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ENGLISH PLANNING LAW: A SUMMARY OF RECENT DEVELOPMENTS

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Americans have long been intrigued by English planning law. While there have been some excellent writings on the subject,[1] there is at present no comprehensive summary of English planning law which deals with the substantial changes in English law since 1968. This article is intended as an update for the American reader on the English law on local planning and development control, eminent domain, compensation, and betterment recapture. Where helpful, comparisons have been drawn between the English practice and the typical American practice.

Americans should understand that the English use the term "planning law" to describe what Americans call "planning and land development control law."[2] Americans will also find it easier

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1 David Callies has written on several aspects. Callies, *Positive Planning in England: A Survey*, 4 LAND USE CONTROLS Q., Spring, 1970, at 12; Garner & Callies, *Planning Law in England and Wales and in the United States*, 1 ANGLO-AM. L. REV. 292 (1972). M. CLAWSON & P. HALL, PLANNING AND URBAN GROWTH: AN ANGLO-AMERICAN COMPARISON (1973) is the most recent comparative non-legal study. LAW AND LAND: ANGLO-AMERICAN PLANNING PRACTICE (C. Haar, ed. 1964) is now somewhat outdated. *See also* B. POOLEY, THE EVOLUTION OF BRITISH PLANNING LEGISLATION (1960). Basic English materials relating to planning are reprinted in D. HAGMAN, PUBLIC PLANNING & CONTROL OF URBAN AND LAND DEVELOPMENT, ch. 22 (1973).

2 In the United States planning or plans are conceptually separate from and usually separately enabled by statutes from controls, *e.g.*, zoning, which implement plans. In the past the English used the plan itself as the control. The term "plan-

to understand the English system if they realize that a "planning permission" is permission to develop land and that a "planning inquiry" is not an inquiry on a particular plan[3] but an inquiry on a request for development permission. Reliance on an ad hoc system of "planning permissions" rather than on adherence to a zoning-like plan represents the fundamental theoretical difference between English and American land use control.

I. The Planning Process

A. *Historical Background*

The first English legislation to deal with "planning" as the term is understood today was the Housing, Town Planning, &c. Act, 1909,[4] which empowered local authorities to prepare planning "schemes" to regulate development. In 1919[5] planning schemes were made compulsory for boroughs and urban districts.[6] To provide control during the preparation of the planning scheme, the law specified that unless a developer obtained an interim development control permit, his building could be removed *without compensation* if it conflicted with the development scheme finally approved.[7] From these interim development permits came the entire ad hoc system of planning permissions.

The Town and Country Planning Act, 1932[8] provided a comprehensive overhaul of the planning process which retained the interim permit control concept and expanded planning jurisdiction

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ning law" might also derive from the acts which authorized both planning and controls in England, which had only the term "planning" in their title.

3 These are called development plan inquiries.

4 9 Edw. 7, c. 44.

5 Housing, Town Planning, &c. Act, 1919, 9 & 10 Geo. 5, c. 35.

6 Until recently all land was either in "county boroughs" (a coextensive city-county in American terms) or "counties." Counties could consist of "non-county boroughs" (cities), urban districts, and rural districts. Districts, roughly speaking, were multi-purpose governmental units (termed "authorities" in England) responsible for those areas not within the jurisdiction of the boroughs. This system was extensively simplified and reworked in the Local Government Act 1972. *See* note 26 *infra.*

7 Compare the American practice as explained in D. Hagman, Urban Planning and Land Development Control Law 84-85, 274-75 (1971) [hereinafter cited as Hagman] on interim zoning and sanctions for violations of official maps.

8 22 & 23 Geo. 5, c. 48.

to built-up areas and areas not to be developed at all. Because plans had to be approved by Parliament and, once approved, were binding at the local level, few *plans* were actually proposed, due partly to the maze of complex procedures and the lack of flexibility in amendment.

During the late 1930's and early 1940's governmental attention focused on the problems of economic development and industrial location, urban growth and development, and loss of agricultural land to urban and industrial growth.[9] Concern heightened during World War II as a result of the bombings and blockade. The success of the central government in relocating war industries perhaps rendered the citizenry more amenable to centralized control of planning.

Such control was implemented in 1943[10] when a Ministry of Town and Country Planning was established to secure "consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales."[11] Additional development tools were provided bringing all of England and Wales under the interim development control system,[12] extending urban renewal powers to local authorities,[13] and allowing the Ministry to undertake the planning and development of new towns.[14]

A major advance occurred when the comprehensive Town and Country Planning Act, 1947[15] repealed the encrusted 1932 Act and

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9 *See* Special Areas (Development and Improvement) Act, 1934, 25 Geo. 5, c. 1 (an attempt to control economic development and industrial location); ROYAL COMMISSION ON THE DISTRIBUTION OF THE INDUSTRIAL POPULATION (the Barlow Commission), REPORT, CMD. NO. 6153 (1940); COMMITTEE ON LAND UTILIZATION IN RURAL AREAS (the Scott Committee), REPORT, CMD. NO. 6378 (1942). These committee reports, along with that of the Uthwatt Committee, see note 153 *infra*, constitute a famous trilogy on English planning law.

10 Minister of Town and Country Planning Act, 1943, 6 & 7 Geo. 6, c. 5.

11 *Id.* § 1.

12 Town and Country Planning (Interim Development) Act, 1943, 6 & 7 Geo. 6, c. 29.

13 *Compare* Town and Country Planning Act, 1944, 7 & 8 Geo. 6, c. 47 *with* Housing Act of 1949, 42 U.S.C. §§ 1401-36 (1970), 63 Stat. 413 (1949), described in HAGMAN, *supra* note 7, at 370-72.

14 New Towns Act, 1946, 9 & 10 Geo. 6, c. 68; Town Development Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 54. In the United States, federal programs for new towns provide financial incentives rather than development powers. These incentives were not provided until 1966. *See* HAGMAN, *supra* note 7, at 434-37.

15 10 & 11 Geo. 6, c. 51.

enacted a more flexible and broad based approach to planning. The number of planning authorities was reduced from 1441 to 145.[16] Each authority was to survey the area within its jurisdiction and prepare a development plan explaining the overall planning objectives and proposed stages of development. The plan was to be submitted to the Minister of Town and Country Planning for alteration or approval. These plans were to be reviewed at least every five years. Local planning authorities were given financial assistance and broader powers to undertake development and implement the development plan.[17]

The 1947 Act required industrial developers to obtain planning permits not only from the local planning authority but also from the central Board of Trade. A similar system was made applicable to office building construction in certain congested areas in 1965.[18]

The Town and Country Planning Act 1962,[19] repealed and consolidated the substance of all previous planning statutes. Planning under the "1947/62 Acts" had several shortcomings. These were noted in 1965 by the Planning Advisory Group, which had been established by the central government.[20] In June, 1967, the government issued a White Paper which further explored planning problems under the existing system.[21]

First, the central government approval process required for development plans was taking 2-5 years, making plans obsolete before they could be adopted. The cumbersome and complex procedures for formulating and amending plans required too much central government involvement and inundated the central planning agencies with detail, leaving insufficient time for consideration of overall policy goals.

Second, citizens were inadequately involved, particularly at the

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16 The larger non-county boroughs and the county boroughs retained their powers to plan. However, the planning powers of the smaller local authorities were transferred to the counties. *Id.* § 4.

17 Including powers to preserve trees and buildings of architectural and historic importance and authority to control advertisements. *Id.* §§ 28, 29, & 31. Compare HAGMAN, *supra* note 7, at 95-97, 139-44.

18 The Control of Office and Industrial Development Act 1965, c. 33.

19 10 & 11 Eliz. 2, c. 38. Some call the 1962 Act the "1947/62 system" since the procedure under both acts is substantially the same.

20 MINISTRY OF HOUSING AND LOCAL GOVERNMENT, THE FUTURE OF DEVELOPMENT PLANS: A REPORT BY THE PLANNING ADVISORY GROUP (1965).

21 TOWN AND COUNTRY PLANNING, CMND. NO. 3333 (1967).

early stages of planning, and a popular feeling that local interests were not considered was putting the planning process in a poor public light. Further, there was hope that with greater public participation and more vigorous protection of the individual's right to participate in the planning process, a more streamlined approval procedure would be justified.

Third, development plans were often negative in nature, seeking to block undesired development rather than serving to promote a more pleasant environment. Local problems were arising too rapidly for central review. Because local planning authorities (LPAs) had been intensively involved in the planning process for many years, they had acquired staffs of considerable professional competence. Extensive informal consultation of these staffs with central government officials made streamlining formal procedures more practicable.

Dissatisfaction with the existing system and confidence that a more workable structure could be achieved prompted the passage of the Town and Country Planning Act 1968,[22] a comprehensive revision of English planning legislation. The new procedures take legal effect in particular geographic areas upon promulgation of a government order authorizing implementation. The first such order took effect on August 6, 1971.[23] Until an area is ordered to adopt the new procedures, planning is carried out under the provisions of the Town and Country Planning Act 1962.

The Town and Country Planning Act 1968 sought to speed and simplify the planning process as well as encourage citizen participation. Broad planning goals and development policies for various regions are to be embodied in "structure plans" which require the approval of the central government. These broad objectives are implemented through local plans which generally do not require central approval and which, though they must always be consistent with the structure plan, may be easily amended to meet changing local needs. By freeing the central government from the onerous burden of supervising local plans, more time and resources are made available for developing policy objectives and long range planning.

22 Town and Country Planning Act 1968, c. 72.

23 Town and Country Planning Act 1968 (Commencement No. 6) (Teeside, etc.) Order 1971, STAT. INSTR. 1970, No. 1108.

The Town and Country Planning Act 1971 (TCPA 1971),[24] which consolidated the 1962 and 1968 Acts, made few substantial changes. The ink was hardly dry, however, before Parliament passed the Town and Country Planning (Amendment) Act 1972 (TCPAA 1972).[25] The main impetus for the amendment was the need to do something about structure plan inquiries (hearings) held to inform the minister responsible for planning of considerations relevant to his decision to approve structure plans.

B. *The Current Planning Process*

The 1968 system, as consolidated in TCPA 1971 and modified by TCPAA 1972 and the Local Government Act 1972,[26] specifies the following procedure. The planning process begins with a survey by a county planning authority (CPA) or by a joint planning board created to represent all or parts of two or more counties if the Secretary of State for the Environment[27] so directs. These surveys are much like the studies typically made as a predicate for master planning in America.[28] The CPA then prepares a structure plan which contains general policy and proposals.[29] Since there are currently 45 counties in England exclusive of London, there will ultimately be 45 structure plans unless some are done jointly.

After the survey and proposed plan are publicized, "representa-

24 Town and Country Planning Act 1971, c. 78 [hereinafter cited as TCPA 1971].

25 Town and Country Planning (Amendment) Act 1972, c. 42 [hereinafter cited as TCPAA 1972].

26 The structure of local government in England is currently mandated by the Local Government Act 1972, c. 70 [hereinafter cited as LGA 1972]. Only two forms of general purpose local government are permitted with the exception of London, where special provisions apply. The units are counties and districts with each county comprised of several districts. In urban areas the counties are termed "metropolitan counties" and the districts within are called "metropolitan districts." In such areas the division of powers between counties and districts is different from that in more rural counties. This new scheme of local government became fully operative on April 1, 1974.

27 In November, 1970, the former Ministry of Town and Country Planning (which had been merged into the Ministry of Housing and Local Government in 1951), the Ministry of Buildings and Works, and the Ministry of Transportation were drawn together into a new Department of the Environment (DOE), which assumed the functions of each of the former ministries. The DOE is headed by the Secretary of State for the Environment who has primary authority for administering planning and has various powers to set and enforce policy.

28 *See* HAGMAN, *supra* note 7, at 40-41.

29 Local planning authorities can request permission to do joint surveys and structure plans. TCPAA 1972, *supra* note 25, § 1.

tions" are obtained from interested parties. After appropriate revisions, the report of the survey and the proposed structure plan are submitted to the Secretary of State. Copies of the plan are made public, and the Secretary may require further publicity and resubmission of the plan if necessary. If the Secretary decides not to reject the plan, an opportunity must be provided for objections — subject to the Secretary's discretion as to which issues will be heard and from whom. Moreover, the process has been considerably "dejudicialized," with none of the near-formal cross-examination by lawyers as was the former practice. The Secretary can then approve, modify, or reject the plan.[30] No structure plans have been approved as of this writing, though some have been submitted, published, and made available. Proposed amendments to the structure plan follow a similar procedure.[31]

The CPA then prepares a development plan scheme which specifies what local plans are to be prepared, what elements the plans are to contain, and who is to prepare them. The CPA has power to prepare a local plan by itself or delegate the responsibility to a district planning authority (DPA). The Secretary of State may alter the CPA's development scheme as deemed necessary and may designate joint planning boards for areas encompassing more than one district. In most cases, primary responsibility for local planning rests in the individual DPA, which exercises discretion as to whether or not to prepare a local plan for the territory within its jurisdiction. The local plan itself is based on the structure plan and includes a map and a written statement explaining the plan and discussing local issues and details.

The procedures for adopting a local plan are generally similar to those for the structure plan. A survey is carried out and the proposed plan publicized. Before the local plan is sent to the Secretary of State, it must be made available to the public and an opportunity for representations must be provided. The CPA must certify that the local plan conforms to the structure plan. The

30 TCPA 1971, *supra* note 24, § 9.

31 The provisions making the county or joint planning boards responsible for structure plans are generally in LGA 1972, *supra* note 26, §§ 182, 183. The procedures for structure plans are in TCPA 1971, *supra* note 24, §§ 6-10, 18. The Secretary's power to use discretion in hearing objections is in TCPAA 1972, *supra* note 25, § 3.

DPA must inform the Secretary of the steps it has taken to publicize the plan; the Secretary may then choose to require further publicity. An opportunity for objections must be provided once the plan is made public. An inquiry or other hearing may be held to air objections to the plan either by the DPA itself or by an official appointed by the Secretary of State. While the Secretary may direct that a local plan shall have no effect until he approves it,[32] personal approval is not normally required. The local planning authority, usually the DPA, then adopts the plan and may amend it by following a similar procedure.[33]

II. Development Control

In the United States, before land may be used or developed, the zoning must be proper or one must obtain a rezoning, a variance, a special use permit,[34] or qualify the property as a nonconforming use.[35] While England made efforts to enact zoning-like schemes of regulation,[36] the concept of zoning never took hold in England since plans with zoning-like features were seldom adopted because of bureaucratic problems in the planning approval process. Instead, the planning permit has evolved into the primary system of development control.

A. *The Requirement of a Planning Permission*

In order to develop land in England, the developer first considers whether the project is subject to the planning control law at all. If the proposed activity does not constitute development, the project can proceed without application for a planning permis-

32 TCPA 1971, *supra* note 24, § 14(3). Layfield & Whybrow, *The Examination of Structure Plans* (pts. 1 & 2), 1973 J. of Planning and Environmental L. 516, 627.

33 TCPA 1971, *supra* note 24, §§ 11-15, 18; LGA 1972, *supra* note 26, § 183, sched. 16, pt. I, 3.

34 *See* Hagman, *supra* note 7, at 191-210.

35 *See id.* at 146-62.

36 See text accompanying note 4 *supra*. Those plans which included a land-use element showing the appropriate use of land were similar in concept to zoning in America in that the plan indicated the types of development which could occur. An ad hoc development permission was not required for uses shown on the plan.

sion. Development is broadly defined as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any building or other land."[37]

The statute specifies that a material change in use includes conversion of a single family house to a two or multifamily house and the enlargement of dumps or their extension above adjoining land levels. Court-made law otherwise defines what is a material change in use.

The statute also specifies that certain activities are not development[38] such as alteration of interiors, which typically would not be subject to land-use controls in the United States.[39] Certain renewal of facilities work by highway and local authorities and by public utilities does not constitute development. In the United States, development by such entities is only loosely controlled.[40] Uses incidental to a dwelling house do not constitute development in England, the concept being similar to the notion of accessory use or home operation under zoning ordinances in the United States.[41] A startling exception in England is that "the use of any land for the purposes of agriculture or forestry . . . and the use for any of those purposes of any building occupied together with land so used" is not development in England.[42] Since agriculture is defined to include the keeping of livestock,[43] it is apparently proper under planning laws to keep pigs in the nicest residential areas in England.[44] While agricultural uses are usually favored under zoning in America, it is typical to exclude the more noxious agricultural uses from primarily residential use zones. Of course, while agricultural uses might not be development, the construc-

37 TCPA 1971, *supra* note 24, § 22(1).

38 *Id.* § 23(1) does not require permission where development began prior to July 1, 1948 and the present development is merely a continuation or an attempt to restore the property to normal use or is a continuation of irregular occasional use.

39 Building codes would probably apply. *See* HAGMAN, *supra* note 7, ch. 11.

40 *See id.* at 122-25.

41 *See id.* at 104-05.

42 TCPA 1971, *supra* note 24, § 22(2)(e).

43 *Id.* § 290(1).

44 *But cf.* Belmont Farm, Ltd. v. Minister of Housing & Local Government, 13 Plan. & Comp. 417 (1962) (holding that use of property to breed and train jumping horses was not an agricultural use). Even if the raising of pigs qualified under the planning laws, traditional nuisance concepts would, of course, apply.

tion of new buildings for them would be[45] because construction would constitute "operations."[46]

Development is also not involved if the change of use is from one use to another use within the same class. The Secretary of State for the Environment is authorized by the TCPA 1971[47] to classify property uses, a mandate fulfilled by the Town and Country Planning (Use Classes) Order 1972.[48] The order establishes eighteen classes which read rather like the list of uses permitted under a typical zoning ordinance. Generally, the categories are not as precise as in the United States. For example, if a use as a shop is established, the property can be used (with a few exceptions) for any shop purpose. Typically, in the United States a zoning ordinance would have several classes of commercial uses.

Even if a proposed activity is development, an individual planning permission may still be unnecessary. The Secretary of State for the Environment is authorized to issue a development order which may "itself grant planning permission for development . . . ."[49] Two kinds of orders can be promulgated — a general development order or a special development order. The latter applies to a limited amount of land while a general development order applies to all land in England and Wales except that excluded by the order itself. The General Development Order 1973, for example, lists twenty-three types of uses which are termed "permitted" development.[50] Consequently, even though a landowner's activity constitutes development, he does not need to apply for development permission if the activity falls within one of the permitted classes. For example, because of the provisions of Class VI, a landowner does not need permission to *build* a small building, *i.e.*, a building occupying less than 465 square meters. The GDO also permits minor expansion of houses; erection of

45 *But see* text following note 50 *infra*.

46 It may be of more than passing interest to learn that the definition of development and the exceptions thereto are the basis for the similar key definition of development in the American Law Institute Model Land Development Code. *See* Hagman, *Articles 1 and 2 of a Model Land Development Code: The English Are Coming*, 1971 LAND USE CONTROLS ANN. 3.

47 TCPA 1971, *supra* note 24, § 22(2)(f).

48 STAT. INSTR. 1972, No. 1385.

49 TCPA 1971, *supra* note 24, § 24(2)(a).

50 Town and Country Planning General Development Order 1973, STAT. INSTR. 1973, No. 31 [hereinafter cited as GDO].

fences and the like; change of use from some use classes to a use in a less intensive class, *e.g.*, a general industrial building may be used for light industrial purposes;[51] temporary buildings and uses; minor alterations to industrial development; and incidental uses and minor alterations by local authorities and public utilities. Some utility-like operations are given broad powers to develop under the GDO, presumably because they are governmental bodies or are otherwise stringently controlled. More broadly, a local authority or a public utility will often be "deemed" to have planning permission.[52] As in America, there are complaints in England that utility and governmental developers are among the worst developers and perhaps need more rigorous control.

As is always the case in England, there are provisions for flexibility. By a "direction" the Secretary of State for the Environment or a local planning authority, occasionally only under the Secretary's review power, can indicate areas and types of development to which the GDO does not apply and thus require an ad hoc planning permission.[53]

If the landowner doubts whether planning permission is necessary, two mechanisms may be of help. The landowner can apply for a determination of whether planning permission is required[54] or, if there is doubt about the permissible use of the land, the owner may apply for an "established use certificate"[55] which is tantamount to a planning permission for the use to which the land is currently devoted.

B. *Permission Procedures*

If an ad hoc planning permission is found to be necessary, application must be made to the district planning authority except in some special instances reserved for the county planning authority.[56] The omnipresent Secretary of State for the Environment may

51 Under cumulative zoning in America, a zoning ordinance permits any use first allowed in a less intensive use zone. Nonconforming uses are usually allowed to shift to a use which is more in the direction of conformity. *See* HAGMAN, *supra* note 7, at 150-151.

52 TCPA 1971, *supra* note 24, § 40.

53 *Id.* § 24(5)(b); GDO, *supra* note 50, art. 4.

54 TCPA 1971, *supra* note 24, § 53.

55 *Id.* § 94.

56 LGA 1972, *supra* note 26, sched. 16, pt. I, 15.

require that certain applications be submitted directly to the Department of the Environment.[57] The applicant can request an "outline planning permission"[58] which permits the applicant to learn whether the proposed development is in general proper, but which does not settle the details. An outline permission is good for a term of years during which a normal permission must be obtained for actual development to begin. This two-step process, in the form of tentative and final map provisions, is often used in America with respect to subdivisions and planned unit development.[59] Such a process gives the developer an opportunity to evaluate the chances of receiving development permission without spending the enormous amount of time and energy necessary to finalize the normal application.

An application for a planning permission or an outline permission is made on a form and must be accompanied by a plan and drawings necessary to describe the development. An applicant need not have any legal interest whatsoever in the land affected by the application, but in such cases notice must be sent to the owners.[60] No personal notice to neighbors is required, however, and published and posted notices are required only as to certain types of development. Compared with typical American requirements, the English law reflects considerably less enthusiasm for participation and the kind of notice which will assure it. Recently a government circular, probably influenced by considerations similar to those in the United States National Environmental Policy Act,[61] was promulgated which requires posted notice for proposals of wide concern or substantial impact on the environment, even if the government is the proposer.[62]

The local planning authority must acknowledge receipt of the application and give neighbors and owners the opportunity to make "representations" which the local planning authority must consider. It must also consult with other local governments in the

57 TCPA 1971, *supra* note 24, § 35.
58 *Id.* § 42.
59 *See* HAGMAN, *supra* note 7, at 459-60.
60 TCPA 1971, *supra* note 24, § 27.
61 42 U.S.C. §§ 4321, 4331 (1970).
62 DEP'T OF THE ENVIRONMENT, PUBLICITY FOR PLANNING APPLICATIONS, APPEALS AND OTHER PROPOSALS FOR DEVELOPMENT, CIRCULAR No. 71/73. Circulars are advisory, but they are widely followed.

area under certain specified circumstances. The matter must be decided within two months of application, or three months if major roads are involved, or as otherwise agreed to by the local authority and the applicant. If no decision is reached within that time, the application is deemed denied, and an appeal can then be taken to the Secretary of State for the Environment.[63] If permission is conditioned or denied, the local planning authority must provide reasons in writing.[64] Denial of a permission may give rise to a claim for compensation.[65]

If one wants a planning permission for an industrial building or to change an existing use to an industrial use, one must first obtain an "industrial development certificate" (IDC) from the Secretary of State and furnish it to the local planning authority together with the application for planning permission.[66] The IDC is issued only if the proposed development is consistent with the proper distribution of industry, including the need for employment in the area. By tightening IDC issuance in congested areas and granting them freely in "development areas," the latter areas have received approximately 50 percent of the new employment covered by IDCs, though the areas contain only 20 percent of the population.

An IDC cannot be required where the industrial floor space created is less than 1,000 square feet, and IDCs may not be required for larger projects since the Secretary of State is authorized to set limits and can specify when an IDC is required. In exercising this power the Secretary has divided England into areas. In some areas an IDC may be required if the floor space created exceeds 5,000 square feet. In other areas a permit is required only for developments exceeding 10,000 square feet, while in a third category of areas only developments exceeding 15,000 square feet require an IDC.[67] Conditions may be attached to the IDC which

63 TCPA 1971, *supra* note 24, § 37.

64 *Id.* § 29. GDO, *supra* note 50, arts. 5-17 contains many of the procedural details here outlined.

65 *See* text accompanying notes 132-49 *infra.*

66 TCPA 1971, *supra* note 24, §§ 66, 67.

67 *Id.* §§ 68, 69; Town and Country Planning (Industrial Development Certificates: Exemption) (no. 2) Order 1972, STAT. INSTR. 1972, No. 996. At the present time no areas have been designated in which a development of less than 10,000 square feet requires a permit.

become part of the planning permission conditions.[68] If an IDC is denied, compensation may be payable as in the case of denial of a planning permission.[69] There is no right to appeal a denial.

