done, information gathered and assessments made about the suitability of the present balance the law reaches.

IV Legislative directions

There are three possible legislative approaches towards privacy. The first entails passing a general law encompassing all aspects of privacy for breach of which there would be criminal or civil sanctions or both. The second approach involves a wide-ranging implementation of privacy protection but at the same time keeps the matter within manageable bounds by restricting the law's application to defined areas. The third approach, and the only one which I could support, requires separate examination of privacy issues in particular areas with legislative measures designed to deal with specific problems rather than grant general rights.

An example of the first approach is to be found in British Columbia and Manitoba. Both provinces have passed statutes in broad terms which give general protection by way of civil damages for invasions of privacy. British Columbia's Privacy Act provides:

> "2. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> "(2) The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given

(*u*) Storey, "Infringement of Privacy and its Remedies" 47 ALJ 498, 500 (1973).

(*v*) Comment, "The 'Titicut Follies' Case: Limiting the Public Interest Privilege" 70 Columbia Law Review 359, 360-61 (1970) *Commonwealth v Wiseman* 249 NE 2d 610 (Mass 1969).

(*w*) Post Office Act 1959, ss 30-34.

to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

"(3) Privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass; but nothing in this subsection shall be construed as restricting the generality of subsections (1) and (2)"(*x*).

Manitoba has a provision which is substantially similar although Manitoba allows actions against anyone who ". . . substantially, unreasonably, and without claim of right violates the privacy of another person . . ."(*y*) whereas the British Columbia statute restricts recovery to "wilful" invasions. Some defences are mentioned by the statutes: consent, proper activities of a peace or public officer, exercise of a lawful right of defence of person, property or other interest; and authorisation by a statute or Court.

While the aims of this legislation are no doubt worthy, I do not believe such statute should be contemplated for New Zealand. The objections are substantial. Would such a statute embrace all the categories which have developed in the United States or merely some of them? What is the proper ambit of such a law? Which of the definitions of privacy discussed previously does it embrace? To which of the 14 functional categories outlined in the previous section does it apply and to what extent? On what principles should damages be assessed? Are punitive damages to be available?

Such an approach brings an unacceptable degree of uncertainty and confusion to our law. It leaves too much to be worked out in the interstices of litigation. And even then it may not provide an effective deterrent against the gathering and use of computer stored information or the behaviour of credit reporting agencies. Such a law would place gags upon the media about which it would be extremely difficult for any lawyer to advise.

If further proof is needed that privacy in its general form is a very unruly animal, recent decisions of the United States Supreme Court on constitutional questions provide it. The word "privacy" is not mentioned in the United States Constitution. But the Supreme Court has nevertheless found that the Bill of Rights to the United States Constitution protects privacy notwithstanding the preferred position of the mass media mentioned earlier. In 1965 the Supreme Court struck down a Connecticut statute making the use of contraceptives illegal(*z*). Admitting there was no specific mention of privacy in the Bill of Rights, Mr Justice Douglas found that the specific guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance . . . various guarantees create zones of privacy . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship"(*a*). So it was that the Connecticut statute was declared unconstitutional.

As a constitutional concept, privacy clearly has far reaching possibilities. It has recently been employed in an even more novel context. In the 1973 abortion cases the Supreme Court of the United States held that in the first three months of pregnancy the state's interest is not sufficiently compelling to permit it to make abortions unlawful(*b*). Using the penumbras from the Bill of Rights argument, Mr Justice Blackmun, writing for a majority, found that the guarantee of personal privacy was fundamental to the concept of liberty guaranteed by the Fourteenth Amendment and was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"(*c*).

I am not criticising these decisions as examples of American constitutional law. Extreme breadth in a constitutional concept is not necessarily an evil. But such breadth is an evil in our common law system of judicial decision-making which knows nothing of the techniques of constitutional politics and which cannot avoid deciding issues which are put to it as the Supreme Court of the United States can do(*d*). With us it is for the legislature to order society, not the Judges. In short, I think that the British Columbia type of statute would remove us into territory our judicial institutions are not equipped to handle.

An example of the second more limited although still broad legislative approach to privacy is to be found in a private member's Bill presented to the House of Commons in Britain by Mr Brian Walden in 1969(*e*). The Bill was based on a study made by the organisa-

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(*x*) Statutes of British Columbia 1968, c 39, s 2.
(*y*) Statutes of Manitoba 1970, c 74; Revised Statutes of Manitoba 1970, c P125.
(*z*) *Griswold v Connecticut* 381 US 479 (1965).
(*a*) 381 US at 484-486.
(*b*) *Roe v Wade* 410 US 113 (1973); *Doe v Bolton* 410 US 179 (1973).
(*c*) 410 US at 153.
(*d*) See generally A Bickel, *The Least Dangerous Branch* (1962).
(*e*) Right of Privacy Bill 1969 (UK).

tion JUSTICE(*f*). Clause 9 of the Right to Privacy Bill defined the right to privacy as:

". . . the right of any person to be protected from intrusion upon himself, his home, his family, his relationships and communications with others, his property and his business affairs, including intrusion by

"(a) spying, prying, watching or besetting;

"(b) the unauthorised overhearing or recording of spoken words;

"(c) the unauthorised making of visual images;

"(d) the unauthorised reading or copying of documents;

"(e) the unauthorised use or disclosure of confidential information, or of facts (including his name, identity or likeness) calculated to cause him distress, annoyance or embarrassment, or to place him in a false light;

"(f) the unauthorised appropriation of his name, identity or likeness for another's gain."

The Bill sets out the defences in cl 3:

"(a) the defendant, having exercised all reasonable care, neither knew nor intended that his conduct would constitute an infringement of the right of privacy of another person; or

"(b) the plaintiff, expressly or by implication, consented to the infringement; or

"(c) where the infringement was constituted by the publication of any words or visual images, there were reasonable grounds for belief that such publication was in the public interest; or

"(d) the defendant's acts were reasonable or necessary for the protection of the person, property or lawful business or other interests of himself or of any other person for whose benefit or on whose instructions he committed the infringement; or

"(e) the infringement took place in circumstances such that, had the action been one for defamation, there would have been available to the defendant a defence of absolute or qualified privilege, provided that if the infringement was constituted by a publication in a newspaper, periodical or book, or in a sound or television broadcast, any defence under this paragraph shall be available only if the defendant also shows that the matters published were of public concern and their publication was for the public benefit; or

"(f) the defendant acted under authority conferred upon him by statute or by any other rule of law."

As Dr G D S Taylor has ably pointed out, the Bill "appears to raise exactly those problems with which the United States Courts have struggled for half a century and more"(*g*). Neither does it seem the results would be any more predictable. It must be admitted that the problems are not of the same order as with Canadian statutes referred to but they are nevertheless substantial. I will not repeat Dr Taylor's remorseless destruction of the Bill's practicability. I am fortified in my conclusion that such an approach should not be taken in New Zealand by the majority Report of the Younger Committee in England, which took the view that Courts making decisions on a statute like the 1969 Privacy Bill would have to make an unguided choice between values which might appear to have equal weight, and uncertainty would result(*h*). In addition, I am not disposed to fashion new sticks with which to beat the media when the existing ones impose unacceptable restrictions and are under review.

What, then, does an appropriate agenda for privacy legislation in New Zealand look like? The cardinal rule should be: aim at specific abuses. Blunt instruments should be avoided and consideration must be given to blending privacy into the pattern of our existing law rather than forcing it over the top. With this approach in mind I discuss some particular areas where measures might be contemplated.

1 No immediate action should be taken on any of the privacy issues affecting the mass media. The law of defamation is at present under review. The Attorney-General has said he will be referring defamation and contempt of Court to a group consisting of lawyers and laymen to recommend revisions(*i*). Privacy so far as it touches the media should also be considered by this group. As the American experience demonstrates, privacy in tort law has a great deal to do with the media and is particularly difficult to apply in that context.

2 If the type of aural and visual devices for tracking people, eavesdropping and observing people which are available in the United States can be purchased in New Zealand, we probably should move to restrict their distribu-

(*f*) *Privacy and the Law*, A Report by the British Section of the International Commission of Jurists (1970).

(*g*) Taylor, "Privacy and the Public" 34 MLR 288 (1971).

(*h*) *Report of the Committee on Privacy*, Cmnd 5012 (UK, 1972).

(*i*) "Evening Post", 1 May, p 19.

tion and use. Four Australian states have laws restricting the use of listening devices(*j*).

(3) There may be grounds for controlling the activities of credit reporting bureaux in New Zealand. These organisations can have an important effect upon an individual's life. There are objections, not so much to existence of these organisations, but to accuracy of the information they collect, the identity of those to whom the information is furnished, and the ability of the individual to correct false facts which may be on his file. Queensland's Invasion of Privacy Act 1971 deals extensively with the privacy issues involved with the granting of credit, as well as listening devices and private inquiry agents, a subject upon which New Zealand passed legislation last year(*k*).

4 Obviously there will have to be statutory safeguards in connection with the Law Enforcement Information System on the Wanganui computer(*l*). There may be grounds for introducing legislation which is applicable generally to data banks. Such legislation would have to be preceded by an expert study.

5 There seems to be no pressing need in New Zealand for legislation in the remaining areas where privacy is a factor to be considered. Nonetheless research should be carried out in all fields mentioned to find out the needs.

The only remaining issue is whether we should establish some sort of institution to oversee privacy and generally look after the privacy interest. It must be apparent that my own view is that privacy is an elusive and slippery idea which, while very attractive, brings with it certain dangers. One of the dangers is that we may over-react in support of privacy. Privacy is a valuable ingredient of our civilization; but it is one ingredient among many. I do not believe there is a sufficiently strong case for creating a sort of privacy Ombudsman with a wide-ranging brief to roam around in various unrelated fields with an intervention or reporting power limited specifically to privacy. No doubt it is less spectacular and more difficult to look after the privacy interest by weighing it anew in each place it applies. But that, in my view, is the approach we should adopt. We should take steps to heighten our awareness of the privacy value and that might involve education in a number of fields where privacy arises. The development of adequate privacy legislation should be handled by references made by Government to the Law Revision Commission. Admittedly such a procedure is unlikely to produce good results until New Zealand has adequate law reform machinery with full time Law Reform Commissioners and adequate research staff and facilities. But that is another story.