A similar system applies to the erection of new office buildings, additions to existing ones, and change of existing uses to office use.[70] In designated highly commercialized areas of England, an "office development permit" (ODP) must accompany an application for planning permission. The Board of Trade specifies areas within which office developments above a specified minimum square footage require an ODP. The purpose of the system is to distribute employment more evenly. Conditions may be attached, but compensation is not paid for denial.[71]

In considering the application for planning permission, the decision maker "shall have regard to the provisions of the development plan, so far as material to the application, and to . . . other material considerations . . . ."[72] In short, the plan is a guide but not the exclusive guide. This is similar to the practice in the United States[73] although there is a tendency in America to tighten the requirement that implementation devices such as zoning be consistent with plans. The English experimented with a tight-tie approach during the 1909-46 period but abandoned it.

The permission may be granted, denied, or granted conditionally. The law on appropriate conditions in England is much like that in America with respect to conditions on variances and special use permits,[74] in that the conditions must be reasonable and related to the development. As in America, there is no clear answer as to whether, if the condition is improper, the planning

68 TCPA 1971, *supra* note 24, § 70.

69 *Id.* § 72. For a discussion of compensation, see text accompanying notes 132-49 *infra.*

70 TCPA 1971, *supra* note 24, §§ 73-77.

71 In 1963 a Location of Offices Bureau was established to publicize and encourage voluntary office location away from London in areas where rent and salaries, travel conditions, and accommodations are more favorable. The increasing clustering of office space in a few large cities, particularly London, led to the development of an office development permit system in August of 1965. Control of Office Development Act 1965, c. 33. It was to expire seven years later but has been extended another five years.

72 TCPA 1971, *supra* note 24, § 29(1).

73 *See* HAGMAN, *supra* note 7, at 51-58.

74 *See id.* at 199-201, 210-11. Conditions on rezoning are much more circumscribed in American zoning law.

permission issues without the condition or, alternatively, there is no permission at all. Perhaps the better view is that when a court decides the condition is invalid, the matter should be returned to the planning authority, though, as a practical matter, the applicant has little assurance of fair treatment from a planning authority which has been told it wrongly imposed a condition.

The conditions that can be imposed include time conditions; that is, the development must cease within some period.[75] Such conditions are not frequently used in America, though they are not unheard of. While TCPA 1971 permits conditions "requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorized by the permission,"[76] which appears to raise an issue similar to the intensely litigated question of exaction in America,[77] very little in the way of exactions is permitted in England.[78] It is apparently assumed in England that governmental entities will provide parks, roads, and the like. One would have to turn the clock back in America to a conservative state law in the 1940s to find a situation where the public costs associated with new development were so minimally imposed on developers.

While it used to be true in England that a planning permission once received was good forever unless revoked, this is no longer the case. Development pursuant to the permission must now be undertaken within five years in order to escape termination of the permission unless the permit itself specifies a different time limit.[79] Limiting conditions of this sort are becoming more prevalent in America.[80]

As in America, permission runs with the land, not to the person.[81] Contrary to the generally sloppy American practice, the

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75 TCPA 1971, *supra* note 24, § 30.

76 *Id.*

77 Exaction is used to mean a required dedication of land for public purposes, provision of public improvements, or fees in lieu thereof. See HAGMAN, *supra* note 7, at 253-62 for exactions in connection with subdivision permission, an issue which probably constitutes 90 percent of the case law on subdivisions.

78 MINISTRY OF HOUSING AND LOCAL GOVERNMENT, CIRCULAR NO. 5/68 (1968).

79 TCPA 1971, *supra* note 24, § 41.

80 *See* HAGMAN, *supra* note 7, at 200.

81 TCPA 1971, *supra* note 24, § 33.

English law calls for a register of applications and decisions[82] so that everyone can learn what the land-use controls on the land are.

About 80 percent of the planning applications are granted in England.[83] The disappointed applicant may appeal an unfavorable decision to the Secretary of State for the Environment. While in most cases the Secretary of State only becomes involved with an application for planning permission when a disappointed party appeals, the Secretary automatically receives a copy of any denial or conditional grant of planning permission which gives rise to a claim for compensation.[84] In that case the Secretary has power to modify the original decision and may alter the conditions in order to eliminate or reduce compensation.

Typically, the Secretary of State will assign an inspector from the Department of the Environment to hold an inquiry on the appeal, although a planning commission may be appointed to deal with matters of national or regional importance or matters involving considerable technical or scientific complexity.[85] This appeal procedure should not be confused with the power of the Secretary to call in planning applications for a personal decision.[86] All appeals dealing with relatively minor matters are decided by the inspector whose decision is final;[87] as to major matters, an inspector's decision is only a recommendation to the Secretary of State. The procedure is detailed in regulations[88] which include a mechanism by which the matter may be decided on written representations, without inquiry. The written representations procedure, used in about 70 percent of the cases,[89] shortens the average decision-making time, which has been averaging 30 weeks for certain kinds of appeals and 65 weeks for others.[90] The Secretary of State or the

82 *Id.* § 34; GDO, *supra* note 50, art. 17.

83 DEP'T OF THE ENVIRONMENT, REVIEW OF THE DEVELOPMENT CONTROL SYSTEM 23 (1974).

84 TCPA 1971, *supra* note 24, § 154.

85 *Id.* §§ 47-49.

86 *Id.* § 35.

87 The appeals to be decided in this manner are described in Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1972, STAT. INSTR. 1972, No. 1652.

88 Town and Country Planning (Inquiries Procedure) Rules 1969, STAT. INSTR. 1969, No. 1092.

89 DEP'T OF THE ENVIRONMENT, REVIEW OF THE DEVELOPMENT CONTROL SYSTEM 29 (1974).

90 *Id.* at 28-29.

inspector has full authority to modify the original decision or to treat the matter de novo. Reasons must be given for the decision. While the proceeding is adversary, and interested parties are entitled to notice and an opportunity to appear, the decision involves no conclusions of law, only findings of fact on the merits of an application. Appeals are successful in full or in part in about 30 percent of the cases.

In the United States, generally speaking, there is no appeal to an authority such as the Secretary, though the development of special administrative tribunals and review boards on the state level is one of the current reform proposals in America.[91]

Not surprisingly, when there is a specialized review tribunal, the judicial role is constricted. In England the aggrieved party can appeal to the High Court, but only on the grounds that the action taken was unauthorized or that the Secretary's action was so unreasonable as to exceed the limits of his discretion.

C. *Enforcement*

If land is developed in the United States without compliance with zoning or subdivision ordinances, the development is illegal.[92] This is not so in England. If development not covered by a required planning permission occurs, the development is legal, and trouble only begins when the local planning authority serves an enforcement notice. This notice can be served within four years of development; if the development consists of a material change in use there is no period of limitation. However, since development without a planning permission is not itself illegal, developers can risk that the development may not be noticed, that the local planning authority may perhaps be persuaded to issue a planning permission covering the development at a later date, that the authority may decide not to issue an enforcement notice or withdraw one which had been issued, or that the statute of limitations will run. Any of these outcomes may arise under the statutory scheme,[93] but the risk may be costly since an enforcement

91 *See generally* ALI A MODEL LAND DEVELOPMENT CODE art. 7 (Tent. Draft No. 3, 1971).

92 *See* HAGMAN, *supra* note 7, at 228.

93 Enforcement procedures generally are found at TCPA 1971, *supra* note 24, §§ 87-93.

notice which orders compliance may require demolition of the development.

If compliance is not had within the period granted, the offender is subject to criminal conviction and a fine. Further, the local authority can itself do the work required by the enforcement notice and charge the expense to the stubborn landowner. In order to prevent development operations from continuing after an enforcement notice is served, the local planning authority may also serve a stop notice, similar to a restraining order, to preserve the status quo. Proceeding in the face of this notice subjects one to conviction and fine. The stop notice is cautiously issued, however, since landowner losses incurred as a result of a stop order are compensable under some circumstances.[94]

The enforcement notice states a period of time, at least 28 days, which must elapse before it takes effect.[95] Within that period, the person served with a notice can appeal to the Secretary of State on the following grounds:[96] that a planning permission should be granted; that a violated condition of a previous permission should be waived; that there was no breach of permission; that a statute of limitations applies; that the notice was not properly served; that the requirements of the notice are excessive; or that the compliance period is unreasonably short. One of the Secretary's inspectors will be appointed to afford a hearing under the appeal procedures mentioned earlier. The Secretary of State has wide discretion to uphold or modify the local authority's position including the issuance of planning permission for the alleged improper development.[97]

III. Compensation

The English have been trying for many years to devise a workable mechanism for compensating persons whose property has been confiscated or injured by governmental activity, while at the same time recovering for the public some portion of the increased

94 *Id.* § 177.
95 *Id.* § 87(8).
96 *Id.* § 88(1).
97 *Id.* §§ 88(5-6).

land value which may accrue from government planning and development. The English use the term "worsenment" to define an injury to property values caused by governmental action and the term "betterment" to define enhancement of land value caused by governmental action. "Compensation" is the payment made by the government to the individual who has suffered worsenment.

A. *Worsenment*

1. Compulsory Purchase

The power of eminent domain is called compulsory purchase in England.[98] Authorization for a local authority to exercise compulsory purchase powers may come from various general statutes or private acts.[99] Typically, a local authority wishing to acquire land prepares a compulsory purchase order showing the affected land and either serves notice on the owners and occupiers or directs that notice be posted. After allowing time for objections, the authority submits the order to the Secretary of State for the Environment or whatever other minister the enabling statute requires. If there are objections, the Secretary must hold a public inquiry or private hearing; after the hearing is held and the inspector's report is submitted, the Secretary decides whether to confirm the order. Appeal to the High Court is permitted only on the grounds that required procedures were not followed to the detriment of the appellant, or that the order was beyond the power of the local authority. A similar procedure is used by public

98 Two recent useful texts are K. DAVIES, LAW OF COMPULSORY PURCHASE AND COMPENSATION (1972) [hereinafter cited as DAVIES], and D. LAWRENCE & V. MOORE, COMPULSORY PURCHASE AND COMPENSATION (5th ed. 1972).

99 TCPA 1971, *supra* note 24, § 112 authorizes a local authority to acquire land needed for development, redevelopment, improvement, or to facilitate proper planning. The acquiring authority issues a compulsory purchase order which must be confirmed by a central government minister according to the procedures of the Acquisition of Land (Authorisation Procedure) Act, 1946, 9 & 10 Geo. 6, c. 49. Once the order is confirmed the local authority may proceed with compulsory purchase by following the procedures of the Compulsory Purchase Act 1965, c. 56. Compensation may be payable under the Land Compensation Act, 1961, 9 & 10 Eliz. 2, c. 33. If the parties are unable to agree upon appropriate compensation, the issue is resolved by the Lands Tribunal, a specialized court created by the Lands Tribunal Act 1949, 12 & 13 Geo. 6, c. 42. The Land Compensation Act 1973, c. 26, §§ 68-83, changes compulsory purchase law in several particulars. *See* text accompanying notes 123-31 *infra*.

utilities and departments of the central government when exercising the compulsory purchase power.

Once a compulsory purchase order has been confirmed, the local authority is not bound to acquire the specified land but is merely given the discretion to exercise the compulsory purchase power with respect to that land. The local authority may not enter into possession until additional procedures are followed. If the order is not exercised within three years of confirmation, it lapses unless otherwise specified.

The compulsory purchase power is exercised by a "notice to treat"[100] which informs those parties with an interest in the property that the authority intends to acquire the land. The notice typically has a plan attached and includes a demand that the person served state his interest in the land and detail his claims for compensation by a specified date. The notice to treat is not a contract of sale since price is as yet undetermined, but it does fix the property interest to be acquired and bind the owner to sell. Until 1969, the date of the notice established the valuation date, but in *Birmingham Corporation v. West Midland Baptist (Trust) Association (Inc.)*[101] the court held that the notice to treat date was not the valuation date where several years elapsed between the notice and the actual taking, and where the property had appreciated considerably in value and was of a type qualifying for equivalent reinstatement, *i.e.*, what it would cost to duplicate the property. The valuation date problem is very similar to that in America where, though the valuation date may be defined by statute (*e.g.*, as the service of summons date or the date of verdict), the court may on constitutional grounds require a different valuation date to be used.[102] Of course, such a decision in England could not be based on constitutional grounds. But the English statutes do not specify valuation date, and the courts have felt free first to set up and then to modify the "notice to treat" date rule.[103]

The notice to treat also binds the compulsory purchaser, though the authority can withdraw its notice — subject to compensation

100 One definition of the word "treat" is to carry on negotiations with a view toward settlement.

101 [1970] A.C. 874 (1969).

102 *See* HAGMAN, *supra* note 7, at 334-37.

103 DAVIES, *supra* note 98, at 99-104.

of the owner for any reliance costs and losses — within six weeks of receiving the owner's claim for compensation, or within six weeks after a determination of the compensation by the Lands Tribunal[104] if no such claim was submitted by the owner. Normally in England, as in the United States, compensation is determined prior to vesting and is paid at the vesting of title. But, also as in the United States, there are provisions for taking possession prior to the determination of compensation.

The English have evolved a procedure somewhat akin to the American concept of inverse condemnation which allows a landowner to invoke the compulsory purchase machinery.[105] A plan, both in America and England, may designate areas for acquisition. When so designated it often becomes impossible for the owner to sell the property on the open market at the fair market value it had prior to the promulgation of the plan. The result, sometimes called condemnation blight in America, is called planning blight in England.[106] In the United States, condemnation blight was not generally recognized as compensable until recently when the injustice resulting from the interstate highway and urban renewal programs became clear. Now that the concept is recognized in America, federal and federally-aided acquirers must offer compensation as if the acquisition announcement had not been made.[107] Courts have sometimes dated the taking back to the date of disclosure of the planned acquisition or, more frequently, have valued the property for purposes of just compensation as of the date of the announcement.[108]

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104 If the authority and the owner are unable to agree upon compensation, either party can refer the matter to the Lands Tribunal, which is a specialized court consisting of a President, several lawyers, valuers, and members appointed by the Lord Chancellor. One or more of its members may be assigned to decide any one case. It has other valuation functions, *e.g.*, deciding disputed rate (property tax) valuations. The decision of the Lands Tribunal is final. However, it is primarily a fact-finder, for if parties disagree on the law, the Lands Tribunal states its valuation based on the alternative theories of law. Appeal on the law is to the Court of Appeal.

105 DAVIES, *supra* note 98, at 194-98, 203-09.

106 Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAWYER 765, 765 n.2 (1973).

107 Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4651 (1970).

108 Kanner, *supra* note 106, at 765 n.2.

In England, the problem is handled by statute.[109] If the property of a resident owner-occupier or an owner-occupier of a farm or small business is blighted by a planned acquisition so that the property cannot be sold except at a substantially reduced price, the party is entitled to serve a purchase notice on the blight-causing entity. The entity may object by serving a counter-notice that the claimant is not entitled to blight relief because the property is not to be acquired, at least not for a long period of time, or because the claimant does not otherwise meet the statutory tests, *e.g.*, he has no interest in the land or the depreciation is insubstantial. If there is a dispute over the validity of the counter-notice, the claimant can refer the matter to the Lands Tribunal. If the acquiring authority does not object or the claimant prevails, the acquiring authority is deemed to have served a "notice to treat" and the matter is thereafter handled as if it were a compulsory acquisition.

The blight provisions were changed somewhat in the Land Compensation Act 1973.[110] A circular[111] had previously encouraged local authorities to apply planning blight concepts in related situations involving proposals, indications, and plans for acquisition; the new Act now makes mandatory what was previously optional, provided the statutory conditions are otherwise met. The amendments also make it easier for the property owner to show that he could not sell the property except at a substantially reduced price. Previously, the showing of difficulty in selling had to be for the period after the proposal or plan had reached a rather high level of certainty. While a blight notice cannot be served on the basis of mere rumors, rumors can nevertheless depreciate property values. A landowner can now show inability to sell at these early stages of planned acquisition as evidence of his right to blight relief.[112]

Regardless of who invokes the compulsory purchase machinery

109 TCPA 1971, *supra* note 24, §§ 192-207.

110 Land Compensation Act 1973, c. 26.

111 DEP'T OF THE ENVIRONMENT, CIRCULAR No. 46/70.

112 For more on planning blight, *see* Hagman, *Planning (Condemnation) Blight, Participation and Just Compensation: Anglo-American Comparisons*, 4 THE URBAN LAWYER 434 (1972). On inverse condemnation, see HAGMAN, *supra* note 7, at 328-30. Purchase notices can also be used in connection with denial of certain planning permissions.

the normal measure of compensation is essentially based on market value. However, unlike the United States, where the general rule of just compensation has over time been based almost exclusively on market value,[113] England has experimented with several formulas. Prior to the Acquisition of Land (Assessment of Compensation) Act, 1919,[114] the general basis of compensation for land taken was the value of the land in the open market. Under an assumption that the owner was an unwilling seller, however, the owner would receive additional payment for inconvenience, *e.g.*, disturbance of business. A rule of thumb also came to be adopted: the property was assigned a value of 10 percent more than its market value because of the forced sale. Further, if the property was specially suited to the needs of the compulsory purchaser, *e.g.*, it was the only site in town available for a water reservoir, the compulsory purchaser was required to pay a monopoly price.

The 1919 Act established a basic market value system which has, with the exception of 1944-1959, continued to the present. From 1944 to 1947 compensation was essentially at 1939 market value plus the value of any improvement subsequent to that date. In 1947, due to the nationalization of development rights,[115] compensation came to be based on the existing use value of land rather than market value. Although the 1947 scheme was repealed in 1953, the return to a market value system took a transition period of five years. During this period substantial hardship resulted from compulsory purchase at prices lower than market.

Presently the Land Compensation Act, 1961[116] standardizes compensation, setting out six rules based on the 1919 Act: (1) no special allowance is made for the acquisition being by compulsion, thus the 10 percent extra payment is not made; (2) the value of the land is the open market value between willing buyer and seller, thus the market value test is established; (3) no additional compensation is paid because of special suitability or adaptability of the land if it is special only to one particular person or to a gov-

113 *See* HAGMAN, *supra* note 7, at 331-34.
114 9 & 10 Geo. 5, c. 57.
115 *See* text following note 132 *infra*.
116 Land Compensation Act, 1961, 9 & 10 Eliz. 2, c. 33, § 5. For a more complete discussion of the valuation rules, see DAVIES, *supra* note 98, at 115-21.

ernmental body or someone operating under governmental powers; (4) no increased compensation is given for use of land that either is illegal, is subject to restraint by a court, or is detrimental to the health of those on the premises or the public, (for example, as is theoretically the case in America, if a badly deteriorated building constitutes a nuisance, it is non-property, so no compensation may be payable, though it might have value on the market); (5) where the land is used for a purpose for which there is no general market demand for such land, the Lands Tribunal may pay reasonable costs of equivalent reinstatement if it finds reinstatement by the owner is intended; (6) Rule 2 does not affect assessment of compensation for disturbances to the owner not based on land value.

Rule 6 compensation is more generous than is typically provided in the United States, where payment for disturbance losses is not regularly available.[117] In England, an owner-occupier of urban property would be entitled to compensation for such matters as the cost of removal to other premises, depreciation in the value of fixtures, trade disturbance, and, in the case of business enterprises, damage to goodwill and depreciation or loss on forced sale of stock. Compensation for disturbance includes all loss which is the natural and direct result of the compulsory purchase.

The market value of land is affected by the uses to which it can be put. Thus, in the United States, the existing zoning or even the probability of rezoning in the near future is considered in valuing property to be acquired.[118] In England, where the planning system is much more detailed, the presence or absence of a planning permission ordinarily has more effect on value. Further, the English compulsory purchasers are required to be more generous. The Land Compensation Act, 1961 sets forth general assumptions concerning planning. First, it is assumed that the owner could have had planning permission for a purpose similar to that for which the government acquired the property. In the United States, the

117 *See* HAGMAN, *supra* note 7, at 339-40. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (1970) has provided a marked increase in generosity for federally-aided and direct federal acquisitions. It has stimulated some states to provide more generous compensation for disturbance when no federal funds are involved. *See, e.g.*, CAL. GOV'T CODE §§ 7260-74 (West Supp. 1974).

118 *See* HAGMAN, *supra* note 7, at 334-37.

government pays for the property in its ordinary highest and best use, but the fact that the acquiring government has a use for the property does not alone make that use the highest and best use. Second, it is ordinarily assumed that there is permission to undertake certain development as a matter of right, for example, development permitted under a general development order.[119] Third, the owner can apply to the local authority for a certificate stating that planning permission for a particular use might reasonably have been expected. If the certificate is issued, it is assumed that the property has a planning permission for that use. An English development plan is often more definitive than an American master plan. If a plan designates an area for a particular development, *e.g.*, a planned unit development, a planning permission for that use is assumed. If the plan shows the land to be available, *i.e.*, zoned for certain uses, it is assumed a planning permission would be available for those uses.[120]

2. Compensation for Injurious Affection

While the proposition that compensation is due an individual when governmental entities confiscate his property is widely accepted in both England and America, the issue of whether the government should compensate for mere injurious or restrictive effect caused by governmental action is much less settled. Requiring such compensation might become so burdensome to government as to discourage planning and regulation for public benefit. Problems with compensation are difficult enough when an entire parcel of property is taken. When only part is taken or when property is damaged but not taken, the complexity increases considerably. Both problems are generically covered by the term "injurious affection." In England and in America the partial taking problem is known by the term "severance." The English and American rules are similar,[121] but precise comparison here is

119 See text following note 50 *supra*.

120 Leach, *Compulsory Purchase Valuation: The Six Assumptions of Planning Permission* (pts. 1 & 2), 1973 J. OF PLANNING & ENVIRONMENTAL LAW 464, 527.

121 See HAGMAN, *supra* note 7, at 340-43. The English provisions are in the Compulsory Purchase Act 1965, c. 56.

impossible because of their complexity. One can compare the English and American approaches by analyzing some of the problems which may be encountered in compensating for injurious affection.

Generally speaking, compensation for injurious affection is paid in America only when property is taken. For example, if under state law access is a property right, it is taken by an acquisition which closes the open end of a cul de sac. In effect, since access is deemed property, the case is made into a severance case.

The rules in England have been similar. In order to recover, a property owner has to show that a property right was affected. For example, if a property owner had no right of lateral support, no compensation would be due for the removal of such support. Careless or unauthorized acts by government are compensable not by actions under the Compulsory Purchase Act 1965, but by traditional common law actions for damages.

In order to recover severance damages in England, the remaining property must be held with the property which is taken. This issue is dealt with in America by requiring a landowner to show that ownership is the same, that the remaining property is adjacent to the taken property, and that both properties were used for the same or a related purpose. Prior to the Land Compensation Act 1973,[122] English practice also required that the damage flow from the property taken. For example, if only part of a piece of property was taken for rest facilities along a highway, the remaining property was entitled to compensation only for the damage caused by the rest stop and not for damages caused by the highway; under the 1973 Act damage caused by all related public works is now recoverable.

Further, the damage must be to property rather than personal rights. Until recently, the damage had to be caused by the construction of the public work and not by its subsequent use. For example, a landowner might be injuriously affected by the building of a highway, but compensation would be limited to damage occurring during construction and would not include damage caused by subsequent noise and fumes. Once the property quali-

122 Land Compensation Act 1973, c. 26.

fied for compensation, however, the property was entitled to the full depreciation in value attributable to the act complained of.

Under Part I of the Land Compensation Act 1973,[123] Compensation for Depreciation Caused by Use of Public Works, the concept of injurious affection is extended to include nuisance-like effects flowing from the *use* of public works. Thus, landowners now have a legal right to be compensated for nuisance-like effects. In order to be compensable, the damage must flow from physical factors — noise, vibration, odors, fumes, smoke, artificial lighting, etc. — or from the discharge of any solid or liquid substance on the claimant's land. Physical factors caused by aircraft arriving or departing from an airport are considered use of the airport, an interesting development comparable to the growing Amercian trend to view airports and airport operations as nuisances.[124]

Impairment of view or increase in use, *e.g.*, increased traffic flow, is not compensable, but an alteration of public works may give rise to physical factors requiring compensation. An owner-occupier of any real estate which does not exceed a rather low maximum value, or of a farm regardless of the value, or a resident owner of a home is eligible to claim compensation; the term "owner" includes a tenant for years with at least a three year term remaining. Valuation is generally at a date one year after the opening or first use of the public works in order to allow for some experience with the use. Compensation is based on the amount of depreciation less any mitigation thereof less any betterment resulting from the works. No planning assumptions are made except that the land may be used for any use within the scope of the existing use.