(*j*) Listening Devices Act 1969 (Vic); Listening Devices Act 1969 (NSW), Invasion of Privacy Act 1971 (Queensland); Listening Devices Act 1972 (South Australia).

(*k*) Private Investigators and Security Guards Act 1974. For United Kingdom legislation giving the individual a right to see credit reports on him see Consumer Credit Act 1974, s 158 et seq.

(*l*) Auburn, "A Law Enforcement Information System" [1972] NZLJ 409; "The Drayton Committee Report" [1973] NZLJ 481.

Appeal for discipline—To live in freedom there must be an organised society. To be organised there must be rules of conduct and those rules must apply to all but at the same time respect the rights of each. That is the rule of law. And the rule of law can survive only if it is backed by a discipline acceptable to the majority but applied to the whole unit. Unless society accepts that principle the "Freedoms" for the preservation of which this small country of ours has made huge sacrifices in its short history, are only words on paper.

And what is discipline? I believe it to be the acceptance of a restraint on our own activities in the interests of others. That before reaching a decision or before acting, thought must be given to the effect on others and the subsequent decision or act conditional to that effect. Too often today many act with nosense of responsibility and without a care for the effect on others.

How frequently do we find a very small number putting what they call their rights in priority to the right of the public to enjoy the ordinary privilege of freedom—freedom to move from one place to another when you wish to do so—freedom to get on with your own job without interference from others—freedom to enjoy that which you have earned and are entitled to without disruption of supply. And so today let us all old and young—and I have real respect for the great majority of our young people—rededicate ourselves to the preservation for the rising generations of that individual freedom within the rule of law for which those whom we commemorate today fought and died.

"When you go home
Tell them of us, and say
For your tomorrow
We gave our today."

—extract from SIR HAMILTON MITCHELL'S Anzac Day address.

STATUTORY ADDENDUM

The Utterly Urgent and Utmost Emergency Measures Act 1975 (No 27) (1975, No 1984)

An Act to end all Acts

[*5 November, 1975*]

WHEREAS the absolute power of Parliament has reached the inevitable end of all absolute power: And whereas Dicey is dead and cannot be called to account for his gunboat doctrine of parliamentary sovereignty by which democracy was made to depend on doubtful conventions: And whereas the common law is almost dead and can never recover unless there arises a judiciary with the strength of Coke to lift the weight of legislation that lies hard and long across the whole nation more oppressively than any medieval monarchy: And whereas . . . . [*This recital may only be read under ultra-violet light*] . . .: And whereas no natural lawyer has been allowed a toehold on English legal positivism whether in this or in the old country since Lilburne was time and again imprisoned and Harrington was driven insane: And whereas men today ask who was Lilburne, who was Harrington, and thus tomorrow will ask who was Coke?: And whereas it is desired to settle these matters now once and for all:

BE IT THEREFORE ENACTED by way of last resort, which is more in fun for those who would prefer to die laughing than it is for those who would prefer to live but never laugh at all, and by the authority of the same, however little it may reduce doubt about the numbers of the unemployed, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Utterly Urgent and Utmost Emergency Measures Act 1975 (No 27).

(2) This Act shall be deemed to have come into force with every retrospective means, and to have every retrospective effect, as the real rulers of society for the appropriate purpose and at the appropriate time can possibly . . . . (This space is left vacant whereby the real rulers of society may from time to time insert their own words and so do their own thing).

We have received a copy of an Act, apparently passed in the dying hours of the 1975 parliamentary session and apparently overlooked by the Government Printed. At the risk of offending against its section 13 we publish it in full. Readers are advised to stand whilst perusing the text (cf, section 9 (3)).

2. Interpretation—(1) In this Act, notwithstanding that the context may otherwise require,—

"Appropriate purpose" means the appropriate purpose:

"Appropriate time" means the appropriate time:

"Real rulers of society" means the real rulers of society that are by their nature undiscoverable:

"To deem" means to deem; and "deems", "deemed", and "doomed" have corresponding meanings.

(2) Notwithstanding anything in this or any other Act no one shall preface the word "government" with the definite article, nor yet with the indefinite article, but wherever possible shall commence the word by using for its first letter the upper case, and where not possible shall render the entire word in italics.

3. Scope of Act—It is hereby declared that a state of emergency in the legal system of this country, or in any part of the legal system of this country, is not likely to be declared.