The English indirectly compensate for certain kinds of injurious affection by allowing compulsory purchase of excess acquisitions in order to mitigate damages. While excess condemnation for recoupment[125] is not generally allowed in America,[126] it has

123 Passage of the Act reflects considerable dissatisfaction with the prior law. *See* DEVELOPMENT AND COMPENSATION — PUTTING PEOPLE FIRST, CMND. NO. 5124 (1972), a government White Paper which presents proposals for reform.

124 *See, e.g.*, Berger, *The California Supreme Court — A Shield Against Government Overreaching:* Nestle v. Santa Monica, 9 CAL. WESTERN L. REV. 199 (1973).

125 "Recoupment involves the purchase of more land than is necessary for the construction of an improvement and the subsequent resale of the surplus once the

been used in England[127] and ". . . the general system of compulsory purchase of land 'for planning purposes' seems wide enough to make the practice of 'recoupment' possible today in all but name . . . ."[128]

Part II of the Land Compensation Act 1973, Mitigation of Injurious Effect of Public Works, explicitly recognizes a power of recoupment providing in part that highway authorities may acquire land to mitigate damages, execute mitigating works, or pay the additional expense for alternative living accommodations during the period of construction where continued occupation is not reasonably practical. Part II further provides that the builder of public works may have to soundproof buildings near roads and airports or make grants for soundproofing. The public works builder must do so for new roads where the decibels are expected to exceed a fixed number within 15 years.[129]

The English approach of requiring payment for injurious affection and soundproofing is probably responsive to some of the same kinds of influences existing in America which force builders of public works to be less disruptive. The response in America has largely taken the form of required environmental impact statements under the National Environmental Policy Act of 1969[130] and state laws inspired by that Act.[131] Perhaps the English are wiser, for under the American approach, even though nuisance-like effects are shown, the project may still be built, and without agency liability. While in the English approach the range of environmental concern is less sweeping, agency liability may generate greater incentive to design public works so that the nuisance-like externalities do not arise.

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improvement is completed." R. TURVEY, THE ECONOMICS OF REAL PROPERTY 104 (1957).

126 *See* HAGMAN, *supra* note 7, at 316-18.

127 R. TURVEY, *supra* note 125, at 103-21, recounts some English experience with recoupment. The practice was not a major financial success.

128 DAVIES, *supra* note 98, at 216.

129 DEP'T OF THE ENVIRONMENT, NOISE INSULATION REGULATIONS 1973, CIRCULAR No. 43/73.

130 42 U.S.C. §§ 4321-47 (1970).

131 Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 1974 URBAN L. ANN. 3.

3. Compensation for Denial, Conditioning, Modification or Revocation of Planning Permissions

Compensation may be involved in England for the refusal or revocation of a planning permission. Some of the provisions are necessary to deal with the complexities caused by the Town and Country Planning Act, 1947.[132] Under that Act, development rights were nationalized and landowners were to be paid based on their claims of loss. The Act also prohibited most developments of consequence unless a planning permission was obtained. If the permission was denied, there would be no compensation since the state had already paid for all confiscated development rights. Beginning in 1953 the nationalization scheme was repealed. Instead provisions were made for compensation for loss resulting from adverse planning decisions. Prior to these changes, some claims had been made and the amount of the claims established but in many cases such claims had not yet been fully paid under the deferred payment provisions of the 1947 Act. As to the lands which had "an unexpected balance of established development value,"[133] there are special rules for compensation as related to planning permissions.[134]

As to land to which no claim had attached, however, there are still provisions for compensation, though more limited in scope and availability.[135] Recall that development includes building or other operations and change of use.[136] A permission, whether ad hoc or by GDO,[137] can be revoked or modified before the operations are complete or the change of use has been made.[138] The landowner is then entitled to make a claim to recover any expenditures in construction (including preparation of plans and other preparatory expenses) and loss or damage directly attributable to

132 10 & 11 Geo. 6, c. 51.
133 TCPA 1971, *supra* note 24, § 134.
134 *Id.* §§ 134-63.
135 There is some justification for this differentiation, in a sort of presumption that if no claim for compensation of loss of development rights was made under the Town and Country Planning Act, 1947, then there was no development value or loss when the government took from owners their unrestricted right to develop.
136 See text accompanying note 37 *supra.*
137 See text accompanying note 50 *supra.*
138 TCPA 1971, *supra* note 24, § 45.

the revocation or modification.[139] Losses incurred because the landowner proceeded before having permission are not covered. Moreover, in measuring the loss, it is assumed the property is available for modest operations or changes in use,[140] *i.e.*, an assumption would be made that the land was available for any other use within the same use class as the use to which it was previously put.[141]

If compensation is paid for revocation or modification of a planning permission, and permission is later given, the landowner may have to pay back any compensation received.[142]

In the United States a partially completed building, lawfully started, can usually be completed; it becomes a legal nonconforming use.[143] Preparatory expenditures are usually not enough to vest this right, and if the building had not started, the permitted use could be changed by regulation, and compensation would rarely be paid.[144] Nonconforming uses can be terminated in the United States after allowing a period of years for amortization, and no compensation need be paid.[145]

Compensation is also payable in England if planning permission is refused, or made conditional for development which is within the ambit of "existing use."[146] Existing use includes rebuilding, minor enlargement, use of buildings for agriculture or forestry, another use within the same class of the use class order, and the like. Generally, no compensation would be paid in the United States in an analogous situation, and it is likely that a regulation permitting no intensification of an existing use would be valid.[147]

If a planning permission is refused, conditioned, modified, or

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139 *Id.* §§ 164-65.

140 These modest differences are specified in *id.* sched. 8.

141 See text following note 48 *supra.*

142 TCPA 1971, *supra* note 24, § 168.

143 *See* HAGMAN, *supra* note 7, at 182-87.

144 The injured party is not entirely without relief. The change in zoning might be held invalid. If the regulation were directed to a particular parcel of property which a governmental entity wanted to zone for a less intensive use resulting in lowering its market value, compensation might be obtainable under an inverse condemnation action. *See id.* at 328-30.

145 *See id.* at 154-59.

146 TCPA 1971, *supra* note 24, § 169 & sched. 8, pt. II.

147 *See* HAGMAN, *supra* note 7, at 149-50.

revoked, so that land is incapable of any reasonable beneficial use, the landowner may require the purchase of the property. This "purchase notice" provision also applies if a landowner is required to discontinue a use or alter or remove buildings resulting in loss of all reasonable uses.[148] In deciding whether there is any use left, the existing planning permissions and what may be done within the concept of existing use are taken into consideration.

In the United States, compensation would typically not be paid in such a situation; rather, the regulation which precludes any reasonable economic use being made of the property would be declared invalid. If the government persisted in its regulation, compensation would be recoverable.[149]

B. *Betterment*

The underlying concept of betterment recapture is that owners of land whose value is increased by public actions should be compelled to share their windfall profits with the public. As early as 1909 the English sought to deal with this problem by requiring landowners whose property was enhanced in value by the adoption of a plan to return 50 percent of the increase in value to the state.[150] In 1932 the amount of recapture was increased to 75 percent.[151]

The effect of governmental activity on land values, however, is not easily determinable.[152] Consider a tract of land in 100 separate ownerships, all equal in size and all equally developable. While there is a forseeable demand for development of some of the sites in the future, precisely which sites will be developed is uncertain. Thus, when the first parcel is sold for development, the price is

148 TCPA 1971, *supra* note 24, §§ 180, 189, 190. For a description of how these provisions work in practice see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 267-83 (1973).

149 *See* HAGMAN, *supra* note 7, at 213-19, 323-28.

150 Housing, Town Planning, &c. Act, 1909, 9 Edw. 7, c. 44, § 58(3).

151 Town and Country Planning Act, 1932, 22 & 23 Geo. 5, c. 48, § 21.

152 Since changes in value of land caused by governmental action as distinguished from that caused by the action of other actors, *e.g.*, landowners in the vicinity, can hardly ever be measured precisely, betterment recapture schemes often measure betterment as the increase in value except that caused by the landowner's own activity.

determined by agreement of the buyer and seller. After the sale of the first parcel, however, the demand for similar parcels is somewhat reduced. If the first sale "captures" the existing demand for developable land, the value of other parcels will remain at the existing use value until new demand for development arises. As long as the development value "floats," that is, until the development value is captured by the sale of one or more parcels of land, all parcels of land within the tract possess development value even though as sales continue the development value ascribable to individual undeveloped tracts will decrease.[153]

Now consider the situation in which a governmental authority using compulsory purchase powers seeks to acquire the entire tract. Assume that only a few parcels have recently been sold. Applying the comparable sales rule, the 100 parcels acquired are valued at market on the basis of the earlier sales, even though if all 100 sellers really wanted to sell at the same time, they would receive less for their lots because supply would outstrip demand. Thus, compulsory purchasers complain they are paying too much. They claim that they have been compelled to include the "floating value" of the land in the market price. Similarly, if the government decides to compensate for regulations which restrict land use to less than the "highest and best" use of all 100 lots, landowners will say their loss is the difference between the highest and best use of each lot and the restricted use value, yet if all the lots were sold at one time, the highest and best use value would tend to approach the existing use value.

When government intervenes by permitting or stimulating development in one area or preventing it in another, the total demand for developable land remains unchanged. The government action only determines the area from which that demand will be supplied. For example, assume a tract of 100 parcels of land of equivalent development value. If the government builds a new mass transit system through the area, the tracts nearest the proposed terminals will be more desirable and will command a higher

153 In 1941 the English Government established the Uthwatt Committee. Its report, EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, FINAL REPORT, CMD. No. 6386 (1942) [hereinafter cited as UTHWATT], is regarded as the world's leading review of the problem of compensation and betterment. For a general discussion of "floating value," see *id.*, paras. 24-25, at 14-15.

price than the tracts farther away. Given the concept of "floating value" these closer lands will absorb the development values of the more remote land resulting in increases in value, betterment, for some owners and decreases in value, worsenment, for others.[154]

The Uthwatt Committee, established in 1941 to investigate this problem, recommended that the development value of all undeveloped rural land be acquired.[155] Theoretically undeveloped rural land has little value above existing use value because of lack of development demand, and therefore little compensation for acquisition of the development right would be payable. To the extent compensation was due, however, it was to be paid. When the land became developable, the Uthwatt Committee proposed that the annual value of property be determined initially and every five years thereafter.[156] "Annual value" is the amount at which property is rentable for a year (with various adjustments). Assume, for example, property which has an initial annual value of $1,000. Five years later the annual value is determined to be $3,000. This represents an increase in annual value of $2,000. Under the Uthwatt Committee proposals, 75 percent of the increase, $1,500 per year, would be recaptured.[157] This assumes that nothing was done to the property. If the increase was attributable to the construction of a building on the premises, there would be no recapture.

Of course, as previously noted,[158] the increase in value is not necessarily caused by governmental action. Suppose a parking lot exists next to a department store. The department store doubles its size, and the parking lot owner, because of increased demand for parking, is able to increase his rates. Under the Uthwatt plan, this increase in value would be recapturable so long as it was not the result of the landowner himself improving the property.

The recommendations of the Uthwatt Committee were not implemented directly, but the Town and Country Planning Act,

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154 This concept, often referred to as "shifting value," is discussed *id.*, para. 26, at 15-16.

155 *Id.*, para. 49, at 27-28 & ch. IV.

156 *Id.*, para. 311(ii), at 136; *see generally id.*, para. 51, at 29, & ch. IX.

157 *Id.*, para. 311(iii), at 137.

158 See note 152 *supra*.

1947[159] did accept the notion that developable value belong to the state. In effect, the 1947 Act nationalized development rights and thus development values in all land, leaving owners with their existing use value. A fund of £300 million was established to pay for all development values made by claims agreed to or determined by a Lands Tribunal. The claims were to be paid in July, 1953. If development permission was granted, the resulting increase in value due to government action was subject to a development charge for the entire amount. Of course, if the state acquired land, it paid only the existing use value, since any development value had already been "bought" by the state. It was hoped that planning would be financially more feasible for local authorities since they no longer had to pay compensation for restrictions on development and would be able to acquire land at existing use value.[160]

The system did not operate smoothly. Land was sold on the open market at higher than existing use value, due in part to land scarcity caused not only by planning control over development but also by the reluctance of many owners to sell. The 100 percent development charge removed any incentive to give up land, and even where a premium was offered by a developer, many held out in reliance on the return of the Conservative Party to power and the abolition of the development charge altogether. A Central Land Board was given power to acquire property by compulsion in order to counter this reluctance to sell, but the Board did not exercise its powers. As a result, developers had to pay a premium over existing use value to induce an owner to sell and then had to pay the government for the right to develop. Further, the value of the right to develop was not based on actual development values but on a projection about what the development would be worth in the future. This determination was made by the government and was not subject to appeal. Thus a developer would have to make his decision without knowing what value the government would attach to the development rights.

Upon the return to power of the Conservative Party in 1951 the development charge was abolished;[161] the return to the earlier

159 See text accompanying note 132 *supra.*

160 *See* UTHWATT, *supra* note 153, para. 49, at 28.

161 Town and Country Planning Act, 1953, 1 & 2 Eliz. 2, c. 16, § 1. In addition,

system was extremely difficult and caused much hardship, especially in providing compensation for compulsory purchase.[162]

When the Labour Party returned to power in 1964, the government again sought to tackle the betterment recapture problem. The Land Commission Act 1967[163] created a government agency to acquire land for development and provided for a betterment levy. The scheme sought to avoid two problems which had arisen under the 1947 Act. First, the betterment levy, left unspecified by the Act, was set at 40 percent by administrative order[164] instead of 100 percent, thus leaving owners with some incentive to sell. This levy was charged for the sale, lease, or material development of land. Compulsory purchase compensation was treated like a normal sale between willing parties; the owner received market value less the levy, or 60 percent of the development value. Second, to insure that land was available for development and not withheld from the market, the Land Commission was empowered to obtain land, either through agreement or by compulsory purchase, and could either develop, sell, or lease the land.[165] The compulsory acquisition for development could be viewed as a form of betterment recapture or recoupment. Only increases in development value were subject to the betterment levy. Increases in existing use value were subject to the capital gains tax.

Among the Conservative Party's complaints about the betterment levy was the complexity which resulted from taxing part of the increase in value as a capital gain. The Conservatives believed that Inland Revenue, the English analog to the Internal Revenue Service, could collect betterment more efficiently and without duplication.[166] Moreover, the Conservatives were extremely dis-

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the payments to be made in July, 1953, as contemplated in the 1947 Act, were suspended. *Id.*, § 2.

162 *See* DAVIES, *supra* note 98, at 230-32.

163 Land Commission Act 1967, c. 1.

164 *Id.*, § 27, which gave the minister the authority to set the appropriate rate. A rate of 40 percent was set by the Betterment Levy (Prescribed Rate) Order 1967, STAT. INSTR. 1967, No. 544. At the same time, the minister indicated his intention to raise the rate to 45 percent and ultimately to 50 percent in the near future. *See* D. HEAP, ENCYCLOPEDIA OF BETTERMENT LEVY AND LAND COMMISSION, LAW AND PRACTICE, para. 2-039 at 2040 (1967).

165 Land Commission Act 1967, c. 1, § 6.

166 Generally speaking, a capital gains tax is not considered to be a betterment recapture device. Capital gains are taxed because they are income, not because the community has created values which the owner of property should share with the community. But despite the theoretical differences, the capital gains tax does

pleased with the compulsory purchase powers of the Land Commission. Arguing primarily on ideological grounds, the Conservatives promised to repeal the Land Commission Act if elected. This promise was fulfilled in 1971.[167]

Late in 1973 the Conservatives sought to implement betterment recapture through the mechanism of a special capital gains tax on land.[168] Under the proposal, capital gains arising from the disposal of land or buildings were to be taxed at ordinary income tax rates. The gain to be taxed was based on increases in value above the value on the date the proposal was announced. Owner-occupied residences were to be exempt as were disposals of property by individuals which did not exceed £10,000 in one year. In order to solve the problem of business enterprises avoiding taxation through fragmented sales, the tax threshold for business enterprises was to be set at £1,000. The gain on each transaction to be taxed as income was to be the disposal proceeds less 120 percent of original cost, the disposal proceeds less 110 percent of current use value at the date of disposal, or the full gain, *i.e.*, the disposal proceeds less the original cost, less the increase in use value over the entire period of ownership, whichever formula resulted in the lowest figure. If there was no sale of property, but significant development occurred followed by a lease of the property, the lease was to be treated as a sale. This proposal seems unlikely to succeed since the February 28, 1974 election left neither the Labourites nor the Conservatives with a parliamentary majority.

Conclusion

The English revised their basic development control processes in 1947, their compulsory purchase and compensation laws in 1965 and 1973, and their local planning laws in 1968. None of these revisions arose from partisan activity by the major political

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constitute an increment recapture device. Capital gains have been taxed by the American income tax since modern income taxes were adopted in the United States in 1913, but capital gains were not generally taxed in England until passage of the Finance Act 1965, c. 25.

167 Land Commission (Dissolution) Act 1971, c. 18.

168 The Times (London), Dec. 18, 1973, at 5, col. 1.

parties. Consequently, the next few years are likely to witness no major changes in these areas regardless of the future of either the Conservatives or the Labourites. For the same reason one can expect minor revisions to be achieved swiftly and without partisan debate when the need for them becomes apparent.

By contrast, the English have not yet reached agreement on the proper approach to the betterment recapture problem. The law on this issue is likely to remain the same not because of a lack of partisan activity but because the Labour Party lacks the power to take any major initiative. Of course, Labour could conceivably adopt the Conservative proposal of a special capital gains tax on land and put through a measure with bi-partisan support. Such a course of action might be beneficial in the long run, since it would eliminate the problem of landowners holding their property off the market in the hope that a change in government would alter the recapture mechanism.[169]

An American who finds the English planning system complex and detailed may be amazed by the pride which the English have for their system and be amused by their unwillingness to change it. The English have worked hard on their system, however, and they are probably justified in their oft-stated opinion that their approach is the world's best.

It is not entirely fair, however, to compare the English system with American law. England's smaller territorial area renders it more amenable to unified control than America. The English also have the advantage of a form of government possessing more centralized direction on the national level. In assessing the American experience one must remember the predominant role of state government in planning and development control law, and the consequent babble of diverse state procedures. Until state practice is harmonized, the English system will continue to influence and impress Americans, if only for the virtue of its uniformity.

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169 In his March 26, 1974 budget statement, Mr. Healey, Chancellor of the Exchequer, announced that the special capital gains tax on land would be introduced. It was introduced as part of the Finance Bill on April 1, 1974.

ALTERNATIVES UNDER NEPA: THE FUNCTION OF OBJECTIVES IN AN ENVIRONMENTAL IMPACT STATEMENT

MICHEL G. PICHER*

Introduction

The most important provision of the National Environmental Policy Act of 1969[1] (NEPA) to date has been its requirement that a comprehensive environmental impact statement be prepared by a federal agency undertaking any "major Federal actions significantly affecting the quality of the human environment."[2] Section 102(2)(C)(iii) requires that the statement include alternatives to the proposed action,[3] and § 102(2)(D) mandates that agencies shall "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources . . . ."[4]

NEPA has been extensively litigated,[5] praised,[6] criticized,[7] and analyzed.[8] There has been comment in particular on the scope[9]

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1 42 U.S.C. §§ 4321-47 (1970).

2 *Id.* § 4332(2)(C).

3 *Id.* § 4332(2)(C)(iii).

4 *Id.* § 4332(2)(D).

5 F. ANDERSON, NEPA IN THE COURTS 298-307 (1973).

6 *E.g.*, Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

7 *E.g.*, Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239 (1973); Kreith, *Lack of Impact*, 15 ENVIRONMENT 26 (Jan. 1973).

8 *E.g.*, F. ANDERSON, *supra* note 5; Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973); Durchslag & Junger, *HUD and the Human Environment: A Preliminary Analysis of the Impact of the National Environmental Policy Act of 1969 Upon the Department of Housing and Urban Development*, 58 IOWA L. REV. 805 (1973).

9 *See* Zimmerman, *Alternatives to Proposed Actions Under NEPA: The AEC*

of alternatives that the statute requires to be considered. That scope may depend on such factors as retroactivity in application of NEPA to a project;[10] the timing of judicial review;[11] the timing, nature, extent, and duration of federal involvement;[12] and the size of the project.[13] Suggestions also have been made that, notwithstanding NEPA's command, the scope of alternatives in fact will be seriously constrained by the limited capacity of some federal agencies for environmental analysis,[14] by inherent limitations on bureaucratic decisionmaking,[15] and by the boundaries of human rationality.[16]

Response After Calvert Cliffs, 14 ATOMIC ENERGY L.J. 265 (1973); Comment, *Environmental Control: Environmental Impact Statements Must Include Discussion of Alternatives Beyond Scope of Authority of Reporting Body*, 57 MINN. L. REV. 632 (1973).

10 Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971).

11 This problem has been related to the problem of retroactive application of NEPA in transition cases. *E.g.*, Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971). The principles of review developed in the transition cases can be expected to be applied, along with traditional doctrines such as ripeness, laches, and mootness, to litigation over projects that originated after NEPA for which suit is brought under NEPA only after the project is partially completed. The true test of NEPA is whether in such cases the courts might find themselves, in the words of the *Morningside-Lenox* court, "directing the defendants to rip up a multi-million dollar highway project or otherwise to undo anything that has already been done." *Id.* at 145.

12 Hanks & Hanks, *supra* note 6, at 257-65; *Retroactive Application*, *supra* note 10, at 737. For a useful discussion of timing an environmental impact statement so as to minimize the foreclosure of alternatives, see Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81, 131-36 (1972).

13 Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972); *Environmental Control*, *supra* note 9, at 637. This article disagrees. The objective, not the size, of a project should be the primary determinant of the ambit of alternatives.

14 Cramton & Berg, *supra* note 8, at 531; Current Developments, *Environmental Impact Statements—A Duty of Independent Investigation by Federal Agencies*, 44 U. COLO. L. REV. 161, 169-71 (1972).

15 Sax, *supra* note 7, at 245-48. For material on bureaucratic decisionmaking, see generally G. ALLISON, ESSENCE OF DECISION 67-96 (1971); H. SIMON, MODELS OF MAN 196-206 (1957).

16 Consider the remarks of Dr. Dillon Ripley, concerning the kind of knowledge required to fulfill the intent of NEPA:

> So, I think it may take us a generation perhaps to achieve even the beginnings of the kind of training, the kind of production of original minds and talents that will be able to perform the sorts of biological monitoring, the sorts of biological control studies which we . . . stress the urgency of.

Joint House-Senate Colloquium to Discuss a National Policy for the Environment, Hearings Before the Senate Comm. on Interior & Insular Affairs, & House Comm. on Science & Astronautics, 90th Cong., 2d Sess. 75 (1968) [hereinafter cited as *Joint Colloquium*]. Consider also the comment of Dean D. K. Price, Kennedy School of

This study will examine the question of what range of alternatives in an impact statement a court may appropriately require. This examination will show that a rational doctrine of alternatives can be arrived at only by appreciating the function of objectives. It is the author's contention that case law and comments have made a false start in choosing criteria to define the range of alternatives required by NEPA. Specifically they have failed to articulate rules relating the breadth of alternatives to the definition of program objectives, and to consider the problems involved in defining objectives for this purpose. A doctrine determining the scope of alternatives by reference to objectives would simplify the lives of both the impact statement's drafter, who seeks to restrict the realm of alternatives to the manageable, and the environmentalist, who seeks principles to govern reviewability of the statement for failure properly to consider alternatives.

An appreciation of the function of objectives will lead to the realization that a completely coherent doctrine of alternatives consistent with the goals of NEPA may not be possible. Yet there may be no alternative to NEPA-type statutes as a means to force environmental consciousness onto decisionmakers in the public sector. The private sector may be subject to other environmental control devices such as licenses, permits, fines, effluent charges, and other tax incentives and disincentives. However, these devices cannot be brought to bear on a large segment of governmental activity, and so to some extent NEPA-type statutes may be the only way to deal with the environmental problems that arise strictly from the public sector. Therefore, while it is important to realize NEPA's shortcomings, it is still more important to strive for a workable method of applying NEPA's "alternatives" provisions.

I. The Negative Alternative: No Project

There is little legislative history indicating any specific principles intended by Congress to govern the scope of alternatives in

Government, Harvard University: "[W]e may be broadening our interests so much that it's impossible to act on [the complex of environmental problems] at all." *Id.* at 64.

impact statements.[17] Testimony in hearings on S. 1075, the NEPA bill, and the report of the Senate Committee on Interior and Insular Affairs speak only in the broadest terms of the need to consider alternatives to government programs and projects in the interest of the environment.[18] Perhaps the clearest definition is a description of the meaning of § 102(2)(C)(iii) given by the bill's principal Senate sponsor, Senator Henry M. Jackson (D.-Wash.): "[An environmental impact statement] must include a detailed statement by the responsible official on: . . . [t]he alternative ways of accomplishing the *objectives* of the proposed action and the results of not accomplishing the objectives."[19]

Senator Jackson's comment on the need to consider the results of not accomplishing a project's objective has been fashioned by the courts into an affirmative requirement to consider the alternative of having no project at all. Although Senator Jackson spoke in the context of § 102(2)(C)(iii), the court in *Calvert Cliffs' Coordinating Comm. v. AEC*[20] applied that principle to § 102(2)(D), stating:

> This requirement, like the "detailed statement" requirement, seeks to insure that each agency decisionmaker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost benefit balance.[21]

In the leading case on the NEPA alternatives requirement,

17 For an account of the legislative history, see Hanks & Hanks, *supra* note 6, at 244-51; Zimmerman, *supra* note 9, at 269-76; S. REP. No. 296, 91st Cong., 1st Sess. 10-12 (1969).

18 The following passages are typical of the generality of discussion respecting alternatives: "In summary, to make policy effective through action, a comprehensive system is required for the assembly and reporting of relevant knowledge; and for placing before the President, the Congress and the people, for public discussion, the alternative courses of action that this knowledge suggests." SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 90TH CONG., 2D SESS., A NATIONAL POLICY FOR THE ENVIRONMENT 11 (Comm. Print 1968), in *Joint Colloquium*, *supra* note 16, app. I, at 104. "Priorities and choices among alternatives in environmental manipulation must . . . be planned and managed at the highest level of our political system." SENATE COMM. ON INTERIOR & INSULAR AFFAIRS & HOUSE COMM. ON SCIENCE & ASTRONAUTICS, 90TH CONG., 2D SESS., CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT 15-16 (Comm. Print 1968).

19 115 CONG. REC. 40,420 (1969) (emphasis added).

20 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

21 *Id.* at 1114.

Natural Resources Defense Council, Inc. v. Morton,[22] the court referred to Senator Jackson's words in declaring that an impact statement must consider the alternative of no project at all under § 102(2)(C)(iii).[23]

II. The Scope of Positive Alternatives

A. Natural Resources Defense Council, Inc. v. Morton: *A False Start?*

Alternatives other than the alternative of no project at all may be termed "positive" alternatives. The range of positive alternatives will often be the major source of disagreement in litigation between administrators and environmentalists. Judicial analyses of the required range of such alternatives therefore merit examination.

Natural Resources was decided by the court with the greatest influence on NEPA.[24] In that case the court enjoined the Secretary of the Interior from issuing leases for oil and natural gas drilling on the outer continental shelf off eastern Louisiana. The court found the impact statement prepared by the Department of the Interior deficient in that it failed to explore such alternatives to further offshore drilling as altering existing oil import quotas to permit greater use of foreign sources and increasing onshore exploration.[25]

The most important conclusion of the court was that agencies may be required to consider alternatives which are beyond their own power to implement, especially when the proposed action is related to a coordinated plan to deal with a broad problem.[26] The court added that alternatives that require legislative changes must sometimes be considered,[27] and alternatives not feasible within

22 458 F.2d 827 (D.C. Cir. 1972).

23 *Id.* at 833.

24 The federal courts of the District of Columbia are available to most NEPA litigants. Durschslag & Junger, *supra* note 8, at 832 n.97.

25 458 F.2d at 834. The opinion was ambiguous on whether the alternatives of developing nuclear power, freeing production from state prorationing, or changing the natural gas pricing policies of the Federal Power Commission should have been considered. *Id.* at 837-38.

26 *Id.* at 834.

27 *Id.* at 837.

the time span of the project need not be considered.[28] Finally, the court emphasized that its requirements regarding alternatives are "subject to a construction of reasonableness."[29]

The court viewed the proposed oil and gas leases in the greater context of the President's June 4, 1971 message to Congress on energy.[30] It found the project so related to that statement of national policy that a broader development of alternatives was required than might be the case in a narrower undertaking:

> The scope of this project is far broader than that of other proposed federal actions discussed in impact statements, such as a single canal or dam. . . .
>
> When the proposed action is an integral part of a coordinated plan to deal with a broad problem the range of alternatives that must be evaluated is broadened.[31]

The court may not have intended this statement as the guiding principle on the scope of alternatives. However, since this is the first major case construing what the court termed "the scope of the requirement of . . . a discussion of alternatives"[32] and since there are no other succinct statements of this kind in the decision, there is a danger that other courts will adopt this statement, out of context, as the governing rule on the scope of alternatives. That this has already occurred[33] demonstrates the importance of understanding the limitations of the court's statement.

To the extent that this statement of the *Natural Resources* court is an observation that the number of alternatives available increases with the breadth of a project, it is neither profound nor necessarily correct. Common sense suggests that big projects have greater ramifications than small ones. However, it is not true that broad scope and integration into a coordinated plan always impart a broader range of alternatives. For example, the nuclear test on

28 *Id.* at 837-38.

29 *Id.* at 837.

30 7 WEEKLY COMP. PRES. DOC. 855 (1971).

31 458 F.2d at 835.

32 *Id.* at 829.

33 One court relied on just this language from *Natural Resources* to find that a special burden regarding alternatives attached to the water-cooling system of a fossil-fueled electrical generating plant: "Here, because the cooling system is integral to the power plant, alternatives are especially important. As was said in *Natural Resources Defense Council, Inc. v. Morton* . . . ." Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696, 708 (S.D.N.Y. 1972).

Amchitka, itself the subject of NEPA litigation,[34] was both a sizable project and an integral facet of a broad, coordinated plan addressed to national defense and foreign policy. However, those attributes did not readily suggest a broad range of alternatives for the decisionmaker beyond the alternatives of testing in a different location and no test at all. Conversely, a project decision very limited in scope and not an integral part of a coordinated plan may give rise to many alternatives. An example is the decision on use of land after slum clearance as part of an urban renewal project. The alternative uses for such land are limited only by geography and the planner's imagination.

The court may have meant that larger projects do not necessarily spawn a greater *number* of alternatives, but do require more *thorough* consideration of relevant alternatives. But this interpretation is not stated explicitly, and it is still unsatisfactory if it tends to ignore that apparently small and isolated federal actions can have widespread environmental ramifications. For example, small adjustments in fuel allocations or sales taxes on gasoline might have large effects on the national pattern of energy use, and in turn on the environment.

There are other limitations on the usefulness of the teaching of *Natural Resources*. For example, requiring consideration of only those alternatives feasible within the time span of the project will permit the long term waste of resources.[35] Also, uncertainty arises from the court's statement on the one hand, that decisionmakers must consider alternatives which are beyond their power and require legislative implementation because it is their duty to enlighten the ultimate decisionmakers (the President and Congress), but on the other hand that alternatives requiring a change of law

34 Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 463 F.2d 788, 463 F.2d 796 (D.C. Cir.), *application for injunction in aid of jurisdiction denied sub nom.* Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917 (1971).

35 Comment, *Proper Time Limitations on Outer Continental Shelf Leases Under the National Environmental Policy Act*, 10 HOUSTON L. REV. 158, 166 (1972). In *Natural Resources*, the leases were supposed to meet short term energy needs over a period of 5 to 15 years, but recovery operations under the leases were expected to last for a period of 26 years. The court required a study of alternatives only through 1980, the period of short term energy need. The Comment suggests that greater economy might result if the court required a study of alternatives through the entire period of expected operations.

need not always be considered. The court stated, for example, that alternatives requiring a change in the antitrust laws need not be considered.[36] It is difficult to understand why this should be so. If it could be shown that the antitrust laws operated to cause an environmentally negative result, why is it not an agency's duty to advise the President and Congress of this fact by suggesting the environmental alternatives that would be possible in the absence of those laws?

Leading cases such as *Calvert Cliffs'*[37] and *Natural Resources*[38] have not explored directly how the definition of the objective of a given project may govern the scope of alternatives required. Nor have the commentators.[39] Among the important NEPA cases only *Sierra Club v. Froehlke*[40] appears to articulate the function of objectives in its discussion of alternatives. In a particularly sensitive judicial analysis of NEPA, Judge Bue there enjoined the Secretary of the Army and the Corps of Engineers from proceeding with major river and canal works in Texas, pending both procedural and substantive compliance with NEPA. In his discussion of alternatives Judge Bue adopted Senator Jackson's definition,[41] and in discussing the methodological approach for compliance with §§ 102(2)(C)(iii) and 102(2)(D), he stated: "The proper method for approaching a consideration of alternatives under NEPA is to consider first the primary purposes or functions that the project is to serve."[42]

The court in *Natural Resources* quoted Senator Jackson's reference to objectives[43] and the effect of the decision was to require the Secretary of the Interior to explore alternative means of achieving the broad objective of providing energy to the nation. If the court really meant to say that the objective determines the scope of alternatives, then implicit in its opinion is a broad defini-

36 458 F.2d at 837.

37 *See* 449 F.2d at 1114.

38 *See* 458 F.2d at 835.

39 Commentators have been generally uncritical of the doctrine in *Natural Resources* that the scope of alternatives should be governed by the size of a project and its relationship to a broad program qualified only by the "rule of reason." *E.g.*, Zimmerman, *supra* note 9, at 287; *Environmental Control*, *supra* note 9, at 637.

40 359 F. Supp. 1289 (S.D. Tex. 1973) (Trinity River-Wallisville Dam).

41 *Id.* at 1343.

42 *Id.* at 1353.

43 458 F.2d at 833.

tion of "objective": for the purposes of NEPA, offshore oil development is not an objective in itself but a means to the greater objective of obtaining oil, or more broadly still, energy. Under this definition of objective the scope of alternatives is at least as wide as the range of plausible sources of energy. The problem with this reading of *Natural Resources* is the lack of explanation as to how the court came to determine the objective. Arguably, the court might have considered the objective to be "the sound use of energy" or "sound energy policy," and so have required research into the alternatives of energy rationing, lowering speed limits, extending daylight saving time, and adjusting foreign policy in the Middle East. As long as honest men may differ about what objectives truly are, the "construction of reasonableness" will be a less than reliable beacon to the boundaries of administrative activity.

If bound only by the limits of "reasonableness," the definition of objectives may become a device in the hands of the court, just as it might be in the hands of an administrator, to justify a result chosen for other reasons. The environmentally desirable result of *Natural Resources* would flow easily from the facts of that case, a doctrine that objectives determine possible alternatives, and the court's broad characterization of the objectives. But a problem must be recognized once a court ventures to cast an agency's objectives in this way: the court may achieve environmentally optimal results only at the expense of great administrative uncertainty. Agencies unsure how broadly they must cast their objectives nets will inevitably cast them, on occasion, rather more broadly than courts would require; time and resources are thus wasted. If too broad or too ambiguous a judicial standard is set down, each agency could do little else than study what other agencies might do. Adjudication of the scope of objectives (and thus alternatives) on a strictly case-by-case basis will also invite such a quantity of environmental litigation as very nearly to paralyze a federal bureaucracy not now noted for much speed or decisiveness.

If reference to objectives is the best way to minimize confusion over the scope of alternatives, something better than judicial opportunism is needed to avoid a parallel confusion over the scope of objectives. NEPA is in need of a doctrine relating alternatives

to objectives and establishing a basis for determining the scope of objectives. Such a doctrine should not permit the administrator to manipulate his statement of objectives so as to define away alternatives. Yet it should give him concrete guidance for determining the scope of alternatives that the courts will require him to explore.

B. *Positive Alternatives as a Function of Objectives*

It will be helpful to distinguish three levels of governmental objectives. (1) The *broadest* practical statement of objectives is defined in terms of broad societal needs, and the corresponding range of alternatives includes all courses of action that promote the same broad ends. For example, the purpose of a highway can be described as the promotion of transportation and communication, and the correspondingly broad range of alternatives must include such generically different alternatives as railroad, air, and water transportation. (2) In contrast, the *statutory* objective of a given federal agency is ordinarily defined more narrowly. For example, an agency may be empowered to assist highway systems but have no legal basis to expend public funds on railroad or air transportation. Such an agency is statutorily restricted to the objective of highway construction. (3) Finally, agencies often speak in terms of a still more narrowly defined *project* objective. For example, the highway agency can state that a project's objective is to build a freeway between two specific points. Consideration of a freeway between two different points or construction of a different type of highway would not be relevant to such a project objective, even though both actions would be relevant to the statutory objective of highway construction.

It will generally be to the advantage of the environmentalist-plaintiff to cast the objective in the broadest terms, forcing the administrator to consider a wide range of alternatives, some of which are likely to be more environmentally palatable than the agency's proposal. On the other hand, the administrator will generally seek to characterize his proposed action with the project objective because he may lack the financial and personnel resources needed to study wide-ranging alternatives. Indeed, he may have no statutory authority to develop the expertise necessary to carry out wide-

ranging studies. In any event extensive study will cost time and money the administrator would prefer not to spend. The judicial resolution of this conflict over objectives definition will be critical to the functioning of NEPA and will be explored more fully below.

1. Statutory Constraints: An Example

The Department of Housing and Urban Development (HUD) has been preparing an impact statement for a major urban renewal project on 87 acres in downtown San Francisco.[44] Largely through HUD financing, the San Francisco Redevelopment Agency has purchased and cleared the previously blighted site. The planned reuse is a convention complex, the Yerba Buena Center, to include a large indoor sports arena, apparel mart, hotel, off-street parking, meeting halls, shopping mall, office buildings, and some low and moderate income housing.[45]

Such an undertaking has a considerable effect on the environment and is subject to NEPA.[46] The draft impact statement for the Center describes the objective as follows: "It was intended to eliminate substandard buildings and blighted surroundings and to provide land for re-use for activities appropriate to this downtown location."[47] This definition of the objective suggests a broad range of alternatives, for there are a great number of rational uses for such valuable land. On the other hand, if the objectives state-

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44 For detailed account of the facts, see San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D. Cal. 1972), *aff'd in part*, 472 F.2d 1021 (9th Cir. 1973); ARTHUR D. LITTLE, INC., SAN FRANCISCO & U.R.S. RESEARCH CO., SAN MATEO, YERBA BUENA CENTER PUBLIC FACILITIES AND PRIVATE DEVELOPMENT, ENVIRONMENTAL IMPACT REPORT (DRAFT) (May 1973) [hereinafter cited as DRAFT E.I.R.].

45 DRAFT E.I.R., *supra* note 44, at I-9 to -10.

46 In fact, *San Francisco Tomorrow v. Romney* held that NEPA did not apply to Yerba Buena Center since the major federal actions predated NEPA. 342 F. Supp. at 82. However, the court stated that any major change in plans having ecological significance would be subject to NEPA. *Id.* Following that decision, litigation arose over the relocation of residents of the urban renewal area, and resulted in a settlement that added middle and low income dwelling units to the project. TOOR v. HUD, Civil No. C-69-324-SAW (N.D. Cal., filed Nov. 5, 1969, dismissed July 19, 1973). The design changes were such that HUD felt itself bound to prepare an impact statement for the entire complex.

47 DRAFT E.I.R., *supra* note 44, at III-1.

ment were more narrowly defined at the outset, whole worlds of logical alternatives might be eliminated by the stroke of a pen. The objective might have been phrased as follows: "The primary intention of the project is to satisfy San Francisco's urgent need for a large and comprehensive convention center." Then, any discussion of alternatives to a convention center would become irrelevant as inconsistent with the stated purpose. Once the objective so stated is accepted, the discussion of alternatives is automatically reduced to evaluation of internal design variations for the convention center, or to alternate sites. Potentially this is a serious impairment of the environmental protection function of NEPA. To what extent can an administrator gerrymander the statement of objectives in his impact statement to avoid alternatives that would qualify for attention if the objective were more broadly defined?

Two essential tools of urban renewal are federal funds and the power of eminent domain granted by state law. For a project to qualify for HUD urban renewal grants and loans, it must conform to the following definition of "urban renewal project" under the federal statute:

> "Urban renewal project" or "project" may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area . . . .[48]
>
> "Urban renewal area" means a slum area or a blighted, deteriorated, or deteriorating area in the locality involved which the Secretary approves as appropriate for an urban renewal project.[49]

Thus, the San Francisco Redevelopment Agency is *required* to characterize the primary purpose of its project as slum clearance or prevention, in order to qualify for the necessary federal funding. In turn, the statute requires HUD to describe the project's primary objective in the same terms, whether for the purpose of an impact statement or any other. Under California law this purpose also suffices to permit exercise of the power of eminent domain.[50]

48 42 U.S.C. § 1460(c) (1970).
49 *Id.* § 1460(a).
50 CAL. CIV. PRO. CODE § 1238 (West 1972).

It may be useful to speculate on the consequences if federal legislation defined urban renewal more broadly, as for example: "the elimination of slums and blight or, with the approval of the Secretary, any other public purpose of urban improvement for which the power of eminent domain may be exercised by a local agency." California law would permit the exercise of eminent domain, quite apart from slum clearance, for construction of many types of convention centers.[51] Hence, the hypothetical objectives statement above, calling for a "large and comprehensive convention center," could be used as a device to restrict the discussion of alternatives in an impact statement under NEPA.[52] However, because a federally funded urban renewal project's impact statement must describe the project in terms of the broader statutory objective, the impact statement should be required to consider the correspondingly broader alternatives.

2. Statutory Objective or Project Objective?

Most enabling legislation will not compel articulation of statutory objectives. Federal officials responsible for preparation of impact statements can be expected to state objectives in the narrowest project terms, and thereby avoid the consideration of as many alternatives as possible. Moreover, an administrator working under a narrowly defined statutory objective or a wide selection of narrow statutory objectives may be able to describe his program in terms as broad as a relevant statutory objective, but at the same time exclude a wide range of alternatives.

NEPA ought to be read as requiring consideration of all alternatives through which the relevant statutory, not project, objective of the acting agency can be effected. This reading is sound first because statutory objectives reflect the general will of Congress, while project objectives more often reflect the case-by-case

51 *Id.* § 1238.4.

52 The same objectives statement would probably also pass muster under the California Environmental Quality Act of 1970, under which the alternatives requirement is identical to § 102(2)(C)(iii) of NEPA. CAL. PUB. RES. CODE § 21100(d) (West 1973). However, the San Francisco Redevelopment Agency may be unable to use this device if its own statutory jurisdiction is limited to matters of urban renewal and slum clearance. *See* CAL. HEALTH & SAFETY CODE § 33131 (West 1973).

linguistic dexterity of the administrator. If Congress explicitly commands an agency to develop strip-mining, NEPA is of little aid. But if Congress' mandate is generally to regulate mining, one must look more sharply at an administrator's choice of "more strip-mining" as his objective. Because project objectives are (or can be) written to avoid alternatives, use of them as the standard to determine alternatives is self-defeating. Such use undermines the basic purpose of this part of NEPA: to compel agencies to explore alternatives which may be environmentally superior, but are less convenient from the agencies' parochial perspective.

To select "relevant statutory objective" as the standard does not end the problem, however. Courts must be prepared to examine the administrator's selection of what may appear to be alternate statutory objectives. For example, a statute might state a principal objective, such as clean water, and list a number of means to that end, such as filtration plants, sewage treatment, and industrial waste disposal. The language of the statute may term the latter objectives, but a court should regard them as alternative means to the principal objective, and require inclusion of all alternatives effecting that principal objective in the impact statement.

The alternatives section of NEPA will nonetheless be of unequally effective application in practice, because federal agencies whose range of statutory purpose is narrow may have a lighter burden than agencies with one or a few broadly defined purposes. The urban renewal program, with almost open-ended possibilities as to alternative reuses of cleared land, stands in contrast to certain activities of the U.S. Army Corps of Engineers pursuant to narrowly defined objectives. An example is the jurisdiction of the Corps over matters of flood control.[53] In this instance, the discussion of alternatives will consider relatively few courses of action — the possible locations and designs of a dam or reservoir and the alternative of no action.

In many instances programs will have numerous objectives of varying degrees of importance. Attempts to identify one primary objective or to establish a priority of objectives, some of which may be mutually inconsistent, will be strained and artificial at

53 33 U.S.C. § 701 (1970).

best. But there may be no escape from this straining if the legitimacy of an agency's impact statement is to depend upon the yardstick of its statutory objective or objectives.

3. A Broader Statement of Objective?

The courts have engaged in active review of impact statements under NEPA and, as in *Natural Resources*, they have tended to require a broad consideration of alternatives.[54] Generally, the cases have not dealt with the alternatives requirement in terms of those objectives fairly derivable from an agency's legislative mandate. Rather, the courts require an agency to consider alternatives that will serve that broadest practical objective of a project. For example, in *Natural Resources* the Secretary of the Interior could not confine the range of alternatives to be considered by defining his objectives as procuring oil from the continental shelf, or even procuring oil generally. The *Natural Resources* court chose to impute to the project, and thus to the alternatives discussion of its impact statement, the greater objective of procuring energy for the United States. This is the real import of the *Natural Resources* court's finding that the agency must consider alternatives that it does not have the power to implement, and it explains the court's rationalization of the requirement for a broader scope of alternatives on the basis of the size of a project and its relation to a broad, coordinated plan.

Whether it is necessary to apply the broadest practical objective function as in *Natural Resources*, rather than the more narrow statutory objective function, raises a serious issue of statutory construction. Albeit productive of an environmentally desirable result, *Natural Resources* may rest on questionable legal grounds. The argument against *Natural Resources* is drawn from basic principles of statutory construction: governmental agencies, being creatures of statute, may do only those things that they are constitutionally and statutorily empowered or required to do.[55]

54 *E.g.*, Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 740 (D. Conn. 1972).

55 United States v. Baltimore & O.R.R., 293 U.S. 454, 463 (1935); Morrill v. Jones, 106 U.S. 466, 467 (1882); American Brass Co. v. Wisconsin State Bd. of Health, 245 Wis. 440, 448, 15 N.W.2d 27, 30 (1944).

Agencies' powers and duties must derive from clear and express statutory terms and new powers and duties are not lightly to be inferred from general statutory language; nor is it to be easily assumed that Congress intended to depart from an established policy.[56] The language of §§ 102(2)(C)(iii) and 102(2)(D) of NEPA does not show explicit congressional intent to confer on all federal agencies the power or duty to explore programs beyond the scope of their express statutory mandates, and hence it should be read as requiring them to explore alternatives only within their statutory powers. To read §§ 102(2)(C)(iii) and 102(2)(D) otherwise, as the court did in *Natural Resources,* would expand the scope of activities of federal agencies in an almost limitless fashion. Absent more specific language, it could not have been Congress' intention to expand the jurisdiction of all federal agencies to make each a universal planning body with a limitless power to spend time and appropriated funds[57] in endless environmental study and recommendation. Rather, it seems most probable that Congress intended each agency to investigate those alternatives within the purview of its particular field of experience and statutory competence.

This argument is not unanswerable.[58] Yet it may be especially important in view of indications that a majority of the Supreme Court may be predisposed to an interpretation of NEPA more restrained than that in many lower courts. The Court appears concerned with the administrative paralysis that NEPA threatens to visit on the various federal agencies.[59]

56 Robertson v. Railroad Labor Bd., 268 U.S. 619, 627 (1925); *see* cases cited at note 55 *supra.*

57 3 J. SUTHERLAND, STATUTORY CONSTRUCTION § 6603 n.17 (3d ed. 1943).

58 The counter-argument is that since the term "alternatives" is ambiguous as to its scope, a broad meaning may be inferred from the intent of Congress and the purpose of NEPA as a whole. *See id.* § 6604.

59 Consider remarks of Chief Justice Burger as Circuit Justice for the District of Columbia, "reluctantly" sustaining a NEPA-based injunction:

> Our society and its governmental instrumentalities having been less than alert to the needs of our environment for generations have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.

Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 409 U.S. 1207, 1217-18 (1972). The Supreme Court reversed the District Court in

C. *The Scope of Judicial Review*

A doctrine determining statutory objectives and deriving the scope of alternatives from those objectives will only be as effective as the courts are willing to make it. Absent judicial requirement of a statement of statutory objectives, few administrators can be expected to take on the extra alternatives burden such a definition implies. Consequently if NEPA's alternatives provisions are to serve their purpose, courts must be willing to scrutinize an agency's statement of objectives in light of that agency's statutory mandate.