4. Validation—Notwithstanding that this Act was introduced in and carried over from a previous session of Parliament than that in which it was assented to by the Governor-General, and notwithstanding that this Act does not expressly purport to be assented to in Her Majesty's name, it shall be deemed to be valid, and always to have been valid, in every way as if—

(a) It had been introduced in the same session as that in which it had been assented to by the Governor-General; and

(b) It had been assented to, and did expressly purport to be assented to, in Her Majesty's name; and

(c) Standing Orders of the House of Representatives relating to public business made no mention of the rules, forms, and usages of the mother of parliaments.

5. Effect of Act—For the purposes of avoiding all animadversion to this Act inimicable to the peace, order, and good government of New Zealand, whether expressed by any member of the judiciary or otherwise, all the type composing this Act shall be pied, every reference and former reference to the peace, order, and good government of New Zealand shall be erased, and all the peace, order, and good government of New Zealand shall, if necessary, be sacrificed to the purposes of this section, or, if these be unattainable, be simply destroyed.

6. Regulations—(1) All regulations made under this Act shall, within 28 days after Bellamy's Christmas Dinner if then still in session, be confirmed by the government party whips who shall humbly lay the same before the Honeypot in holeless stocking soles, and if not still in session then shall be laid in the same manner within 28 days after the said whips first manage to crack the next ensuing session.

(2) Notwithstanding anything in subsection (1) of this section, it is hereby declared that this section is merely directory.

(3) Nothing in subsection (2) of this section shall be taken to mean that any section of this Act other than this section might not also be merely directory if need be.

(4) For the purposes of this section "session" means "sitting".

7. Offences against the people—(1) The real rulers of society shall by regulation, press release (whether published or not), or otherwise as they see fit determine what under this Act shall constitute offences against the people.

(2) Without limiting the generality of subsection (1) of this section, any inference whether express or implied made by any person (other than a real ruler of society) as to any provision of this Act being unclear, or, for that matter, being no more than in bad taste, shall be an offence against the people.

(3) Any person convicted or deemed to be convicted of an offence against the people, and all poets, poms, and intellectuals, shall, between the hours of sunset and sunrise, be put against an inner wall that complies with the requirements of the Milk Production and Supply Regulations 1973 for the internal wall of the milking area of a farm dairy, and be shot out of clean hands:

Provided that—

(a) Poms may be bashed; and

(b) Poets may be shot out of either or both hands whether clean or not; but

(c) All genuine home owners are exempt.

(4) Any person who brings a cat or any other animal apart from a cow into a farm dairy shall, if he is female and pregnant, be guilty of an offence against the Milk Production and Supply Regulations 1973, and shall be liable to toxiplasmosis.

8. Other offences—(1) It shall be an offence punishable by public scandal to mention any of the names, or to mention any name that might resemble any of the names, of Harrington, Fuller, Hyak, Chase, or Hayakawa:

Provided that to mention the name, or any name that might resemble the name, of Lilburne shall be punishable by death by public scandal.

(2) It shall be an offence punishable by ameliorated public scandal to possess, look at, or think about any book that might once have been known, or might be thought once to have been known, by such title as *Oceana, The New Despotism, The Road to Serfdom, The Trial, The Morality of Law,* and, of course, *England's Birthright Justified Against Arbitrary Usurpation, Royal or Parliamentary,* or *Under What Vizor Soever*:

Provided that this subsection shall not relate to certain words which are now old hat in *Lady Chatterly's Lover,* or certain exercises not yet old hat but currently engaged in by those real rulers of society who would accordingly prefer that no one read about them in *Lolita.*

(3) There shall be no year 1984, nor shall the numbers 1, 9, 8, and 4 ever be used together without intervening punctuation.

(4) No names whatsoever shall ever be used in any legal proceedings, and judges, jurymen, and accused alike shall be identified only by the respective numbers issued to them solely for the purposes of accident compensation.

(5) Every person who commits an offence against subsection (3) or subsection (4) of this section shall be deemed to have committed an offence against the Land and Income Tax Act 1954 by having so arranged his affairs as to pay less income tax than he otherwise might have been able to afford, and shall be liable accordingly in direct proportion to the length of the Commissioner's boot.

9. **Entrenchment**—(1) This Act is entrenched for ever.

(2) This Act is in lieu of and in substitution for any written constitution, and is intended to put an end to any idea whatsoever of a constitution whether written or unwritten.

(3) All persons whenever seated shall stand up on reference being made whether slight or not to any provision of this Act.

(4) All previous national anthems are repealed, and notwithstanding anything in the Defamation Act 1954 all actions of defamation against the real rulers of society are done away with, and so is any privy council.

(5) For the purposes of this section, the teaching of history, legal history, constitutional history, and anything that might pass for history is banned: and the expression "for ever" means as long as the real rulers of society think fit.

10. **Administration**—Notwithstanding anything in section 2 of this Act, this Act shall be deemed to mean other than it states, and to state other than it means; and shall be given such fair, large, and liberal construction and interpretation by all who administer it as will best ensure their end.

11. **Repeals and saving**—All previous Acts are hereby repealed, and nothing is saved.

12. **Matters not contemplated**—(1) Any matter not contemplated by this Act, including the demise or presumed demise of any person who stands in the way, shall be avoided or resolved by the real rulers of society whose avoidance or resolution shall have the force of law, anything to the contrary in conscience or positive law notwithstanding, in every way as might have been thought necessary by the Governor-General pursuant to section 6 of the Education Amendment Act 1915 had that Act not been repealed, but nonetheless without any need for the making of regulations.

(2) For the purposes of subsection (1) of this section, everything is contemplated that is uncontemplated, and everything that is uncontemplated is contemplated.

13. **Publication prohibited**—Notwithstanding anything in section 13 of the Acts Interpretation Act 1924, or in section 29 or section 30 of the Evidence Act 1908, this Act shall not be published, nor may be lent, sold, re-sold, hired out or otherwise disposed of to anyone other than a real ruler of society in any form other than that in which it is now first post-humorously written by one-time parliamentary counsel N J Jamieson.

This Act is self-administering.

THREE POINTS

Extracts from an address given by MR J R P HORN SM *to a Bar Dinner at Palmerston North on the occasion of his departure to take up the position of Chairman of the Licensing Control Commission.*

I have reminded myself that many, many years ago John Wesley claimed that a good sermon should have three points and then "finally my brethren". I also reminded myself that he never spoke for less than 90 minutes. I *have* three points; the things I want to forget, the things I want to remember, and the things I have left undone.

Now the things I want to forget. All appeals, past and pending. The day I disqualified a man for riding his bicycle through a "Stop" sign—never was a rehearing granted more promptly! I want to forget the monotony of judgment summonses, relieved only by the look on counsel's face when the debtor appears, is examined and counsel gets no order. I want to forget the futility of certain useful provisions in the Domestic Proceedings Act, destroyed as they often are by the operation of social welfare benefits. And I want to forget the anguish on parents' faces in defended custody applications.

I want to remember the pleasure that granting adoptions has given me. Unless it is inconvenient I like the adopting parents to appear, and this is one of the things that provides great pleasure. I want to remember certain notable items of graffiti I have seen on the walls of the prisoners' room. I want to remember the criminal record sheet which once described an intersection as "an uncontrollable intersection". I want to remember the day when a very respected practitioner referred to me as "Your Majesty" (but I have not yet been called "Your Holiness"). I want to remember the phrase in a recent probation report, which re-

ferred to the reliability of an offender as "being equal to a chronometer of 20 cents value". I want to remember a probation report that referred to an offender's occupation as "gainfully employed in clerical duties". I want to remember a delightful Maori lass who would steal, and who came to my Children's Court so often it was only a shame. Finally a Social Welfare report informed me that they had told the lass that she was due for Borstal, but that they did suggest I gave her another chance, even though she expected to go to Borstal. I gave her another chance, tears of gratitude and relief flowed, and she was overjoyed—so much so that she collected all her friends, went to the Fitzherbert Tavern (under age of course) to celebrate her non-departure to Borstal. She got boozed, ran out of money, pinched a purse, came back to Children's Court the following Tuesday and went to Borstal. I have not seen her for over three years. I like to remember the other lass who was leaving high school for the last time. Her boyfriend took her to an end-of-school party and she was introduced to gin, with which she had not previously been acquainted. The boyfriend was walking her home across the Square late at night and they were having navigational difficulties. A young constable approached and said the equivalent of "Wot's going on 'ere?", so she hit him. You can't do that to a police constable, young or old. It took three of them to get her through the door of the watch house and she appeared in my Court shortly before Christmas, charged with drunk and disorderly. The Social Welfare report disclosed a first class family background and spoke highly of the girl in all respects. It suggested that I read her a short lecture on the use of liquor, and that as by the time I would read the report she would have a job, I could impose a small fine. I did read a small lecture and told her that she wasn't the only one of us that had had difficulties with gin. I then imposed a fine of part of her first week's wages, and as she was about to go I said "And by the way, where are you working?" She told me, as clerk in a wine and spirit store.

Thirdly, the things I have left undone. One of the things I would like to have done before I left is write the epilogue to the forthcoming book to be written and published by Mr D McKegg, entitled *McKegg on Adjournments* and its sub-title *A Thousand and One Ways to Persuade J.R.P.* The other is that I would like to write the foreword to another book not yet ready for publication but which will be known as *De Cleene on Decorum*—and I was looking forward to reading the chapter entitled "On Shorts, and How to Wear Them in Court".

Back, however, to the Judiciary, and to my small part of it. In very many ways the Monday morning Criminal Court is the "bargain basement" of justice, but it is also the "show window". It is newsworthy, and is reported fairly fully. The unguarded remark from the Bench is usually seized upon by the news media and, of course, misreported. It is a Court which is subject to prompt correction by that great national tribunal which publishes every Tuesday. I like to think that I am aware of "the man in the back of the Court". He may be a spectator or he may be someone waiting for a friend or waiting for his own case, and he must be satisfied that offenders are getting a fair go. He may be disgruntled by the result, but he must be convinced that the process is fair. The cheap sneer, undue pressure from counsel, or any apparent arrogant refusal by the Bench to listen, even sometimes to balderdash: these are the things which in a crowded and busy Magistrate's Court diminish the respect which Courts need to maintain justice. For justice is still derived from the willing, though not necessarily cheerful, acceptance by people.