As has been noted earlier,[60] the major NEPA opinions thus far seem if anything overzealous in their application of the alternatives provisions. There is some danger that a greater judicial reticence might surface, however, when the issue shifts to examination of objectives. Courts may view the phrasing of objectives in an impact statement as questions of "policy," and shrink from active scrutiny beneath a mantle of deference to the "political" branches on such matters.[61] Such judicial reticence would give rise to the danger of self-serving gerrymandering of statements of objectives by administrators.

This result is neither desirable nor necessary. If NEPA's alternatives clauses are read to require inclusion of all alternatives effecting statutory objectives, the question of what those objectives are is one of statutory construction. On such questions the courts have no obligation to defer to administrative judgment, or give it any more weight than they think it merits.[62] Thus in construing statutory objectives for purposes of NEPA, courts have a far freer hand than in reviewing findings of fact upon which agency project objectives may be based.[63] Judges should be in no hurry to accept

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United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). *See also* the implicit attitude towards earlier NEPA decisions. *Id.* at 722-24 (partial dissent of White, J., joined by Burger, C.J., and Rehnquist, J.).

60 See text at notes 20-33 *supra.*

61 *Cf.* Berman v. Parker, 348 U.S. 26 (1954).

62 "Undoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944).

63 In particular, this distinction invalidates any analogy that might be drawn to courts' reluctance to go behind an agency's statement of its own reasons for

an agency's version of its own legislative mandate, especially when the agency's interest in defining that mandate is hostile to an express congressional policy.

Conclusion

The objective function points up the workings of the alternatives sections of NEPA. It also indicates the limitations of that statute. On the one hand, if NEPA always intends the broad objective function, such as the *Natural Resources* court seemed to find, it creates a burden intolerable for any bureaucracy because there may be no limit (or at least no predictable limit) to the alternatives that must be considered. Restriction of the objective function to the more narrow dictates of agency enabling legislation will sharply restrict the search for alternatives — the lifeblood of constructive environmental policy. Yet a statutory objective standard may be the best, or least bad, possibility. Restriction will be greater still, and to the author's mind excessively narrow, if the objective function is confined to project objectives.

NEPA is a vital step in the trial and error process of environmental legislation. And to the extent that NEPA may be the only environmental regulation controlling some forms of federal endeavor, it is vital for the courts to give effect to it and to articulate a doctrine respecting the definition of objectives, and hence the scope of alternatives that NEPA requires. It will not do for courts to engage in the judicial wizardry of defining objectives to suit the courts' purpose in each case; rather it is incumbent on the courts to arrive at a doctrine of objectives that will restrain the court, be a clear guide to administrators, and serve the policies of NEPA. That will not be easy. Indeed, it may sometimes prove impossible. But it should be tried.

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undertaking a given project. For an example of such judicial reticence, see Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659, 120 N.Y.S.2d 758 (1953), *cert. denied*, 374 U.S. 934 (1954).

NEPA'S ENVIRONMENTAL IMPACT STATEMENT, SOCIAL IMPACT, AND FEDERALLY FUNDED LOW INCOME HOUSING

J. TUCKER ELM*

[There is a] growing use of the rhetoric and symbols of the environmental movement by those who seek to confine minorities and poor people to the environment of the ghetto.[1]

Introduction

Section 102(2)(C) of the National Environmental Policy Act (NEPA) requires federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare detailed statements which describe the impact of the proposed federal action on the existing environment.[2] A major purpose of the Act and its operational requirement of impact statements is "to promote efforts which will prevent or eliminate damage to the environment."[3] This article will first discuss two aspects of NEPA's scope which are raised by its application to federally subsidized low income housing: 1) What is included in NEPA's conception of the environment? Does NEPA apply only to the physical environment or does it extend to the social environment, including elements of psychological well-being, physical security, and aesthetics? 2) Does NEPA apply only to the environmental effects of purely physical causes, or is it also directed at the impacts of sociological ones?[4]

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1 N.Y. Times, Jan. 21, 1973, at 22, col. 4 (remarks of Percy Sutton, Borough President of Manhattan).

2 42 U.S.C. § 4332(2)(C) (1970).

3 *Id.* § 4321.

4 "Sociological causes" here refers to behavior patterns exhibited by various identifiable groups within the larger society.

The article will argue that NEPA does apply to both physical and sociological impacts upon both the physical and the social environment, and will indicate through a discussion of a recent case that the statutory language might be employed by groups wishing to use the impact statement as a device for improperly excluding the poor and non-white from existing social environments. It will then demonstrate that traditional concepts of judicial review of agency action can be used by courts to inhibit discriminatory use of NEPA without deviating from the congressionally required, broad definitions of environment and environmental impact.[5]

In order to illustrate the difference between psychological and sociological factors and purely physical ones, we might consider two hypothetical federally funded low income housing projects. The several square mile area within which our hypothetical housing is to be constructed can be characterized as "white middle class residential." The first proposal, "Gargantuan Towers," consists of two 25 story apartment structures, each containing 250 units. The second proposal is a 500 unit low-rise scattered site project, "Diaspora Estates." In it one hundred sites, each housing between four and six families, would be dispersed over a several square mile area.

Even though Gargantuan Towers and Diaspora Estates would each provide the same quantity of housing, the physical environmental effects would be very different. Those of the Gargantuan Towers will be substantial; those of the scattered site project minimal. Because of its dispersed nature, Diaspora Estates will have little adverse effect on municipal services, schools, traffic arteries, etc. It may, however, produce purely sociological environmental impacts caused, for instance, by the behavioral characteristics exhibited by low income people. If, as will be argued, NEPA applies to such sociological and psychological influences, an impact statement might have to be prepared for Diaspora Estates despite its insignificant physical impact.

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5 While not necessary to the argument, it is submitted that the great strength of NEPA lies precisely in its applicability to appropriate psychological and sociological considerations.

I. Statutory Interpretation of "Human Environment," "Affect," and "Impact"

NEPA requires that a detailed impact statement be prepared for every major federal action "significantly affecting the quality of the human environment."[6] The words "affect," "impact," and "human environment," however, are nowhere defined in the Act.

A. *"Human Environment"*

Environment has been defined as "the surrounding conditions, influences, or forces that influence or modify: [such] as . . . the aggregate of social and cultural conditions that influence the life of an individual or the community."[7] Does "environment" as used by NEPA comprehend this broad notion of environment, or does the Act contemplate a more restricted meaning of the term?

It is presumed that Congress intends the ordinary meanings of words.[8] NEPA § 102(2)(B) directs that "presently unquantified environmental amenities and values" be given appropriate consideration in agency decisionmaking,[9] but nowhere in the Act are these "amenities and values" defined. NEPA does seem to use "environment" to denote "safe, healthful, productive, and esthetically and culturally pleasing surroundings."[10] It also speaks of "an environment which supports diversity and variety of individual choice."[11] Thus NEPA seems directed toward a view of "environment" which encompasses not only inanimate, physical aspects but also social conditions and forces.

Senator Henry Jackson (D. — Wash.), the principal sponsor of NEPA, apparently intended that it protect the social environment. In explaining the Act to fellow senators, he suggested that NEPA was addressed to environmental problems which "detract from man's social and psychological well-being."[12] The Council on En-

6 42 U.S.C. § 4332(2)(C) (1970).

7 Merriam-Webster New International Dictionary 760 (3d ed. 1966).

8 *See generally* Swarts v. Siegel, 117 F. 13, 18-19 (8th Cir. 1902); 2A J. Sutherland, Statutes and Statutory Construction § 46.01 (4th ed. 1972).

9 42 U.S.C. § 4332(2)(B) (1970).

10 *Id.* § 4331(b)(2).

11 *Id.* § 4331(b)(4).

12 We see evidence of this inadequacy [of present environmental programs] all around us: haphazard urban and suburban growth; crowding, congestion,

vironmental Quality, created to advise the President on steps to improve the environment, apparently believes that NEPA mandates a broad definition of environment. Its guidelines direct federal agencies to include an assessment of the impact on the "social and economic" environment in an impact statement.[13] The agencies themselves assume that the NEPA environment "is meant to be interpreted broadly to include physical, social, cultural, and aesthetic dimensions."[14]

The case law has raised but not decided the question of NEPA's application to man's social environment. At least one court has mentioned "psychic irritation" in connection with the consideration of alternative proposals for federal action.[15] The leading case is *Hanly v. Kleindienst*,[16] in which residents of lower Manhattan sought to block the construction of a penal facility in their neigh-

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and conditions within our cities which result in civil unrest and detract from man's social and psychological well-being; the loss of valuable open spaces; inconsistent and often incoherent rural and urban land-use policies; critical air and water pollution problems, ...

115 CONG. REC. 40,417 (1969).

13 Secondary, as well as primary consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e.g., highways, airports, sewer systems, water resource projects, etc.), stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities and through inducing new facilities and activities, may often be even more substantial than the primary effects of the original action itself.

Council on Environmental Quality, Preparation of Environmental Impact Statements, Proposed Guidelines, 38 Fed. Reg. 10856, 10859 (1973).

14 The Department of Housing and Urban Development (HUD) defined the term as follows:

Environment is not defined in NEPA or in the CEQ Guidelines. However, it is clear from Section 102 of the Act and elsewhere that the term is meant to be interpreted broadly to include physical, social, cultural, and aesthetic dimensions. Examples of environmental considerations are: . . . land use planning, site selection and design, subdivision development, . . . urban congestion, overcrowding, displacement and relocation resulting from public or private action or natural disaster, noise pollution, urban blight, code violations and building abandonment, urban sprawl, urban growth policy, preservation of cultural resources, . . . urban design and the quality of the built environment, the impact of the environment on people and their activities.

U.S. Dept. of Housing & Urban Development, Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality, 38 Fed. Reg. 19182, 19183 (1973) [hereinafter cited as HUD Policies].

15 Town of Groton v. Laird, 353 F. Supp. 344, 351 (D. Conn. 1972) (dictum).

16 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

borhood. They attacked the decision of the General Services Administration not to prepare an impact statement and alleged that the presence of the facility and an adjoining drug treatment center in their neighborhood would lead to an increased crime rate. The court ruled that the GSA must investigate this problem before deciding whether there would be any significant environmental impact. In dicta the court and a dissenting judge debated whether "psychological and sociological effects upon neighbors"[17] should be considered when determining the significance of environmental effect. Judge Mansfield, for the majority, stated that because such considerations do not lend themselves to measurement, they should not be included.[18] Chief Judge Friendly in dissent, however, saw

> no ground for the majority's doubt "whether psychological and sociological effects upon neighbors" constitute the type of factors that may be considered . . . . The statute speaks of "the overall welfare and development of man," 42 U.S.C. § 4331(a) and makes it the responsibility of Federal Agencies to "use all practicable means . . . to . . . assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."[19]

Judge Friendly suggested that the majority's doubts might subside should the GSA try to build such a facility at Park Avenue and East 72nd Street.[20]

Though no court to date has explicitly so held, the proposition that NEPA contemplates a broad view of human environment is supported by the language of NEPA, its legislative history, the directives of the Council on Environmental Quality, and federal agency interpretations of NEPA's requirements.

B. *"Affect" and "Impact"*

Like the term "human environment," "affect" and "impact" are nowhere defined in NEPA. The courts have had no difficulty in recognizing tangible physical impacts on the environment.[21] The

17 *Id.* at 833.
18 *Id.*
19 *Id.* at 839.
20 *Id.*
21 *See, e.g.*, Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971); National

Second Circuit has further indicated that NEPA "must be construed to include protection of the quality of life for city residents. Noise, traffic, over-burdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' . . . ."[22] The court apparently equated "human environment" with "quality of life." NEPA specifically directs agencies of the federal government to use ". . . natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."[23] NEPA recognizes "the profound impact of man's activity" on all components of the environment, "particularly the profound influences of population growth, high-density urbanization, [and] industrial expansion, . . ." and thus intimates that human activity is indeed an impact to which the statute is addressed.[24]

The introduction of low income people into a white middle class neighborhood is a human activity which may produce sociological effects. For example, if there is an inverse relationship between income level and propensity to commit crime, the construction of a low income housing project in a middle class neighborhood may have a significantly adverse effect upon the existing environment in terms of a rising crime rate. Introduction of low income people (a sociological cause) may also have psychological ramifications for the environment, such as an increase in fear and anxiety among existing residents.[25] HUD has recognized this view by defining "environmental impact" as "*any* alteration of environmental conditions or creation of a new set of environmental conditions."[26] HUD specifically includes "socio-economic and racial characteristics" in its prescribed description of "existing environment."[27]

It is thus apparent that "affect" and "impact" as used in NEPA

Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971).

22 Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972).

23 42 U.S.C. § 4332(2)(A) (1970).

24 *Id.* § 4331(a).

25 The level of fear and anxiety, being subjectively determined, will not necessarily vary with the crime rate.

26 HUD Policies, *supra* note 14, at 19183 (emphasis added).

27 *Id.*, Appendix C-I, at 19191.

mean something more than the influence of inanimate physical entities upon an environment. The Act, the case law, and agency interpretations of NEPA indicate that these terms may properly be construed to include psychological and sociological considerations as well.

II. Use of the NEPA Impact Statement Requirement for Discriminatory or Exclusionary Purposes

There is a danger that the statutory duty to take account of the impact of human beings upon the social, psychological and aesthetic aspects of the environment may be misused to further improper exclusionary and discriminatory ends under the guise of environmental protection. Courts have a dual and often conflicting responsibility when reviewing complaints which allege that agencies have failed to take account of the social impact of federal housing programs. They must hold the agency to strict compliance with the congressional mandate to prepare an impact statement while guarding against improper use of that statement to deny better housing to the poor and non-white, simply because they are poor and non-white. A recent case, *Nucleus of Chicago Homeowners Association v. Lynn*[28] *(NOCHA),* illustrates the dilemma facing agencies and courts. Plaintiffs claiming to represent "members of the 'middle class and/or working class' which emphasizes obedience and respect for lawful authority"[29] brought suit against the Secretary of HUD for failing to file an impact statement with regard to a scattered site housing project which allegedly would significantly affect the human environment. They asserted that the prospective tenants of the housing units have a higher propensity for commission of crime, a lesser regard for aesthetic amenities, and a lower commitment to hard work. The introduction of the prospective tenants into the existing neighborhood, it was claimed, would have a direct and adverse impact upon the physical safety of the present members of the community and would hasten the economic and aesthetic deterioration of prop-

28 6 ERC 1094 (N.D. Ill. Nov. 21, 1973), *appeal docketed,* No. 74-1206, 7th Cir., Mar. 14, 1974.

29 *Id.* at 1095.

erty in the immediate vicinity of the sites.[30] The complaint concluded that HUD had acted arbitrarily and in bad faith by failing to file an impact statement and urged the court to order the agency to file such a statement.

In its opinion the court drew a distinction between the socio-economic characteristics of the prospective tenants and the asserted impact of those characteristics, such as a higher crime rate and deterioration of aesthetic and economic values.[31] Although the court cited the *Hanly* dicta which questioned the consideration of "psychological and sociological effects," the court never squarely confronted this issue. Instead, it held that there was no evidence that the prospective tenants of the housing project had a greater propensity toward anti-social conduct than had the plaintiffs.

In reaching this conclusion the court ignored the generalized evidence culled by the expert witnesses[32] from census data and HUD reports which associated low income families with higher crime rates. The *NOCHA* court regarded the ability of social scientists to generate reliable information with skepticism verging on hostility, and stated that the "conclusions [of social scientists] are not very persuasive in a court of law."[33] The court's attitude in *NOCHA* runs counter to the increased judicial use of sociological and psychological data heralded by *Brown v. Board of Education*,[34] where such evidence was used to show the effects of segregated schooling upon blacks.

What if a court less opposed to the use of the handiwork of social scientists is confronted with rather particularized data comparing prospective tenants and present inhabitants in an attack on an agency's failure to prepare an impact statement or to include this data in an impact statement, or on an agency's determination to implement a project despite an impact statement disclosing this

30 *Id.*

31 *Id.*

32 Dr. Thomas M. Gannon, Chairman and Professor, Department of Sociology, Loyola University, Chicago, Illinois and Dr. Andrew M. Greeley, affiliated with the University of Chicago Center for the Study of American Pluralism. Both Dr. Gannon and Dr. Greeley received doctorate degrees in sociology from the University of Chicago. Record at 312,624, Nucleus of Chicago Homeowners Ass'n v. Lynn, 6 ERC 1094 (N.D. Ill. Nov. 21, 1973).

33 6 ERC at 1096.

34 347 U.S. 483, 494 (1954).

data? How should a conscientious court which is convinced that NEPA contemplates social, psychological, and aesthetic effects on the environment relate plaintiff's evidence to the impact statement requirement?

III. Judicial Review of Agency Action

Judicial review of agency action as prescribed by NEPA arises principally in three circumstances: (1) review of agency failure to prepare an impact statement; (2) review of the adequacy of the substantive content of the impact statement; and (3) review of the agency decision to fund a project, once an impact statement disclosing all relevant impacts has been prepared. Because of the wide latitude which reviewing courts accord agency discretion, particularly at the third stage of review, the court has the power to protect the poor and non-white from abuse of the requirements that agencies both consider psychological and sociological effects when deciding whether to prepare an impact statement, and include those effects in the statement when prepared.

A. *Judicial Review of Agency Failure to Prepare an Impact Statement*

Not every impact is substantial enough to require an impact statement.[35] An agency is only required to prepare one when its proposed action will significantly affect environmental quality.[36] However, the agency must make clear its threshold decision regarding significance of effect, its rationale for that decision, and the means of arriving at it.[37] A sufficient environmental record to sustain and support that decision must be submitted.[38]

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35 *See* Maryland-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv., 349 F. Supp. 1212 (D.D.C. 1972); Citizens For Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972).

36 *E.g.*, Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore. 1971).

37 Citizens For Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696, 707 (S.D.N.Y. 1972).

38 First Nat'l Bank v. Richardson, 484 F.2d 1369, 1381 (7th Cir. 1973); Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir. 1972); Citizens For Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696, 707 (S.D.N.Y. 1972).

The courts have prescribed a variety of standards for judicial scrutiny of an agency decision. In *Hanly v. Kleindienst*,[39] the court articulated the following standards: "de novo" review of questions of law, a "rational basis" test to review mixed questions of law and fact, and, for review of purely factual disputes, the "arbitrary, capricious, an abuse of discretion" standard enunciated by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*.[40] In *Hanly* the court found that the question of significant impact was one of fact, and therefore applied the *Overton Park* standard.[41] Other courts have applied a reasonable basis in law test,[42] de novo review,[43] and the arbitrariness test.[44]

Regardless of the language used by the courts when discussing the extent of review of an agency determination of insignificant impact, there seems to be a marked preference for the fairly rigorous standards of review.[45] This careful judicial scrutiny of an agency's decision not to file an impact statement is another indication of the courts' sympathy for NEPA's objectives. Therefore where an agency has doubt regarding the significance of the environmental effect of its proposed action, it might be well advised to prepare an impact statement to avoid risking the delay, expense, and inconvenience of a lawsuit.[46] Certainly the agency should consider and discuss all relevant physical, psychological, and sociological environmental effects.

B. *Judicial Review of the Substantive Content of an Impact Statement*

"At the very least, NEPA is an environmental full disclosure law."[47] The detailed impact statement required by NEPA must

39 471 F.2d 823 (2d Cir. 1972).

40 401 U.S. 402, 416 (1971); Hanly v. Kleindienst, 471 F.2d 823, 828-29 (2d Cir. 1972).

41 Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972).

42 Citizens For Reid State Park v. Laird, 336 F. Supp. 783, 789 (D. Me. 1972).

43 Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

44 Goose Hollow Foothills v. Romney, 334 F. Supp. 877, 879 (D. Ore. 1971).

45 *E.g.*, Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973); Scherr v. Volpe, 336 F. Supp. 886, 888 (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972); F. ANDERSON, NEPA IN THE COURTS 96-97 (1973).

46 *See* text at note 72 *infra*.

47 Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

"contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed, the Congress, to all known *possible* environmental consequences of the proposed agency action."[48] The Act, however, only requires a diligent good faith research effort, utilizing effective methods and reflecting the current state of the art of relevant scientific disciplines.[49] The results of research must be supported by adequate documentation.[50] Where experts or ordinary lay citizens bring adverse environmental impacts to the attention of the agency, the impact statement should set forth these contentions and opinions even if they lack merit. The agency can of course respond with its own opinion.[51]

NEPA requires that an impact statement discuss alternatives to the proposed action.[52] Mere mentioning of alternatives is not enough. Each discussion must contain sufficient information to permit a "reasoned choice of alternatives so far as environmental aspects are concerned."[53] While remote or speculative possibilities need not be included,[54] any alternatives that might satisfy all the competing interests must be explicitly considered.[55] In particular, failure to discuss the environmental consequences of the alternative of not going forward with a project is a "glaring deficiency" in an impact statement.[56]

While the agency need not "dot all the I's and cross all the T's in an impact statement,"[57] the impact statement must nonetheless contain sufficient information to enable the agency to make an "informed choice."[58] If a federal agency is aware of a possibility

48 *Id.*

49 Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971).

50 *Id.*

51 Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

52 42 U.S.C. § 4332(2)(C)(iii) (1970). For a detailed analysis of this requirement, *see* Picher, *Alternatives under NEPA: The Function of Objectives in an Environmental Impact Statement*, 11 HARV. J. LEGIS. 595 (1974).

53 Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

54 *Id.* at 838.

55 Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 762 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

56 *Id.* at 761.

57 *Id.* at 759.

58 Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C.

that its action may exert psychological and sociological as well as physical impacts, these impacts should all be included in its statement to prevent a judicial finding of inadequacy.

C. *Judicial Review of the Agency Decision to Fund a Project*

At this third level of review the agency has the greatest amount of discretion. Mere inclusion in the impact statement of unavoidable adverse environmental effects will not necessarily occasion judicial veto of the project. A balancing between the project's benefits and its environmental costs is necessary.[59] But the court may not substitute its judgment for that of the agency.[60] "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[61] Thus a court must allow HUD, if it adequately considers the environmental impacts, to reasonably balance the competing values.

Environmental values can be marshalled *in favor of* locating low income housing in middle class neighborhoods. We have seen that the environmental effects of alternative locations must be considered,[62] and that the environmental consequences of not going forward with the project must also be discussed.[63] Thus the environmental benefits to the urban core can be balanced against the purported harm to a specific neighborhood.[64] Since racial concentration has been found to lead to urban blight,[65] when en-

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Cir.), *application for injunction in aid of jurisdiction denied sub nom.* Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917 (1971).

59 Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 301 (8th Cir. 1972); Scherr v. Volpe, 466 F.2d 1027, 1031 (7th Cir. 1972).

60 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (agency action under Dept. of Transportation Act of 1966 and § 138 of the Federal-Aid Highway Act of 1968); Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972).

61 Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971). *Compare* Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972).

62 *E.g.*, First Nat'l Bank v. Richardson, 484 F.2d 1369, 1380 (7th Cir. 1973). *See* text at notes 52-55 *supra.*

63 *See* text at note 56 *supra.*

64 Negative impacts, of course, are not inevitable. If provision is made for additional services it is conceivable that negative impacts may be largely eliminated.

65 Shannon v. HUD, 436 F.2d 809, 820-21 (3d Cir. 1970).

vironmental effects are considered on a regionwide basis there may, on balance, not infrequently be an argument favoring location of low income housing in middle class neighborhoods. Such judicial analysis is supported by NEPA's directive that diversity and long term productivity of the human environment be enhanced.[66]

D. *Abuse of NEPA and Judicial Review*

We have seen that courts have considerable flexibility in their review of agency action under NEPA. They can and should compel an agency to consider the sociological and psychological impacts of a proposed activity. But when convinced that an agency has adequately considered all legitimate environmental effects and reasonably balanced the costs and benefits, they can defer to agency discretion and protect it from ill-founded lawsuits.

The courts' most difficult problem lies in determining which lawsuits are ill-founded. Most plaintiffs who challenge housing projects under NEPA are likely to be motivated both by ethnic or class bias and by legitimate fear of higher crime rates and neighborhood deterioration. Even if a suit is brought solely out of racial prejudice, the complaint is likely to be phrased in terms of legitimate environmental concerns.

The courts are becoming aware that a suit may be instituted under NEPA for "spurious" reasons and that "environmental aspects" may be "brought in only to maintain the action."[67] Should the court decide the case on an environmental basis alone? Should it dismiss on the ground that the suit is improper because environmental issues are but incidental to the "real interest" of the plaintiff?