The soul of wit—Be brief! One of the most effective pleas that I ever heard was one word. It may be that you don't now have counsel involved in a plea of mitigation on such a charge as disorderly conduct whilst drunk, but such was the case, and counsel when after the police had given a lurid description of the behaviour of the criminal at the Wellington Airport, counsel got up and uttered one word "drunk" The Magistrate was startled, but was equal to the occasion with one word reply "discharged". —MR W V GAZLEY to the Wellington Young Lawyers.

The price of counsel—Some idea of the costs of defended proceedings in England is given by the recent revelation that Mr Justice Templeman's life was insured for £500,000. The sum represented the estimated cost of a rehearing if the Judge died before giving his decision. The hearing of the proceedings, appropriately connected with the liquidation of National Life Insurance Co Ltd, was expected to last only three weeks.

Church Sign Board—THE WAGES OF SIN ARE NOT FROZEN.

REWARDING VIRTUE TO PUNISH GUILT

Psychologists MESSRS D A SANDFORD *and* R D TUSTIN, *of the New Zealand Psychological Society, and* MR P N PRIEST *of the Department of Psychology, University of Waikato, examine behavioural psychology and some implications for individual "freedom".*

Psychology is a comparatively recent discipline. Until the 1930s psychologists premised their neophytic science upon commonplace assumptions about man. They regarded him as essentially a free agent with his immediate environment exerting minimal influence only. Indeed, the function of the environment was simply to elicit man's instincts, the call of which he was able to obey or deny, depending on his "intellect" and "will". Man's *mis*behaviour was similarly explained. The inherent disposition to delict, meant the criminal needed to be put in a place where the mishapen aspects of his personality could not manifest themselves in felonious activity. Also it was hoped that the offending individual would learn to bend his free will in the direction of overriding his impulses. Indeed he was punished for not so using his "free will". Contemporary lay accounts of human behaviour often do not depart too much from this vignette.

Within psychology these views held sway until the 1930s despite serious threats from the early behaviourists like Pavlov and Watson, who believed that environment was more responsible for human conduct than inherited instincts. By the late 1930s, however, new evidence required psychologists to rethink their position concerning the effects of the immediate environment on man. B F Skinner, a psychologist at Harvard, found that he could control much of the lower mammal's behaviour by altering the immediate environmental consequences of it. Animals could be made to perform actions not normally in their behavioural repertoires, eg, pressing a lever, by rewarding (the technical term is "reinforcement") the particular response. Skinner subsequently established quite complex sequences of behaviour in such animals (eg, playing pingpong) using this principle of reinforcement. This control of behaviour by its environmental consequences was soon demonstrated in many of the infra-human species.

Two logical propositions follow from these data. The first is that most, if not all, behaviour is formed and maintained by the "natural" occurrence of contingencies of reinforcement and punishment(*a*) in the organism's environment. The second is that these principles apply with equal force to homo sapiens and that his behaviour is shaped and sustained by the very processes that regulate the behaviour of the decidedly ignoble rat and the slightly more respectable pigeon. There is ample evidence in support of both propositions. Since the 1950s behaviour modification, as the application of reinforcement and punishment to human situations is called, has tackled the rehabilitation of both psychiatric patients and criminals with considerable success. Some of these programmes will be described later within the context of arguments derived from the two aforementioned propositions.

One of the more fundamental implications of these premises would be the unpalatable task of revising some of our cherished beliefs about ourselves. "Free will" no longer seems pertinent, if it exists at all! If a psychologist adopts the task of manipulating human behaviour we might be tempted to immediately accuse him of controlling and that this immoral and unethical. Regardless of our view of man and "free will", we would be forced to concede that he has always been in the business of influencing his fellow beings. It may be facetious to suggest that our indulgences and toleration of this has hitherto been easy because he has not been too successful at it! We have thus been able to retain some respect for "free will".

To answer the criticism that deliberate control and manipulation are factually wrong we would do well to consider an example of the use of behavioural procedures. The tantrums of a child pose considerable problems for the child and parents. Williams (1959) was confronted with such a child. He observed that every time the child became excessively irascible the parents would attempt to placate the child. Williams reasoned that the parental attention

(*a*) "Punishment" is here used in a technical, not a punitory sense. Any stimulus which reduces the frequency of behaviour is defined as a "punisher" (the opposite effect to a reinforcer). If frowning at a person every time he swore had the effect of reducing his swearing then frowning would be regarded as a punisher. Of course, if it increased his rate of swearing it would be a "reinforcer".

was reinforcing the tantrum behaviour and he advised the parents to leave the room whenever the child became overly angry (this withdrawal of reinforcement and the consequent drop in rate of responding is called "extinction"). In a matter of 10 days or so the response had disappeared. This example illustrates several points. Firstly, the parents were already systematically reinforcing the tantrums by their reaction even though they did not intend to do this. Secondly, a change in the immediate environmental consequences resulted in a sharp change in the child's behaviour. Thirdly, the behaviour modification programme had beneficial effects for all the people involved.

Even if we do not question the versimilitude of the behavioural approach we may have reservations about the ethics of manipulation. Some may accept the use of systematic attempts to control behaviour in restricted situations, but are uneasy about extending the area of methods of control. We accept that parents and teachers will try to control the behaviour of children. Employers and employees have means of controlling one another's behaviour. Indeed behavioural control is almost always reciprocal. It might be argued that if we do not accept responsibility for the control of another person's behaviour, perhaps less acceptable sources of influence will do so! It is not so much a question of whether to control or not to control, but *how* to control. This is more a scientific problem than an ethical one.

The extent of behaviour control described so far may be acceptable because we still see scope for individuality and the operation of "free will". The "token economy" constitutes a more rigorous and total form of control. Psychologists Ayllon and Azrin (1968) designed a token economy programme for a ward of chronic psychiatric patients in which every prosocial response, no matter how trivial to begin with (making bed, eating properly), was reinforced with a metal token exchangeable for cigarettes, television, social events, etc. Twenty-one of the 46 inmates have been subsequently discharged and many of these have been successfully rehabilitated after years of virtual vegetation. (*Time* has reported the programme, see reference.) Perhaps it is even difficult to take exception to the type of control in the token economy, because it so closely parallels what happens to us in the real world. We are constantly reinforced and punished for appropriate and undesirable behaviours respectively. The one crucial difference is that the "token economy" is extremely systematic in its recognition, and reinforcement and punishment, of specific behaviours.

In programmes like token economies, closed circuit television is frequently used to enable accurate and immediate delivery of reinforcers. This may raise the objection that privacy is being invaded. This criticism assumes that people prefer to be supervised in person rather than through the medium of a discreetly placed camera. It also implies that whatever the possible benefits to both the individual and society of data collected by such means, the individual has a "right to privacy". In the context of criminal behaviour this can never be a serious objection. By the fact of his conviction society has implied that the person has no "right" to continue behaving in such a fashion. To not take the most efficacious steps possible to alter behaviour under these circumstances is morally reprehensible.

Token economy principles have been used to change behaviour in a socially desirable direction outside institutional settings. Schwitzgebel (1964), for example, approached 40 confirmed delinquents and offered them part-time jobs talking into a tape recorder about anything they wished. He then initiated a reinforcement procedure to get prompt and regular attendance. He used for this an hourly rate of pay of coca-cola, food, subway tokens, bonuses, etc. After about two months of employment in the project, many of the subjects began to value the relationship with the project and the experimenter as much as, and even more than, their small pay. The boys came to seek approval from established authority figures who were formerly avoided. Termination of the job with the project came gradually as the boys began to take part-time jobs in the community. Three years after termination of employment within the project an extensive follow-up showed a statistically significant reduction in the number of arrests and incarcerations as compared with a control group.

Schwitzgebel makes a particularly relevant point: "The fact that . . . an operant conditioning orientation could develop dependable prompt attendance and certain other behaviours in delinquents may not surprise therapists familiar with the experimental analysis of human learning. What is more difficult to explain, however, is why this knowledge has not been put to systematic use in the large majority of treatment programmes" (p 141).

Many programmes involve some form of deprivation of luxuries to which the person for-

mally had free access. Sometimes there is debate over whether particular things should be regarded as privileges to be earned, or as rights which the individual is entitled to without meeting conditions. When people are accustomed to unimpeded paths to reinforcers they may object to having to earn them. It is contentious where the lines between rights and privileges should be drawn. We would point out that the average member of our society must work to earn food, shelter, clothing and entertainment. Provided he has some realistic means of earning these reinforcers the average person accepts that they will be available contingent on his own behaviour. It seems not unreasonable to expect persons in micro-societies, like prisons or psychiatric hospitals, to earn reinforcers by emitting behaviour that will aid their later adjustment to the outside society.

People sometimes object to the practice of withholding privileges until they have been earned by the appropriate behaviour on the grounds that this encourages materialism, arguing that the outward behaviour is not as important as the internal reasons for the person behaving as he does. The implication is that behaviour is "good" only if it is internally motivated, as this shows that the person performed the good deed freely, and not simply to earn the reinforcement. Receiving a tangible reinforcement is sometimes thought of as bribery as a truly good person would be satisfied just knowing that he had been virtuous.

The emphasis on the importance of a person's internal feelings in determining his behaviour has been stressed in much of our society's literature. Unfortunately, psychologists have found it very difficult to build up strong new behaviour patterns simply by dealing with internal feelings. The greatest change in people's behaviour occurs when it is promptly followed by reinforcing environmental consequences.