The courts may be willing to look behind the plaintiff's environmental claims for evidence of his real motivation in order to assess the legitimacy of the complaint.[68] An analogous line of cases is typified by *Kennedy Park Homes v. City of Lackawanna*.[69] In that case claims of an "urgent need for park space" and a "sewer crisis"

66 42 U.S.C. §§ 4331(b)(4), 4332(2)(C)(iv) (1970).

67 Pizitz v. Volpe, 2 ELR 20378 (M.D. Ala.), *aff'd*, 467 F.2d 208 (5th Cir. 1972); National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971).

68 Zlotnick v. Redevelopment Land Agency, 2 ELR 20235 (D.D.C. 1972).

69 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970).

would not justify municipal acts which prohibited construction of low income housing when the real motivation and intent, the court found, was discriminatory.[70] Where racially discriminatory conduct has been alleged, a court will examine very closely the purpose and effect of an otherwise valid law.[71]

The potential for success of illegitimate environmental claims is perhaps the most serious problem raised by the application of NEPA to sociological and psychological environmental impacts. It will take great judicial insight to discern 1) whether suits brought pursuant to NEPA are motivated primarily by environmental concerns or by racial prejudice, and 2) whether the plaintiffs' claims, on the facts, are environmentally sound or not. And what is the court to do with the bigoted plaintiff who brings an environmentally sound complaint? The judge is then confronted with a painful dilemma: should he validate a sound NEPA argument (and thereby give effect to racial discrimination), or deny relief to a plaintiff motivated by bigotry (and thereby thwart a legitimate NEPA claim)? Indeed, the problem may be even more difficult if (as will often be the case) clear-cut answers to the first two questions cannot be given.

Conclusion

The present state of NEPA requirements place the federal agencies in a quandary. If an impact statement discusses the socioeconomic characteristics of low income people and environmental impacts attributable to them, it may stimulate a lawsuit which, regardless of validity, can impede or block the construction of low income housing. However, failure to prepare an impact statement or to include such environmental impacts in it may easily result in a valid lawsuit. If the court decides that the agency must submit or supplement an impact statement, the project may be seriously impaired. The unanticipated expenditure incurred in the preparation of an impact statement and the postponement of construction may upset the agency's budgetary planning and

70 *Id.* at 696.

71 *Cf.* Reitman v. Mulkey, 387 U.S. 369, 373 (1967); Yick Wo v. Hopkins, 118 U.S. 356, 362-363 (1886).

curtail or even cancel the project.[72] However, as courts and agencies become more experienced in separating genuine from spurious environmental claims and agencies begin routinely analyzing all environmental impacts, the problems of delay should be mitigated.

NEPA is a statute of sweeping proportions and is to be applied to the fullest extent possible. Agency interpretation has indicated that it applies to environmental impacts of a sociological and psychological nature which affect the human environment. These considerations, although elusive and difficult to measure, are perhaps more significant than mere physical impacts. The courts are only beginning to perceive NEPA's breadth. Given its proper construction, the urban poor have the "most to gain from environmental improvement" achieved under NEPA, provided that the "concept [of environment] embraces not only more parks, but better housing; not only cleaner air and water, but rat extermination."[73]

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72 Ackerman, *Impact Statements and Low Cost Housing*, 46 S. CAL. L. REV. 754, 762, 771 (1973). Delay alone may be enough to satisfy plaintiffs. *See* National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan.), *aff'd*, 455 F.2d 650 (10th Cir. 1971).

73 First Nat'l Bank v. Richardson, 484 F.2d 1369, 1378 (7th Cir. 1973) (dictum), *quoting* 2 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 189-91 (1971).

THE FAIRNESS DOCTRINE AND CABLE TV

STEVEN J. SIMMONS*

Introduction

Community antenna television (CATV), or cable TV, is a rapidly expanding means for providing a greater quantity and variety of television service to viewers. As this industry grows it will change the nature of television programming available to American communities and will solve the technical problem which has spawned the current regulation of broadcast television. This article will examine a specific regulation of the Federal Communications Commission (FCC), the fairness doctrine, and explore the question of its application to cable television in the future.

It is the author's contention that if cable television develops to the extent predicted by its advocates, the nature of the medium will at some point become so different from traditional broadcast television that the fairness doctrine should not be constitutionally required in cable systems. This degree of development will exist, from this author's point of view, when at least 50 percent of all American households are linked to cable systems carrying 20 or more channels. It has been predicted that this event will occur by 1980 or shortly thereafter.[1] At that time the uninhibited marketplace of ideas which the Supreme Court has held the first amendment to require[2] will be achievable in a cable system without fairness regulations.

It is further contended that the FCC under present Supreme Court interpretation of its enabling legislation should not have the authority to impose fairness doctrine requirements on cable systems. Fairness requirements should not be interpreted to be "reasonably ancillary" to the Commission's television broadcast-

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1 *See* text at note 83 *infra*.

2 *See* text at note 52 *infra*.

ing responsibilities and cannot be effectively justified on this basis. Even if the courts eventually decide that the FCC does have the authority to impose cable fairness regulations, the Commission should not do so in the interest of sound policymaking.

The article will first define the fairness doctrine, look briefly at its history, and analyze the major Supreme Court case in point. Next the article will discuss the technology of cable television and the effect this technology will have on the problems to which the fairness doctrine is a response. A discussion of the reasonably ancillary doctrine — the current rationale for applying the fairness doctrine to cable TV — will follow. Finally, the policies and interests involved in determining whether to apply fairness requirements to cable television will be weighed.

I. The Fairness Doctrine

A. *A Definition*

The fairness doctrine is the name given to two requirements which the FCC imposes on all licensed television and radio broadcasters. First, the licensee has an affirmative obligation to present controversial public issues as part of his programming. Second, when a licensee airs one side of a controversial public issue, he must afford reasonable opportunity for presentation of a conflicting side. The doctrine signifies the unification of these two ideas: required presentation and fair presentation.[3]

There are no absolute standards of fairness, and the critical factors in judging the licensee are whether his action is reasonable and taken in good faith.[4]

> The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the

3 *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249-52, ¶¶ 6-10 (1949) [hereinafter cited as Editorializing].

4 *Id.* at 1255, ¶ 18.

> policy to aid and encourage expression of contrasting viewpoints.[5]

Licensees must play a "conscious and positive role in bringing about balanced presentation of the opposing viewpoints,"[6] for they have an "affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities . . . ."[7] If a broadcaster cannot get the other side represented under the auspices of a paying sponsor, then he must pay for the opposing view broadcast himself.[8] If no request is made to present the opposing side, the licensee must program on his own initiative a presentation of the conflicting viewpoint.[9] And a "reasonable percentage" of broadcasting time must be devoted to discussion of controversial public issues.[10]

The licensee has control over the exact program format in which the issues are presented, and it is the overall pattern of his programming rather than any particular program which may violate the fairness doctrine. On one night he may present solely one point of view on an issue. If he balances this programming with effective presentation of conflicting views on other nights, he has not violated the fairness doctrine. Even if the licensee has clearly but honestly blundered in presenting one side of a controversy much more powerfully than another, or in not presenting another side, he will not be "condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues."[11] His "overall pattern of broadcast service" and his "other program activities" will always be considered.[12]

A subcategory of the fairness doctrine in which the FCC has issued more specific standards and guidelines is the "personal attack"[13] and "political editorial"[14] area. If during a broadcast on

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5 Letter to Mid-Florida Television Corp., 40 F.C.C. 620, 621 (1964).
6 Editorializing, *supra* note 3, at 1251, ¶ 9.
7 *Id.*
8 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969).
9 *Id.* at 378.
10 Editorializing, *supra* note 3, at 1257-58, ¶ 21.
11 *Id.* at 1255, ¶ 18.
12 *Id.*
13 47 C.F.R. § 73.123(a) (1973) (standard radio broadcast stations); *id.* § 73.300(a)

a controversial public issue an attack is made upon the character or integrity of an identified individual, the licensee must within one week notify the attacked person of the date and time of the broadcast, furnish him with a script or tape of the attack, and offer a reasonable opportunity for him to reply over the air. Certain exceptions to the rule are made, such as for attacks by legally qualified political candidates or their spokesmen, or attacks made in bona fide news programs and interviews.[15] A procedure similar to the political attack procedure is authorized when a licensee endorses or opposes a legally qualified political candidate, except that notification and sending of a script or tape must be made within 24 hours of the editorial. If the editorial is broadcast within 24 hours of election day, the licensee must comply with the procedure before the broadcast to insure the candidate time to prepare a reply.[16]

As with the fairness doctrine generally, personal attack and political editorial procedures obligate the broadcaster to present both sides of a controversial issue. However, these procedures differ from general fairness rules in that they have been codified and specific steps have been directed. Under the personal attack and political editorial procedures, a broadcaster does not have the option of presenting the attacked party's view himself or of choosing the specific party to represent the other side, as he does in other fairness doctrine situations. In the political editorial area, a broadcaster does not have any obligation to present specific political endorsements, whereas he is required by the general fairness doctrine to present controversial issues of public importance. Although the Commission has raised the possibility of setting down more tightly delineated rules in the general fairness field,[17] it continues to be satisfied with issuing policy statements.[18]

The fairness doctrine should be distinguished from the much-

(FM broadcast stations); *id.* § 73.598(a) (noncommercial educational FM broadcast stations); *id.* § 73.679(a) (television broadcast stations).

14 *Id.* §§ 73.123(c); 73.300(c); 73.598(c); 73.679(c).

15 *Id.* §§ 73.123(b); 73.300(b); 73.598(b); 73.679(b).

16 *Id.* §§ 73.123(c); 73.300(c); 73.598(c); 73.679(c).

17 Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27, 32, ¶ 11 (1970) [hereinafter cited as Obligations].

18 *Id.*

publicized equal time requirement. Equal time requires that if a licensee allows a candidate to broadcast over the licensee's facilities, he must give an equal broadcasting opportunity to all other legally qualified candidates for the same office.[19] The licensee has no power of censorship over what the candidate broadcasts.[20] Rates charged cannot be greater than what a commercial advertiser would pay for broadcasting to the same area and must be uniform among candidates for the same office.[21] The rates are even more strictly regulated for 45 days preceding a primary election and 60 days preceding a general election. During those periods the rates must be no more than "the lowest unit charge of the station for the same class and amount of time for the same period."[22]

Unlike the equal time requirement, the fairness doctrine does not require granting equal time to all opposing viewpoints. A 5-minute commentary by the station on a controversial community project does not require that exactly five minutes be granted to all other sides. The licensee's obligation is to provide overall fair treatment, not precisely equal time. Unlike equal time, fairness does not necessarily require a broadcaster to offer time to an outside spokesman. Spokesmen can be obtained from a licensee's own staff.

The fairness doctrine is much broader in its application than equal time. Equal time has impact only during the relatively short period before elections and affects only programs involving legally qualified political candidates.[23] The fairness doctrine is always applicable and affects all programming involving controversial public issues. The equal time requirement focuses on personalities and is triggered by a candidate's appearance. In contrast, the fairness doctrine determines when the licensee's general program content requires the presentation of opposing views.

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19 47 U.S.C. § 315 (1970); 47 C.F.R. § 73.120(b) (1973) (standard broadcast stations); *id.* § 73.290(b) (FM broadcast stations); *id.* § 73.590(b) (noncommercial educational FM broadcast stations); *id.* § 73.657(b) (television broadcast stations).

20 47 C.F.R. §§ 73.120(b); 73.290(b); 73.590(b); 73.657(b) (1973).

21 *Id.* §§ 73.120(c); 73.290(c); 73.590(c); 73.657(c).

22 47 U.S.C. § 315(b) (Supp. II, 1972).

23 47 C.F.R. §§ 73.120(a); 73.290(a); 73.590(a); 73.657(a).

B. *History and Purpose of the Doctrine*

The fairness doctrine can be traced back to rulings of the Federal Radio Commission (FRC), the predecessor of the FCC. Prior to 1927 the allocation of radio frequencies was left to private initiative, and airwave interference made transmission extremely difficult. A series of National Radio Conferences held between 1922 and 1925 addressed themselves to the problem. The conferences resolved that federal regulation of the radio spectrum was necessary and that airspace should be made available only to those who would serve the public interest. In answer to these demands, Congress passed the Radio Act of 1927, which created the Federal Radio Commission.[24] The FRC was to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[25]

The Commission soon determined that the fairness doctrine was part of the public interest standard imposed on broadcasters. In 1929 the FRC declared that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussion of issues of importance to the public."[26] The Commission determined that because a) scarcity of the frequency resource meant that only a few could have the broadcasting privilege, and b) the government played a role in granting that privilege, the broadcaster had to use it consistent with the "most beneficial sort of discussion of public questions."[27]

The FCC, operating under the authority of the Communications Act of 1934,[28] continued FRC fairness policies. In its *Sixth Annual Report* the FCC stated: "In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussion of public questions."[29] The Commission asserted in *Mayflower Broadcasting Corp.* that

24 Radio Act of 1927, ch. 169, 44 Stat. 1162.

25 *Id.* § 4(c), 44 Stat. 1163. *See also* 67 CONG. REC. 5478 (1926) (remarks of Representative White (R.-Me.), a sponsor of the Radio Act).

26 Great Lakes Broadcasting Co., 3 F.R.C. App. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

27 *Id.* at 34.

28 Ch. 652, 48 Stat. 1064.

29 6 FCC ANN. REP. 55 (1940).

> Freedom of Speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively, and without bias.[30]

Since the FCC also held that a broadcaster "cannot be an advocate,"[31] the decision was interpreted as an outright prohibition of broadcaster editorializing.

A report, *Editorializing by Broadcast Licensees,* was issued by the FCC in 1949 largely as a result of the reaction to its broadcaster advocacy ruling.[32] The report is still regarded by the Commission as the "definitive policy statement" on the doctrine.[33] The report reaffirmed the broadcaster's obligation to afford reasonale opportunity for discussion of controversial public issues and to make sure that such issues are addressed from conflicting points of view. It set forth the broadcaster's obligation to seek conflicting viewpoints, his right to control format, and the standard of reasonableness and good faith for judging compliance. It also reversed *Mayflower* and ruled that broadcasters could editorialize.[34]

In justifying the fairness requirements the Commission declared that the broadcaster is "trustee"[35] of a scarce medium to be utilized for public benefit and that licenses are to be issued only where the public interest, convenience, or necessity would be served.[36] This standard demands that the public be kept informed by hearing different viewpoints.[37] The legislative history of the Communications Act[38] as well as the needs of democracy[39] so require, said the Commission. Nothing in the Communications Act or its history indicates that the people acting through Congress wanted to diminish their "paramount rights in the airwaves . . . ."[40]

30 Mayflower Broadcasting Corp., 8 F.C.C. 333, 340 (1940).
31 *Id.*
32 Editorializing, *supra* note 3, at 1246, ¶ 1.
33 Obligations, *supra* note 17, at 27, ¶ 2.
34 Editorializing, *supra* note 3, at 1252-53, ¶ 13.
35 *Id.* at 1247, ¶ 3, 1258, ¶ 21.
36 *Id.* at 1248, ¶ 5.
37 *Id.* at 1251, ¶ 9.
38 *Id.* at 1248, ¶ 5.
39 *Id.* at 1249, ¶ 6.
40 *Id.* at 1257, ¶ 20.

In 1959 Congress amended § 315 of the Communications Act. The amendment stated that broadcasters must "operate in the public interest and . . . afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[41]

C. *The* Red Lion *Decision*

Despite the 1959 amendment and the enforcement of the fairness doctrine by the Commission and the courts for decades, there were still broadcasters in the mid-1960's who questioned its validity. The Supreme Court ruled on the issue in the well-known case of *Red Lion Broadcasting Co. v. FCC.*[42]

In that case WGCB, a Pennsylvania radio station licensed to the Red Lion Broadcasting company, aired a 15-minute program featuring the Reverend James Hargis in his "Christian Crusade" series. Reverend Hargis, in discussing a book written by Fred J. Cook entitled *Goldwater—Extremist on the Right,* declared that Cook had been fired by a newspaper for making false charges against city officials, had then worked for a Communist-affiliated publication, and had subsequently written the book to smear Senator Barry Goldwater (R.-Ariz.). When Cook demanded free reply time, WGCB refused. After investigating a complaint by Cook, the FCC concluded that Reverend Hargis' comment did constitute a personal attack. Red Lion, said the Commission, had not met its obligation under the fairness doctrine to send a tape, transcript, or summary of the broadcast to Cook and offer reply time — free if Cook would not pay. The Court of Appeals for the District of Columbia Circuit upheld the Commision's ruling as constitutional and otherwise proper.[43] Red Lion petitioned for certiorari.

The Supreme Court also considered a suit by the Radio Television News Directors Association (RTNDA) challenging the personal attack and political editorial rules. The Court of Appeals for the Seventh Circuit had held that these rules unconstitution-

41 Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1970)).

42 395 U.S. 367 (1969).

43 Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd,* 395 U.S. 367 (1969).

ally abridged freedom of speech and the press.[44] The Supreme Court held that the specific application of the fairness doctrine in *Red Lion* and the promulgated rules at issue in *RTNDA* were "valid and constitutional."[45]

After concluding that the public interest standard,[46] the 1959 amendment,[47] and past FCC practice made the Commission's fairness doctrine and personal attack—political editorial regulations a "legitimate exercise of congressionally delegated authority,"[48] the Court considered the broadcasters' complaint that the doctrine and rules violated their first amendment freedoms. The licensees contended that the first amendment protects "their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."[49]

Ironically, the Court held that if the broadcasters violated the fairness doctrine, they would be infringing the first amendment rights of the public. As Professor Jaffe puts it, "the constitutional shoe turned out to be on the other foot."[50] The Court declared that there was a "First Amendment goal of producing an informed public capable of conducting its own affairs."[51] The objective of the first amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[52] "It is the right of the

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44 Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367, 375 (1969).

45 395 U.S. at 375.

46 The Court stated that the FCC's mandate under the public convenience, interest, or necessity standard of the Communications Act, 47 U.S.C. §§ 303, 303(r), is "not niggardly but expansive." 395 U.S. at 380.

47 The Court stated that the amendment

> makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.

395 U.S. at 380.

48 *Id.* at 385.

49 *Id.* at 386.

50 Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773-74 (1972).

51 395 U.S. at 392.

52 *Id.* at 390.

viewers and listeners, not the right of the broadcasters, which is paramount."[53]

The Court based its conclusion that the first amendment right of the public required the fairness doctrine on the state of the broadcasting industry as viewed in 1969. The Court pointed to the scarcity of the airwave resource and the governmental role in allocating part of that resource to a particular licensee. The broadcaster became a public trustee, with a temporary privilege to use a scarce public good. Since it would be technically impossible for every citizen to have his own radio station and frequency, and since only a few persons were given the right to have such a station, those privileged few had to allow others to express views over the facilities. If not, these few could monopolize the information available to the public over the airwaves.[54]

The broadcasters argued that although scarcity may have previously justified government fairness requirements, new technology had opened up additional frequencies and scarcity was no longer an adequate justification. The Court disagreed. Justice White cited the ever-present conflicting needs for airspace for everything from radio-navigational aids used by aircraft and ships to police and fire department communications. He then illustrated that the VHF television spectrum was almost entirely occupied in major markets and that UHF frequencies were being filled.[55]

The Court stated that "[s]carcity is not entirely a thing of the past."[56] "Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential."[57] But in its footnote to this conclusion, the Court quoted from the congressional sponsors of the 1959 amendment:

> If the number of radio and television stations were not limited by available frequencies, the committee would have no

53 *Id.*
54 *Id.* at 388-90.
55 *Id.* at 398 n.25 (chart summarizing VHF and UHF channels allocated to and available in the top 100 television market areas as of Aug. 31, 1968).
56 *Id.* at 396.
57 *Id.* at 399.

> hesitation in removing completely the present provision regarding equal time and urge [*sic*] the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.[58]

The Court was also concerned with the results of the governmental role in helping existing broadcasters. Even where new technology makes new entry possible, said the Court, initial governmental selection of licensees had already led to present broadcasters' having extensive experience in broadcasting, an established audience, network affiliation, and advantage in program procurement which gave them a "substantial advantage over new entrants."[59]

The Court contrasted broadcasting with other sources of public information, such as newspapers, on which the fairness rules are not imposed. For these media there has been no scarcity of resource necessitating government regulation or involvement. "[D]ifferences in the characteristics of new [recently developed] media justify differences in the first amendment standards applied to them,"[60] and therefore justify imposing the fairness doctrine on broadcasting but not on the print media. The Court warned, however, that if the quality and quantity of broadcast coverage were affected negatively by the fairness doctrine, it could reconsider the constitutional implications.[61]

In summary, *Red Lion* held that because the fairness requirements were necessary to ensure the "uninhibited marketplace of ideas" required by the first amendment, the broadcasters' first amendment claims could not prevail. The fairness doctrine was held to be necessary because of the scarcity of the airwave resource and the role the government had played in helping existing broadcasters. The case dealt only with fairness and the personal attack and political editorial regulations as applied to the broadcasting industry of 1969.

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58 *Id.* at 399 n.26 (quoting from S. REP. No. 562, 86th Cong., 1st Sess. 8-9 (1959)). The Court in its discussion in this footnote mixed the fairness, personal attack, and equal time doctrines together when discussing scarcity as the basis for regulation.

59 *Id.* at 400.

60 *Id.* at 386.

61 *Id.* at 393.

II. Cable Television

A. *Cable Television Technology*

The great technological advantage of cable TV is that it utilizes a wire rather than airspace to transmit images and sound. A conventional TV broadcast system receives light images and sound through camera and microphone apparatus, transforms this information to electric current, and then radiates from a transmitting antenna electromagnetic waves carrying this same information. A TV set receives these electromagnetic waves through its receiving antenna, decodes the electronic configuration, converts it into a picture on a cathode ray tube, and amplifies the accompanying sound. Conventional TV does use wire at the receiving end and the transmitting end. But the major distances over which signals are transmitted are covered by airspace transmission, not wire.[62]

Conventional TV airspace is considered a scarce resource because only waves with frequencies from approximately 50 million cycles per second to 200 million cycles per second are well suited for television transmission.[63] This frequency spectrum, known as the very high frequency (VHF) band, must also provide a medium for FM radio and other services.[64] Space for only 12 TV channels remains between 54 and 88 million cycles per second, and between 174 and 216 million cycles per second.[65] Although there is spectrum space for an additional 70 channels in higher frequencies, ultra high frequency (UHF) television transmission is inferior to VHF transmission.[66] At ultra high frequencies waves tend to travel more in straight lines, reflecting off buildings and dissipating their energy.[67]

Competition for nontelevision use of both the VHF and UHF frequency range is intense. Requests come from sources as diverse as radio astronomers who want to communicate with an explod-

62 Sloan Commission on Cable Communications, On the Cable: The Television of Abundance 11 (1971) [hereinafter cited as On the Cable]. This section of the article is drawn directly from chapter two of the Sloan Commission Report.
63 *Id.* at 17.
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.* at 19.

ing distant galaxy and policemen who want to radio their stations. When either receiver or transmitter is moving, as in airplane to ground communication, airspace must be used or no communication would be possible.[68]

Both VHF and UHF face the problem of frequency interference. When waves at approximately the same frequency travel through the same airspace, they interfere with each other. Thus, "an antenna radiating a signal on channel 3, for example, makes it impossible for another station to transmit at that frequency within a radius of approximately 200 miles,"[69] and a channel 2 or 4 broadcast cannot be made within 100 miles. Interference on a UHF band is even more intense.[70]

The pure, self-contained cable system eliminates all of these technical problems, for it transmits its signals exclusively over wire. The electrical signal is carried by a coaxial cable, in which an inner conductor and outer conductor are separated by plastic foam and encircled in a plastic sheath. The coaxial cable used to transmit television signals can carry electric signals of frequencies from 40 million to 300 million cycles per second. A television signal requires a band width of six million cycles per second. Theoretically, the coaxial cable can carry up to 40 channels of television.[71] It is predicted, however, that channel capacity may be increased to 80.[72] Economics permitting, more than one cable may be laid, thereby doubling, tripling, or further increasing the number of available channels.