In this paper we have endeavoured to demonstrate what the modern behaviourally oriented psychologist is doing. Regrettably the absorption of behavioural techniques into clinical practice has been extremely slow despite the demonstrated superiority of these procedures over more traditional interventions (Priest, 1972; Sandford, 1973). The speedy adoption of behavioural procedures would seem to hold many benefits for the individual and society that are difficult to ignore.

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JUST ASK

DR RICHARD LAWSON *continues his Occasional Notes from Britain.*

One of the nice things about sinking into one's thirties is the feeling that, by and large, life's major battles are over and done. One has a wife, house, mortgage, car, telly, children and a nice, secure job: the "complete disaster", as a character put it in *Zorba the Greek*. Oh, I know that much hard graft lies ahead in the 40 years which I reckon are to come, but the rosy glow remains that, overall, one is home and dry. Children are the bonus. One can wax wise and portentous as one guides the little feet along a path so deftly trod by oneself before.

One of the not so nice things about descending into the dismal bog of one's thirties is the way today's juveniles leave you feeling that soon you will be dust, decay and worm-fodder. My wife and family went to an hotel in Cornwall recently. Locking up the children, we betook ourselves to the local disco to relive the passionate moments of our courtship at "The Kiwi" in Wellesley Street. (Is it still there, by the way?) Now, I don't mind hearing the hits of my youth being described as "Revive 45s" or even "Golden Oldies", but when I heard my dear old "Rock Island Line" described as a "Rave from the Grave", I felt sandbagged and coffin-bound to an unutterable degree. This

sense of mortality has still to lift. The brand new superannuation policy achieved for university staff is called (and this is true, good reader) the "drop-down-dead" policy. I ask you!

One of the better things about getting on is the gradual dismantling of some of our more futile conventions. Recently, Lord Justice Bridge put quill to parchment and explained to readers of *The Times* just why he had given such-and-such a sentence to so-and-so bombers. An "appalling precedent" was how a distinguished Queen's Counsel saw it.

Well, I beg to differ. Time and time again over the years, billions of words have tumbled through the pages of law journals attempting to say just what some Judge meant in his judgment. It really is preposterous when there the Judge is, reading these learned articles, but keeping mum since convention so requires. A quick call on the blower could probably have saved countless pounds and countless hours.

As it happens, a splendid example lies close at hand (indeed, close at heart, too). At an arbitration presided over by a Queen's Counsel last July, university staff were awarded a 20 percent increase on the salaries obtaining at October 1974. A second part to the award gave a further increase on this increase, based on movements in the Retail Price Index at a date to be after the date of the award. Because it was thus postdated, this further part of the award was not precisely quantified, though it was reckoned on being (as indeed events showed it would have been) a further 20 percent.

Then came the "Voluntary" pay limit of £6 a week (as "voluntary as rape" it was described at the Trade Union Conference recently). When this limit was formally enshrined in the Remuneration, Charges and Grants Act, it was also stated that arbitration agreements would be fully honoured. You and I would think that the university arbitration had thus slipped under, past or through the net. The Department of Education and Science agreed that the basic 20 percent increase could go through, but not the further cost-of-living award. By a mind-boggling process of "reasoning", it was contended that, not being precisely quantified, it was not part of the arbitration.

Representations and arguments were hurled to and fro till we have now reached the final lunacy. At great expense and consumption of time, the arbitration is to be reconvened to ask it whether its arbitration award is part of the arbitration award, or not. Why not ring up the arbitrator and ask him? That, apparently, is not the thing to do. Who said one's thirties bring greater tolerance?

SING A SONG OF SICKNESS

Burglary, Robbery, Larceny and Rape,
Arson, Extortion, Sodomy and Escape,
Sing a song of wickedness,
A pocket full of crimes,
Ugly names for ugly things,
Bequeathed from Latin tongue,
No lilt in the timbre,
No mercy in the sound,
Discord in diminished fourths
Seeking to find a common denominator
In the charm of a thousand pleas.

Tuberculosis, Syphilis and Cancer,
Paralysis, Leukemia and the Gout,
Typhoid, Malaria and the Bott,
Sing a song of sickness,
A pocket full of ills,
The Healer sometimes known as the greatest
Devotion pledged by Hippocrates' Oath,
The Healer sometimes known as the greatest
Hyprocrite of all.

He who promised cures for all,
Body held in trust, my man's apothocary,
Music in Greek-given names
For the sickness strain.
Punishment beyond the Roman satire
Of man-created crimes
Prostrate, ill-gotten bequest to him,
Even by inheritance of ovaries to her.

And so let us sing,
Sing a song of sickness
A pocket full of ills,
Choose your partner for the dance,
Latin or the Greek,
Hypocrites or Justinian,
Both lead to the grave,
But choose if you can
For unwise choice
Can eternity be.

GEORGE JOSEPH

Take your choice—Are we a learned profession? Or are we a bunch of nit-wits who simply leave it to the Land Transfer Office to correct and tidy up our documents? MR WARRINGTON TAYLOR at a conveyancing seminar.