Signals can be fed into a cable system in three ways. The simplest method is for an antenna to intercept signals of local conventional television stations and transfer them into the cable system. A second way enables a system to pick up a more distant conventional TV station. The antenna is placed closer to the station than the cable network and the signal is transferred from the antenna

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68 *Id.* at 20-21.
69 *Id.* at 17.
70 *Id.*
71 *Id.* at 12-13.
72 *Id.* at 37. Focus Cable Television of Oakland, California, has recently laid dual cables capable of carrying 64 channels with 2-way communication. In October 1973, 38 of these channels became operational. Telephone interview with Elijah Turner, Director of Public Information, Focus Cable Television of Oakland, Nov. 12, 1973.

to the system by long-distance microwave or cable link.[73] Third, the cable system operator may originate his own signals in his own studio. This studio may vary from a camera focused on a clock to a fully equipped color television studio.[74]

The point of entry into the cable system is called the "head-end." A trunk line runs out from the head-end through the area covered by the system's franchise, and feeder lines run from the trunk to within 75 to 150 feet of each residence. Drop lines from the feeder line to the residence complete the cable link from the head-end to the residence.[75]

B. *Cable Television's History and Future*

Cable television began in this country as a means of supplying television signals to remote areas which were too isolated to receive broadcast signals. A large antenna would be erected, a distant signal received, and through cable this cable antenna television (CATV) would transmit the distant signal to the rural home. Microwave was often used to enable the antenna to pick up the distant signal. By 1960 there were an estimated 640 CATV systems picking up distant signals and transferring them to homes that would otherwise not have had the television service. The system soon began to expand to major metropolitan markets where cable could provide better reception than was received from electromagnetic waves which had to contend with other city transmissions and tall buildings.[76]

By 1966 CATV growth had become, to use the FCC's term, "explosive."[77] This rapid growth continued and, as of 1971, 2,750 cable systems were operating, reaching 5.9 million households, approximately nine percent of all television households in the United States.[78] Franchise applications had been granted or were

73 There is also the possibility of signal transfer via satellite.

74 ON THE CABLE, *supra* note 62, at 15-16.

75 *Id.* at 13.

76 *Id.* at 23-24.

77 Second Report and Order, 2 F.C.C.2d 725, 738, ¶ 30 (1966).

78 ON THE CABLE, *supra* note 62, at 32. In the beginning of 1973, 2,991 cable systems were in operation, reaching a total of 7,300,000 subscribers. TELEVISION FACT BOOK: SERVICES VOLUME 84(a) (1973-74 ed.).

being considered in more than half of the top 30 U.S. TV markets.[79]

Most of today's systems provide 12 or fewer channels to the subscriber and are still only supplying reception of distant signals and clearer reception of close signals.[80] However, in New York and to some degree elsewhere, program origination is taking place.[81] By June 1971 the two cable originating New York systems were serving over 80,000 subscribers.[82]

Under the auspices of the Alfred P. Sloan Foundation, the Sloan Commission on Cable Communications investigated cable television for almost 18 months. The Commission concluded that by 1980, or

> shortly thereafter, the cable television system viewed as a whole will be at least twenty channels over all of its range and forty channels over much of its range; that it will reach into 40 to 60 percent of all American households; that it will provide digital return signals to computers at each head-end and at little extra expense to other computers at a limited number of selected locations; and that it will be capable of full interconnection [via satellite] at moderate cost.[83]

The Sloan Commission considered these estimates conservative, as they were made on the assumption that cable television technology would not change radically during the next few years. Since that technology is already operating, any breakthroughs would only increase the availability of cable TV to the public.[84] The Commission's prediction that interconnection of systems by satellite will be available by 1980 indicates the possibility of providing more expensive, special programming for cable subscribers.[85]

79 ON THE CABLE, *supra* note 62, at 32.

80 *Id.* at 2.

81 This program origination varies from automated filming of a newsletter to full dress studio productions. *Id.* at 27.

82 *Id.* By September 1973 the subscriber total increased further. Teleprompter, the cable company responsible for the upper Manhattan area, had 55,000 subscribers. Telephone interview with Ernie Tarlen, a Teleprompter General Manager in Newport Beach, California, Nov. 9, 1973. Sterling Manhattan Cable TV, responsible for the lower Manhattan area, had over 70,000 total subscribers. Telephone interview with Thomas Griffin, Manager of Engineering, Sterling Manhattan Cable Television, Nov. 9, 1973.

83 ON THE CABLE, *supra* note 62, at 42.

84 *Id.* at 36. The Commission also assumed that neither Congress nor the FCC would lay down any seriously restrictive regulations.

85 *Id.* at 41-42. A cabinet level committee report on national cable television

III. Fairness and Cable TV

A. *Fairness as a Constitutional Requirement*

It was the public's first amendment interest in an open marketplace of ideas that overrode the broadcasters' first amendment claims in *Red Lion* and elevated the fairness doctrine to a constitutional requirement. That public interest, said the Court, could not otherwise be secured because broadcast frequencies are so scarce. Since only a few can possess the broadcast privilege, the government must prevent those few from monopolizing the ideological marketplace by compelling them to broadcast a diversity of views on matters of public controversy.

To bolster its scarcity argument the *Red Lion* Court relied on the FCC's channel allocation chart for the top 100 market areas, printed in the 1968 *FCC Annual Report.*[86] The Court's footnote reference lists 264 commercial VHF, 213 commercial UHF, 34 noncommercial VHF, and 69 noncommercial UHF stations as on the air, authorized, or applied for in those market areas.[87] Implicit in these statistics is the breakdown in the FCC's fuller statistics listed on the page of the 1968 report cited by the Court.[88] All but one of the VHF stations the Court mentions were operating, but only 146 of the 282 UHF stations listed were on the air.[89] The

policy, which was recently released by the White House Office of Telecommunications Policy, was premised on a conclusion about cable's growth similar to that of the Sloan Commission. N.Y. Times, Jan. 17, 1974, at 1, col. 1. The committee indicates that its recommendations should take effect when 50 percent of all American households are hooked up to cable television, which it anticipates will take about five years. *Id.* at 16, col. 3. The 50-percent point has also been chosen by this author, in conjunction with a minimum 20 channel system for households, as the time when fairness doctrine regulations should be lifted. The committee recognizes that "an almost limitless number of channels" will be available to subscribers to "provide entertainment, news, educational programs, and specialized information." Los Angeles Times, Jan. 17, 1974, at 1, col. 3.

> Because the potential number of programs is so great, and because cable transmission makes no direct use of the publicly owned airwaves, the Cabinet committee . . . urged exemption of cable television from regulations that the Federal Communications Commission applies to over the air broadcasters in an effort to ensure fairness in treatment of controversial topics . . . .

Id. at 1, col. 3 and at 18, col. 1. The author strongly concurs in this recommendation.

86 395 U.S. 367, 398 (1969).

87 *Id.* at 398 n.25.

88 34 FCC Ann. Rep. 135 (1968).

89 *Id.*

combined VHF-UHF on-the-air count was 444 stations for the top 100 market areas.

Looking at the Sloan Commission predictions of cable channel capacity,[90] one might conservatively estimate that on the average individual cable systems would have 25 channels by 1980 or shortly thereafter. Assuming one cable system for each major market area, there will be approximately 2,500 channels of television communication allocated to the top 100 market areas. This figure is almost six times the channel allocation the Court referred to when it spoke of scarcity of resources in 1969 and many more times the channel allocation in existence when the FCC and courts justified fairness on scarcity grounds in earlier decisions. In addition, each market area may have several cable systems — New York City already has two. As the Sloan Commission concluded, cable TV will become the television of abundance.

The Sloan Commission based its predictions on the assumption that the FCC would not impose severely restrictive regulations on the cable TV industry. Although there have been cable industry complaints with respect to certain regulations, recent FCC rules will potentially give cable TV a major boost by helping to make the cable system a lively marketplace of ideas and to provide overall television service which is in the public interest. The Commission has already demanded that cable operators engage in cablecasting — the transmission of programs originated by the cable operator or another party exclusive of broadcast signals carried over the system.[91] The Supreme Court recently upheld this regu-

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90 See text at note 83 *supra*.

91 FCC rules stipulate that no CATV system with 3,500 or more subscribers may carry a TV broadcast unless the system operates to a significant extent as a local outlet by origination cablecasting and "has available facilities for local production and presentation of programs other than automated services." 47 C.F.R. § 76.201(a) (1973). The FCC has also stated that in "unusual circumstances" some cable operators with 3,500 or more subscribers may be granted a waiver from the rule. Memorandum Opinion and Order, 23 F.C.C.2d 825, 827 n.4 (1970). CATV operators with fewer than 10,000 subscribers who request an ad hoc waiver of the cablecasting requirements will be excused from the requirement pending an FCC ruling on their request. Cable operators with over 10,000 subscribers will not be excused from compliance unless and until the FCC rules favorably on their requests. Memorandum Opinion and Order, 27 F.C.C.2d 778, 779, ¶ 3 (1971). The FCC granted the ad hoc waiver pending final determination because of alleged potential economic injury to some cable systems if they were required to cablecast immediately. *Id.*

lation.[92] Although there has been some criticism of the cablecasting requirement,[93] it should eventually lead to increased creativity and expression on cable systems. No longer can a CATV system be merely the transferor of existing broadcast stations, increasing the number and quality of signals received in a given area. Now the cable system must use its own channels to present increased and more diverse programming to the receiver.

FCC rules issued on February 12, 1972, go even further in providing diversity and eliminating scarcity.[94] The Commission states that it envisions future cable usage which will principally rely on nonbroadcast signals.[95] It notes that 40, 50, and 60 channel systems are currently being installed in some communities.[96] The new rules require that in the top 100 markets every cable system must have a minimum of 20 channels. For every broadcast signal carried these systems must provide an additional channel.[97] These systems must also establish what are called designated access channels. Cable systems

> will have to provide one dedicated, noncommercial public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis and, without charge during a developmental period, one channel for educational use and another channel for local government use.[98]

In addition, the new rules require that leased access channels, channels the public can rent, be provided on any remaining bandwidth of the cable system.[99] If a broadcast channel or a designated access channel is not in use during a particular time, that band-

92 United States v. Midwest Video Corp., 406 U.S. 649 (1972). Justice Brennan wrote an opinion for himself and Justices White, Marshall, and Blackmun. Chief Justice Burger concurred in the result. Justice Douglas wrote the dissent, in which Justices Stewart, Powell, and Rehnquist joined.

93 *See* Note, *Cablecasting: A Myth or Reality—Authority of the Federal Communications Commission to Regulate Local Program Origination on Cable Television—An Evaluation of the Commission's Cablecasting Rules After* United States v. Midwest Video Corporation, 26 RUTGERS L. REV. 804 (1973) [hereinafter cited as Note, *Cablecasting*].

94 Cable Television Report and Order, 36 F.C.C.2d 143 (1972) [hereinafter cited as Fourth Report and Order].

95 *Id.* at 190, ¶ 120.

96 *Id.*

97 *Id.*

98 *Id.* at 190, ¶ 121.

99 *Id.* at 191-92, ¶ 125. Network cross-ownership is also restricted. 47 C.F.R. § 76.501 (1973).

width must also be available for public lease during that period.[100] Each cable system must also provide the capacity for return communication from receiver to head-end at least on a nonvoice basis over its channels.[101]

The Commission states in the rules: "Our basic goal is to encourage cable television use that will lead to constantly expanding channel capacity."[102] To help meet this objective, as of March 31, 1972, all cable systems in the top 100 markets must be prepared to enlarge their channel capacity. Thus an expanding channel flow will be available to the viewer, offering an increasing diversity of programming.[103]

These plans are a far cry from the thinking in the FCC's 1968 *Annual Report* referred to by the *Red Lion* Court, which defined CATV mainly in terms of broadcast signal reception.[104] For the cable TV which the FCC now foresees, the problem of scarcity on which *Red Lion* was premised will not exist. When broadly developed, cable television will give the public a far wider and more varied marketplace of ideas than broadcasting systems can offer. Thousands of channels with ready, low-cost (even free) access will assure for controversial public issues a forum far richer than any now available. For such a cable television system the fairness doctrine will not be required to secure the public's first amendment interest in an open marketplace of ideas. And since protection of the public's first amendment rights was the keystone of the Supreme Court's rationale, the fairness doctrine cannot under *Red Lion's* logic be a constitutional requirement for developed cable systems.[105]

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100 Fourth Report and Order, *supra* note 94, at 191-92, ¶ 125 (1972).

101 *Id.* at 192-93, ¶ 129.

102 *Id.* at 192, ¶ 126.

103 The rules requiring designated and leased access channels and the restrictions on network cross-ownership will also contribute to this increasing diversity and help achieve a lively marketplace of ideas over cable systems.

104 34 FCC ANN. REP. 4 (1968).

105 It should also be observed that *Red Lion's* "helping existing broadcasters" rationale (see text accompanying note 59 *supra*) cannot be applied to cablecasters. A federal government selection process does not give one cable channel user a dominant position over another. Under the FCC rules local governments make the key decisions on franchises above the minimum operating standards. Fourth Report and Order, *supra* note 94, at 207-10, ¶¶ 177-86. Since more channels are available and since the industry is new, the government, federal, state, or local, has not given any one channel user substantial advantage over others.

B. *The Reasonably Ancillary Doctrine*

The "reasonably ancillary" standard was first stated in *United States v. Southwestern Cable Co.*[106] In that case a San Diego television station applied to the FCC for relief from the competition of Southwestern's CATV system.[107] The system was importing signals from Los Angeles into San Diego, and the TV station alleged its San Diego market was being fragmented and its advertising revenue diminshed. The FCC granted the television station relief by restricting importation of the distant Los Angeles signals pending hearings.[108] The Court of Appeals for the Ninth Circuit set aside the FCC ruling, stating that the FCC lacked the requisite statutory authority.[109] The Supreme Court granted certiorari and reversed.[110]

The Court held that the FCC did have authority to regulate CATV and that the order restricting the Los Angeles signal importation did not exceed this authority. The Court, speaking through Justice Harlan, pointed to § 152(a) of the 1934 Communications Act[111] as the basis for FCC regulation of CATV. Under that section the Act's provisions apply to "all interstate and foreign communication by wire or radio." CATV systems clearly involve such communication.[112] Justice Harlan examined congressional intent and concluded that § 152 covers CATV operations and is itself a grant of regulatory power. He declared that the FCC had reasonably concluded that regulation of CATV was necessary to perform effectively its regulation of television broadcasting.[113] The FCC had pointed to the financial threat CATV posed to television growth and its responsibilty for developing a healthy system of local television broadcasting.[114] The Court concluded that FCC regulation of CATV is justified as part of the Commission's responsibility to protect broadcast television.

106 392 U.S. 157 (1968).
107 *Id.* at 159-60.
108 Memorandum Opinion and Order, 4 F.C.C.2d 612, 624, ¶ 24 (1966).
109 Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).
110 392 U.S. 157 (1968).
111 47 U.S.C. § 152(a) (1970).
112 392 U.S. at 169.
113 *Id.* at 173.
114 *Id.* at 176-77.

The Court expressed no views on the FCC's authority to regulate CATV in any other situation "or for any other purposes."[115]

> It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." 47 U.S.C. § 303(r).[116]

Though the Court indicated that FCC regulation of CATV which is reasonably ancillary to the Commission's television broadcasting responsibilities will be upheld, little guidance was offered on what constitutes a reasonably ancillary regulation beyond the economic protection situation.

Further guidance was provided, however, in *United States v. Midwest Video Corp.*[117] At issue there was an FCC regulation that no cable system with 3,500 or more subscribers can carry a TV broadcast signal "unless the system also operates to a significant extent as a local outlet by cablecasting[118] and has available facilities for local production and presentation of programs other than automated services."[119] Midwest Video, an operator with more than 3,500 subscribers, petitioned for review in the Eighth Circuit Court of Appeals of a Commission order that it engage in cablecasting. The court of appeals set aside the order, holding that it went beyond the Commission's statutory authority,[120] but the Supreme Court reversed.[121]

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115 *Id.* at 178.

116 *Id.*

117 406 U.S. 649 (1972).

118 "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 C.F.R. § 74.1101(j) (1971), *as amended*, 47 C.F.R. § 76.5(v) (1973).

119 47 C.F.R. § 74.111(a) (1971), *as amended*, 47 C.F.R. § 76.201(a) (1973).

120 Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971).

121 406 U.S. 649 (1972). Midwest Video had, in fact, challenged the rules *governing* program origination, including the cable fairness regulations. The court of appeals refused to rule on these regulations, stating that petitioner had no standing to challenge them since under that court's decision he would not be compelled to cablecast at all. Midwest Video Corp. v. United States, 441 F.2d 1322, 1328 (8th Cir. 1971). The Supreme Court ruled only on the program origination rule.

The issue was whether the program origination rule was reasonably ancillary to the Commission's television broadcasting regulation responsibilities.[122] The Court held that it was. Justice Brennan, announcing the decision of the Court, declared that the FCC could regulate cable systems not only to protect television broadcasting from economic harm but also to further other objectives for which the FCC had been given jurisdiction to regulate broadcasting. The objectives asserted by the FCC and reiterated by the Court were "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ."[123] The Court also mentioned the Commission's responsibility to "encourage the larger and more effective use of [television] in the public interest"[124] and to regulate broadcasting in accord with "public convenience, interest, or necessity."[125] With almost no analysis the Court asserted that the program origination rule fulfilled these statutory goals because the rule would provide increased diversity in programming.[126] It concluded that there was substantial evidence that the rule would promote the public interest.[127]

C. *Fairness and the Reasonably Ancillary Doctrine*

Can the fairness doctrine rules which have been imposed on cable operators be justified on the basis of the reasonably ancillary jurisdiction of the FCC as set forth in *Southwestern Cable* and *Midwest Video*? It should first be noted that application of the doctrine cannot be justified by the *Southwestern* economic protection rationale. The absence of a fairness doctrine rule applicable to cable systems would not have the adverse economic impact on television broadcasters that the lack of the distant signal importation restriction had on the television broadcaster in that case.

The Commission's justification for imposing the doctrine on

122 406 U.S. at 662-63.
123 *Id.* at 667-68.
124 *Id.* at 656 n.11. The Court was citing 47 U.S.C. § 303(g) (1970).
125 406 U.S. at 656 n.11. The Court was citing 47 U.S.C. § 303 (1970).
126 406 U.S. at 669. For an intense and skeptical analysis of this proposition, *see* Note, *Cablecasting*, *supra* note 93, at 820-37.
127 406 U.S. at 673.

cable operators is essentially the same as its justification for imposing the origination rule: the doctrine will further its statutory goals for regulation of broadcast television.[128] The Commission states that the policy behind the fairness doctrine will be "grossly circumvented" if a cable television viewer can see both sides of a controversial public issue presented when he looks at a broadcast program, but only one side of an issue when he switches to a CATV program origination channel or stays tuned to the same broadcast channel when program origination material is being presented there.[129] Thus to impose the fairness doctrine adequately on broadcast television, the Commission reasons, it must place fairness doctrine regulations on cable operators. The reasonably ancillary doctrine is therefore said to apply.[130]

The actions of the FCC seem inconsistent, however, with this justification. Although the Commission has continued fairness requirements for channels exclusively controlled by cable system operators,[131] it has eliminated the fairness doctrine requirements for designated access channels and leased access channels.[132] The FCC also states that if a broadcast channel is temporarily not carrying broadcast signals, it may be used as a leased access channel.[133] Programming on any of these channels could therefore present one side of a controversial issue and a response would not be required. Thus under the FCC's own rules broadcast programs will inevitably exist side by side with cable programs not subject to the fairness doctrine. One finds it hard to see why broadcast programs must be protected from electronic cohabitation with some cable programs unrestricted by fairness rules, but not similarly sheltered from others.

It is at best highly doubtful whether application of the fairness doctrine to mature cable systems will further the FCC's statutory objectives. Diversity of programming and community self-expression should be assured by cable technology and the FCC's access

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128 First Report and Order, 20 F.C.C.2d 201, 220, ¶ 41 (1969).
129 *Id.* at 220, ¶ 42.
130 *Id.* at 221, ¶ 45.
131 Fourth Report and Order, *supra* note 94, at 196-97, ¶ 145. 47 C.F.R. § 76.209 (1973).
132 Fourth Report and Order, *supra* note 94, at 196-97, ¶ 145.
133 *Id.* at 191-92, ¶ 125.

and program origination[134] rules. The latter will bring about the access channels and origination equipment which local groups need to express themselves over cable television. Adding the fairness rule may compel the occasional transmission of a different viewpoint over the cablecaster's channel, but it is unlikely to promote a different type of programming. Indeed the doctrine may have the opposite effect by encouraging bland, noncontroversial programming. Cable programmers constantly concerned with whether programs are fairly presenting both sides of issues or whether other shows will have to be presented for balance purposes, perhaps even without paying sponsors, may engage in self-censorship. In addition to balance worries and the prospect of free time being required for an opposing viewpoint, the time and resources needed to deal with fairness complaints against the station may also act as a disincentive.[135]

Imposition of the fairness doctrine on cable systems bears a doubtful relation to the FCC's prime objective of promoting television service in the public interest.[136] To the extent that "public interest" simply restates the public's first amendment rights and its stake in access and program diversity, the article has already noted that the FCC is on slippery ground.[137] Other public policy considerations do come into play, however. A review of these considerations below demonstrates, to this author at least, that the FCC lacks statutory power to impose a cable fairness rule under the "promoting the public interest" rationale. And even

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134 The *Midwest Video* extension of FCC authority may be turned back. The decision was 5 to 4, with Chief Justice Burger providing the swing vote. In his concurring opinion the Chief Justice acknowledged "that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." 406 U.S. at 676. The protectionist rationale of *Southwestern* may be required in the future to obtain a new majority for further FCC cable regulation if there is a shift on the Court. As indicated, the *Southwestern* rationale does not support the fairness rule as applied to cable systems. For a critical evaluation of the *Midwest Video* decision, *see* 22 J. PUB. L. 301 (1973).

135 Under the fairness doctrine programmers cannot, of course, eliminate presentation of controversial public issues altogether.

136 *See* 47 U.S.C. § 303 (1970). As the FCC itself notes, regulations of cable systems are valid only if the regulations are "reasonably related to the public interest." First Report and Order, 20 F.C.C.2d 201, 222, ¶ 46 (1969).

137 See text at notes 104 & 134-35 *supra*. The FCC itself states that "the first amendment . . . is, of course, one of the most crucial aspects of the public interest . . . ." First Report and Order, 20 F.C.C.2d 201, 222, ¶ 46 (1969).

if the FCC is found to possess the authority, these same considerations would argue against its exercise.

D. *Other Policy Considerations*

As now applied to conventional broadcasting, the fairness doctrine may often fail to insure fairness. The Commission's standard of fairness is based on a station's overall programming, not on a specific presentation. Suppose a presentation of a controversial public issue is made one weekday at 7:30 in the evening. A licensee might meet his fairness obligation if he broadcasts a program effectively presenting the other side of the issue at 2:00 o'clock in the afternoon of a day in the following week. But it is unlikely that a large percentage of the audience at 7:30 P.M. would see the rebuttal show at 2:00 P.M. Similar audience incongruity would exist even if the rebuttal show were presented at the same time on another evening. The broadcaster presents only one side of the issue to his 7:30 audience; required to present other views, he again presents only one side of the issue to the later audience.

In addition, there is the problem of defining what issue was raised by the first show. If a party discusses the quality of American education, does this mean that on the later presentation spokesmen may talk about local school issues or education in the Soviet Union or school busing? The best way to insure fair presentation of conflicting viewpoints would be to have those opinions presented in the context of a single program. But this requirement would mean interference by the FCC in planning content of specific programs, a course to which the FCC has steadfastly objected as an excessive interference with broadcasters' rights and an unbearable administrative burden. Needless to say, the same problems would attach to a cable fairness rule.

The time, effort, and money put into administering the fairness doctrine must also be considered in weighing its utility. *Broadcasting* magazine reports that in 1970 the FCC received over 60,000 fairness complaints.[138] Three lawyers plus supporting staff

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138 BROADCASTING, Dec. 27, 1971, at 21.

work full time handling routine fairness doctrine complaints.[139] On an average, at least once a week important fairness questions are sent to the full Commission for consideration. Since the Commission recommends that complainants first contact the station involved, thousands of man-hours must be invested by stations in responding to such complaints. The courts also devote time to fairness questions. This situation now exists in the context of a few hundred VHF and UHF television stations, plus AM and FM radio stations. The amount of effort necessary to deal with fairness questions in a cable network which involves thousands of separate channels would be greatly magnified. If complaints increase in proportion to the number of channels added in the top 100 markets, estimating only one 25-channel system per market, there would be over 360,000 complaints annually.

It is inequitable to impose fairness requirements on broadcasters but not on newspapers. Many towns have only one major newspaper while supporting several television and radio stations.[140] Scarcity cannot be the basis of the distinction in treatment between television and the press. A difference in historic function is not an adequate reason since today TV and radio stations are, like newspapers, considered media through which public issues are to be discussed. This inconsistency of treatment is even more glaring for cable originators, who do not use the public airwave resource. The inequity of the situation was ironically summed up in a mid-1970 order of the FCC with respect to cablecasting. The Commission ruled that although program origination was still governed by fairness requirements, even if a publisher of a newspaper originated the program, a newspaper itself could be distributed over cable undisturbed by the fairness doctrine.[141] The

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139 Telephone interview with Milton Gross, Complaints and Compliance Division, FCC's Broadcast Bureau, Mar. 21, 1972. William Ray, Chief of the Complaints and Compliance Division of the Broadcast Bureau of the FCC, has stated that the manpower input into fairness problems "varies enormously. . . . Sometimes we have as many as seven lawyers working full time on fairness doctrine issues." In addition, supervisory personnel, the office of the FCC's General Counsel, and supporting secretarial staff become involved. Telephone interview with William Ray, Nov. 9, 1973.

140 *E.g.*, Amarillo, Texas.

141 Memorandum Opinion and Order, 23 F.C.C.2d 825, 829, ¶ 8 (1970).

Commission said, "[t]he point is that we have no intention of regulating the print medium when it is distributed in facsimile by cable."[142]

Red Lion held the public's first amendment rights "paramount" over those of the broadcaster;[143] it did not deny the existence of the broadcaster's rights. As one commentator has noted, "[i]t is plain that First Amendment interests attach . . . to the broadcasters' advocacy of their own views, through editorializing and program selections . . . ."[144] The same argument was made by Judge Wright in *Business Executive's Move for Vietnam Peace v. FCC*[145] when he stated that while the fairness doctrine rules do interfere with "broadcasters' free speech," this interference was justified by the *Red Lion* Court in terms of the public's constitutional rights.[146] And he stated that the licensees' "dual role demands that their own constitutional interests in free speech coexist with those of the general public."[147] When in a cable system an end to scarcity eliminates the public's first amendment interest in the fairness rule, however, one should question this continued FCC abridgment of the programmer's freedom of speech.

First amendment concerns become especially important when one considers the potential in the fairness doctrine for governmental abuse. Since the FCC can determine when a controversial issue should be raised and what is fair programming, it could conceivably alter its standards to favor a particular point of view. Commissioners are appointed by the President, and he might favor those whose views reflect his own. An example of the potential for such abuse was alleged by former FCC Commissioner Nicholas Johnson. He stated that the Nixon Administration successfully demanded that a talk show host an advocate of the SST on a particular show as the only way to fulfill the station's fairness

142 *Id.* The recent cabinet committee report, *supra* note 86, apparently also recognized the inequity of not treating cable systems like newspapers. The committee urged "that cable programming be allowed the same freedom of expression accorded printed media under the 'freedom of the press' clause of the Constitution's First Amendment." Los Angeles Times, Jan. 17, 1974, at 1, col. 3, at 18, col. 1.

143 *See* text at note 53 *supra.*

144 Note, *The Supreme Court 1968 Term,* 83 HARV. L. REV. 60, 135-36 (1969).

145 450 F.2d 642 (D.C. Cir. 1971), *rev'd on other grounds,* 412 U.S. 94 (1973).

146 *Id.* at 650.

147 *Id.* at 654.

doctrine obligations.[148] The potential for governmental intimidation of the media was also illustrated by a memorandum written by a Watergate figure and made public by Senator Lowell Weicker (R.-Conn.).[149] In the memorandum, written by then White House Assistant Jeb Stuart Magruder to then White House Chief of Staff H. R. Haldeman, Magruder suggested utilizing several federal agencies to influence the media for political purposes. Among his recommendations was "[h]aving the Federal Communications Commission begin 'an official monitoring system' to prove bias on the part of the networks."[150]

Conclusion

The arguments for eliminating the fairness doctrine are premised on a fully operating cable system. Such a system would be importing broadcast signals to the maximum extent allowed, providing program origination, and supplying effective designated access channel operations. If the Sloan Commission is right, such systems should be in abundance by 1980 or soon thereafter.

The fairness doctrine is based on the need to guarantee that those few individuals who are awarded the privilege of using the scarce airwave resource afford the public an opportunity to hear conflicting views on controversial public issues. In 1969 the Supreme Court reinforced this theme by declaring in *Red Lion* that the first amendment required the fairness doctrine in conventional broadcasting. The Court concluded that in light of the scarcity of the airwave resource, the governmental role in allocating that resource, and the potential for private selfish control of the airwaves, the fairness doctrine was necessary to insure an uninhibited marketplace of ideas for the public.

The growth of cable television will change the premise upon which the Court based its decision. By the end of the decade or shortly thereafter, cable systems will be reaching over 50 percent of American households. Technological improvements required

148 Nicholas Johnson made this allegation when he appeared on the *Dick Cavett Show*, Mar. 9, 1972.

149 N.Y. Times, Nov. 1, 1973, at 8, col. 8.

150 *Id.* at 34, col. 3.

by the new FCC regulations will make cable systems a communication link of abundance. An ever-expanding number of channels will be offered for parties on a first-come, first-served basis, and a public access and short-term lease channel will guarantee that those who want to use the communication link may do so.[151] The first amendment goal of supplying diverse information to the public through an open marketplace will be fulfilled without the fairness doctrine. The FCC's present position that its cable fairness doctrine regulations are reasonably ancillary to its television broadcast responsibilities will become untenable. Cable fairness regulations will neither protect broadcast television in the *Southwestern* sense nor advance statutory objectives under a *Midwest Video* rationale.

Even if the FCC is considered to have authority to impose fairness doctrine rules on cable systems under existing legislation, such imposition will not be sound policy. The lively marketplace of ideas that the FCC seeks will exist without fairness rules in a developed cable system. Moreover one must consider the unnecessary infringement of programmers' first amendment rights, the unfairness caused by the doctrine's application, the time and money necessary to implement the doctrine, the inequity of not applying the same standards to the press, and the potential for governmental abuse of the doctrine. All of these factors cut against imposing the fairness rule on mature cable television systems.

151 *See* ON THE CABLE, *supra* note 62, at 42-43.

ENCOUNTER GROUPS AND HUMAN RELATIONS TRAINING: THE CASE AGAINST APPLYING TRADITIONAL FORMS OF STATUTORY REGULATION

DANIEL B. HOGAN*

Introduction

Since the dawn of mankind the small group has played an essential role in the progress of civilization. The family, the early tribal society, and our educational classroom provide varied but familiar examples. Recently a new type of group has emerged. It has been called, among other names, "T-group," "encounter group," and "sensitivity-training group." I shall refer to these collectively as "human relations training" groups. Each makes explicit and conscious use of the internal dynamics inherent in a small group in order to provide a planned, intensive experience. The purpose of this experience may range from the facilitation of personal growth to understanding what happens in groups. Of it the existential psychologist Carl Rogers has written: "[t]his is, in my judgment, the most rapidly spreading *social* invention of the century, and probably the most potent . . . . "[1]

Naturally, such a potent social invention is likely to be — and has been — received with considerable alarm by many. In the past several years major newspapers[2] and journals[3] have devoted sub-

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1 C. ROGERS, CARL ROGERS ON ENCOUNTER GROUPS 1 (1970).

2 *E.g.*, L.A. Times, April 11, 1973, § 6, at 10, col. 1; Maliver, *That Was Quite a Body Trip!* Chicago Tribune, April 30, 1973, § 2, at 11, cols. 1-4.

3 *E.g.*, Oden, *Inconsistencies and Miscalculations of the Encounter Culture*, 89 THE CHRISTIAN CENTURY 85 (1972); Strupp, *The Experiential Group and the Psychotherapeutic Enterprise*, 23 INT'L J. OF GROUP PSYCHOTHERAPY 115 (1973).

stantial space to articles warning the public about the potential dangers of small groups and seriously questioning their positive value. Several books have been written on the subject.[4] Organizations such as the American Group Psychotherapy Association, the Long Island Psychoanalytic Society, the New York and Colorado Psychological Associations, and the American Medical Association have thought the issue important enough to take a public position on and, in some cases, to issue guidelines for the conduct of these groups.[5] The American Psychological Association (APA) considers these groups of major concern and has made a painstaking effort to develop effective guidelines.[6] New York City and the State of California have held extensive hearings on whether to regulate such groups.[7] A United States Congressman, believing human relations training to be a communist conspiracy to brainwash U.S. citizens, had 14 pages of testimony written into the Congressional Record to demonstrate its danger to fellow Americans.[8] At the 1970 Convention of the APA a report noted that "seventeen legislatures are considering licensing for the leaders of encounter groups," and concluded that this was a good indication of the impact that small group activities were having on our culture.[9]

Public concern has not been limited to legislative and professional bodies. The judicial system has seen a number of suits brought against group leaders and organizations which sponsor groups. These lawsuits are already having a significant effect upon human relations trainers. Partly as a result of suits brought against it (and despite the fact that these suits were settled out of court), National Training Laboratories (NTL), one of the most presti-

4 *E.g.*, K. BACK, BEYOND WORDS: THE STORY OF SENSITIVITY TRAINING AND THE ENCOUNTER MOVEMENT (1972); B. MALIVER, THE ENCOUNTER GAME (1973).

5 American Group Psychotherapy Ass'n, Position Statement on Non-Therapy and Therapy Groups, Jan. 1971; New York State Psychological Ass'n, Hearings on Encounter Groups, May 20, 1971; Council on Mental Health, *Sensitivity Training*, 217 J.A.M.A. 1853, 1854 (1971).

6 American Psychological Ass'n, *Guidelines for Psychologists Conducting Growth Groups*, 28 AM. PSYCHOLOGIST 933 (1973).

7 *Hearings on Encounter Groups Before the Council of the City of New York*, May 20-22, 1971; *Hearings on Senate Bills 1130, 1131, 1132, 1135 & 1136 Before the Senate Comm. on Business and Professions, California Legislature*, Sept. 1973.

8 115 CONG. REC. 15322-35 (1969) (remarks of Representative Rarick).

9 Kennedy, *The American Psychological Association Convention Discussed . . . ; The Soma-Environmental Revolution, Pornography, Synergistic Consciousness, Sex with Patients*, N.Y. Times, Dec. 6, 1970, § 6 (Magazine) at 52, 106.

gious organizations conducting human relations training, had more than a five-fold increase in its malpractice insurance premiums in one year.[10] Professional liability insurance for APA members now specifically excludes coverage for physical injuries which occur in the course of therapy or other forms of psychological practice, including encounter groups.[11]

Given the serious and extensive concern which human relations training has generated, the problem becomes one of taking appropriate and constructive action. It would be all too easy to rush in with a traditional statutory antidote and declare the problem solved. Legislation could easily prohibit human relations training, much in the way that chiropractors are barred from practicing in some states, or permit group leaders to operate only after licensing or extensive academic credentialing, after the fashion of psychology.

A number of basic questions must be answered in order to determine whether regulation of human relations training is justified. A most important preliminary question is whether human relations training is dangerous, and if so, to what extent. If there is significant danger, what is the best course of action to minimize it? Are we able to determine with any reasonable degree of certainty the causes of the danger? Will a given regulatory framework be successful in minimizing harm, and what evidence exists to support such a claim? If certain standards are adopted, to what extent will they curtail the benefits society might derive from human relations training? Even if we know the appropriate standards, of what importance is it that a valid and reliable method of applying those standards may not exist? These and other questions need serious consideration. If we are unable to give them satisfactory answers, then the effectiveness of any regulation must, of necessity, be a matter of pot luck.

Since human relations training is difficult to describe and easily misunderstood, I will begin with a discussion of its essential elements. Alternative methods of statutory regulation, together with the consequences of choosing each method, are then considered. The article will frequently compare human relations training to

10 Telephone interview with Vlad Dupre, President of NTL, May 1, 1974; Shimberg, *New Issues in Insurance,* MASS. PSYCHOLOGICAL ASS'N NEWSLETTER, April 1971, at 6.

11 Shimberg, *supra* note 10, at 6.

the practice of psychology and psychotherapy. Each of these disciplines is commonly considered to be one of the "helping professions." As such they use similar methods and draw from similar principles. An examination, then, of the consequences of regulating psychological practice may serve to cast light on the question of whether human relations training also should be regulated.

I. A Description of Human Relations Training

The range of practice that makes up the field of human relations training is wide. The terms used to describe different variants include those previously mentioned as well as "confrontation labs," "micro-labs," and "marathon groups." The entire field has at various times been called the "human potential movement," "small group movement," and other titles.[12] I will use many of these terms, but in particular will often refer to T-groups and encounter groups. These two stand on opposite ends of a continuum of group types which can collectively be given the label of human relations training.

Buchanan has outlined some of the essential features of the T-group process:

> Training approaches meriting the name of laboratory (or T-group) utilize: (1) face-to-face, largely unstructured group as a primary vehicle for learning, (2) planned activities involving interaction between individuals and/or between groups, (3) systematic and frequent feedback and analysis of information regarding what happened in the here-and-now and what effect it had, (4) dilemmas or problems for which "old ways" of behaving for most of the participants do not provide effective courses of action (and thus for which innovative or "search" behavior is required), and (5) generalization or reformulation of concepts and values based upon the analysis of direct experiences.[13]

12 *See generally* C. Rogers, *supra* note 1, at 4-5.

13 P. Buchanan, quoted in House, *T-Group Education and Leadership Effectiveness: A Review of the Empiric Literature and a Critical Evaluation,* in Sensitivity Training and the Laboratory Approach: Readings About Concepts and Applications 436-37 (R. Golembiewski & A. Blumberg eds. 1970). *See also* T-Group Theory and Laboratory Method: Innovation in Re-Education 1 (L. Bradford, J. Gibb, & K. Benne eds. 1964) [hereinafter cited as T-Group Theory].

A typical encounter group, on the other hand, is described by William Schutz as:

> . . . usually comprised of six to twelve people who meet together for the primary purpose of personal growth. The members of the group are usually not emotionally "sick" in the sense of being psychotic or seriously neurotic. Typically, they are the normals and normal neurotics that make up the bulk of our population.
>
> An encounter group has no preset agenda. Instead, it uses the feelings and interaction of group members as the focus of attention. The process of achieving personal growth begins with the exploration of feelings within the group and proceeds to wherever the group members take it. A strong effort is made to create an atmosphere of openness and honesty in communicating with each other. Ordinarily, a strong feeling of group solidarity develops and group members are able to use each other very profitably.[14]

The learning that takes place in an encounter group tends to be more personal, while the T-group more often (but not necessarily) focuses on group process. Behavior in an encounter group often takes on a more physical form than in a T-group, and sensory awareness is more often the focus of attention. Most groups, regardless of type, are small and relatively unstructured. The expression of feeling and respect for the feelings of others is stressed. The emphasis is on what is happening in the group at the time, and not on past experience or abstract discussion.

Too often in the past T-groups and encounter groups have been categorized as fundamentally anti-intellectual and accused of propagating the "tyranny of emotionalism."[15] This view neglects the very real concern among those seriously involved with groups with cognitive, as well as affective, processes. It also ignores the theoretical basis which has been developed to explain the personality changes which occur in human relations training. A historical and theoretical look at small groups will reveal that such accusations, though true in some instances, are fundamentally false.

Charles H. Cooley was one of the first social scientists to focus on the small group and stress its importance.[16] He hypothesized

14 W. SCHUTZ, JOY: EXPANDING HUMAN AWARENESS 21 (1967).
15 *See* B. MALIVER, THE ENCOUNTER GAME 189-201 (1973).
16 C. COOLEY, SOCIAL ORGANIZATION (1909).

that one of the functions of a small group such as the family, where strong emotional ties exist, was to act as a source of moral norms, as well as to support the adult in his relationships to others in society. Such ideas did not receive much further impetus, however, until the 1930's. This was a period of great activity in sociology and the small group received extensive attention.[17]

Jakob Moreno and Kurt Lewin were two of the first to make use of the internal dynamics of groups to bring about change.[18] Moreno developed his techniques of role-playing, sociodrama, and psychodrama to bring about therapeutic change. Lewin, who came out of a background in Gestalt psychology, was interested in group dynamics as a method of bringing about social change, and was instrumental in originating the T-group concept.[19]

The T-group was also partially an outgrowth of the educational philosophy of John Dewey. Dewey envisioned education as an active process: "I believe finally, that education must be conceived as a continuing reconstruction of experience; that the process and the goal of education are one and the same thing."[20] Dewey's quest for an educational science of "quite a different method and content" was continued by social philosophers in the 1930's and 40's.[21] They had certain ideas and hypotheses, but lacked the proper educational vehicle. The T-group was perceived as such a vehicle and, especially in its formative years, was so developed.

In modern group practice, William Schutz and Carl Rogers have played critical roles, particularly in the use of human relations training as a method for facilitating personal growth.[22] Schutz had for many years been associated with NTL, but eventually moved to Esalen Institute in California, where he could experiment more

17 *E.g.*, E. MAYO, THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION (1933); NATIONAL RESEARCH COUNCIL COMM. ON WORK, FATIGUE OF WORKERS: ITS RELATION TO INDUSTRIAL PRODUCTION (1941); F. ROETHLISBERGER & W. DICKSON, MANAGEMENT AND THE WORKER (1939).

18 Shils, *The Study of the Primary Group*, in THE POLICY SCIENCES: RECENT DEVELOPMENTS IN SCOPE AND METHOD 51, 54 (D. Lerner & H. Lasswell eds. 1951). *See also* K. LEWIN, RESOLVING SOCIAL CONFLICTS (1948).

19 C. ROGERS, *supra* note 1, at 2. *See also* K. LEWIN, FIELD THEORY IN SOCIAL SCIENCE (1951).

20 DEWEY ON EDUCATION 27 (M. Dworkin ed. 1959).

21 *Id.* at 119. *See* J. DEWEY, DEMOCRACY AND EDUCATION (1916).

22 C. ROGERS, *supra* note 1, at 3; W. SCHUTZ, *supra* note 14.

freely with some of his techniques. He has since made Esalen famous and done much to popularize the use of groups. Rogers had experimented with the use of small groups as a vehicle for change as early as 1946. His interest until the 1960's, however, lay mainly in individual psychotherapy.

In the late 1960's Rogers, perhaps more than anyone else, was responsible for the development of the term "encounter group." He has also developed a theory of group dynamics that differs radically from classical Freudian theory. Rogers believes that if a small group leader can develop an atmosphere of trust, the expression of feelings will be promoted and defensiveness will be reduced. As group members express themselves more fully, they learn about themselves. The possibility of significant behavior and attitudinal changes becomes less threatening to them. They listen more to others, learn how to tell others constructively how they are perceived, and come to see change as desirable. Ultimately these changes carry over into outside relationships.[23]

In much the same way that progressive education was misunderstood because of sensationalistic stories and misdirected efforts,[24] human relations training has often been dismissed as fad or radical experimentation. Such treatment is unfortunate, for the theoretical bases of human relations training are deeply rooted in the scientific study of small groups, in the concern of progressive education with interpersonal skills and attitudes, and in the search for effective methods of personal growth. Rather than a fad, we are seeing in human relations training the emergence of a new "profession,"[25] one in which group leaders draw upon a theoretical base and specific skills to assist group members. As is to be expected with a new profession, these theories and skills are not fully explicated and delineated. It is crucial that great care be taken in the development of this fragile entity. Since regulatory processes are so important to the growth of a profession, their underpinnings need to be carefully examined.

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23 C. ROGERS, *supra* note 1, at 6-7.

24 *See generally* J. DEWEY, EXPERIENCE AND EDUCATION (1938).

25 Alfred North Whitehead has described "profession" as "an avocation whose activities are subjected to theoretical analysis and are modified by theoretical conclusions derived from analysis." A. WHITEHEAD, ADVENTURES OF IDEAS 72 (1954).

A. *Purposes and Goals of Human Relations Training*

An excellent enumeration of specific goals in human relations training has been provided by Campbell and Dunnette in their 1968 review of the research on T-groups. They saw six major outcomes which most practitioners would agree to be desirable, although different practitioners would emphasize some more than others:

> 1. Increased self-insight or self-awareness concerning one's own behavior and its meaning in a social context . . . .
> 2. Increased sensitivity to the behavior of others . . . . It refers first, to the development of an increased awareness of the full range of communicative stimuli emitted by other persons . . . and second, to the development of the ability to infer accurately the emotional or noncognitive bases for interpersonal communications . . . .
> 3. Increased awareness and understanding of the types of processes that facilitate or inhibit group functioning and the interactions between different groups — specifically, why do some members participate actively while others retire to the background? . . .
> 4. Heightened diagnostic skill in social, interpersonal, and intergroup situations.
> 5. Increased action skill . . . . [I]t . . . refers to a person's ability to intervene successfully in inter- or intragroup situations so as to increase member satisfactions, effectiveness, or output. The goal of increased action skill is toward intervention at the interpersonal rather than simply the technological level.
> 6. Learning how to learn. This does not refer to an individual's cognitive approach to the world, but rather to his ability to analyze continually his own interpersonal behavior for the purpose of helping himself and others achieve more effective and satisfying interpersonal relationships.[26]

Advertisements and informational brochures for encounter and other groups are usually not as complete in their description of goals and purposes, and tend to emphasize only one or more objectives. Many do not make the goals of the group explicit at all,

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26 Campbell & Dunnette, *Effectiveness of T-Group Experiences in Managerial Training and Development*, 70 PSYCHOLOGICAL BULL. 73, 75 (1968). *See also* Gibb, *The Effects of Human Relations Training*, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE: AN EMPIRICAL ANALYSIS 841-42 (A. Bergin & S. Garfield eds. 1971).

apparently assuming that the public knows and understands what they are. In some cases terms such as "encounter" are used where it is obvious that nothing resembling a true encounter group is to take place and the actual purpose is recreational or social.[27]

Participants, on the other hand, enter T-groups, encounter groups, and other small groups with a wide variety of expectations. Some prospective participants expect the group to function as a therapeutic vehicle; others are simply curious. Little is known about actual participant expectation, but a recent study indicates a high degree of congruence between participant expectation and group goals.[28]

Argument as to whether the goals of human relations training are educational or therapeutic has been raging for many years now. Psychiatrists have claimed that since human relations training attempts to change behavior and attitudes and often deals with emotional problems, it amounts to therapy. Implicit in this view is the far-reaching conclusion that T-group trainers and encounter group leaders should, like other practitioners of therapy, be regulated by state psychology laws or medical practice statutes.

One basis for the contention that human relations training is therapy has been the similarity between therapy groups led by credentialed psychiatrists and human relations training. Both are concerned with increasing a person's awareness of himself and others and with improving one's capacity to function effectively in society. Both types of groups are largely unstructured, have no set agenda, and attempt primarily to examine the process that is taking place within the group.

Nonetheless these similarities, asserts Jerome Frank, should not be allowed to obscure several crucial differences.[29] An important

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27 *E.g.*, Boston Free Paper, May 1, 1974, at 50, col. 2; Boston Phoenix, April 30, 1974, § 2, at 36 col. 2.

28 Bebout and Gordon, *The Value of Encounter*, in NEW PERSPECTIVES ON ENCOUNTER GROUPS 87 (L. Solomon & B. Berzon eds. 1972) [hereinafter cited as NEW PERSPECTIVES ON ENCOUNTER GROUPS].

29 For different views on this issue, *see* J. Frank, *Training and Therapy*, in T-GROUP THEORY, *supra* note 13, at 442; Gertz, *Trainer Role vs. Therapist Role*, in SELECTIONS FROM HUMAN RELATIONS TRAINING NEWS (C. Mill ed., 1969); Berger, *Similarities and Differences Between Group Psychotherapy and Intensive Short Term Group Process Experiences —— Clinical Impressions*, 1 J. OF GROUP PSYCHOANALYSIS & PROCESS 11 (1968); Gottschalk & Pattison, *Psychiatric Perspectives on*

distinguishing feature lies in the reason a person joins the group. T-groups and other groups are meant for participants who hope to improve some personal area of functioning. The participant does not see himself as seeking relief from mental ills, as does the person entering therapy. In this regard, it is assumed that the type of learning in a therapy group is of a far deeper nature and broader in scope than that which occurs in human relations training. It is also assumed that the ultimate goal of therapy is to bring the individual back to normal functioning, while the T-group and encounter group are concerned with improving what is already adequate behavior.

The leader's role is also conceived differently. In a therapy group the leader traditionally remains distant and apart from the group. He does not talk much about himself or reveal how he feels. He is the expert. Because of his silence and seeming uninvolvement, patients project their fears and fantasies onto the leader and become dependent on him. Working through this dependence and examining these fears and fantasies is the source of much of the learning in the group.

The T-group leader or facilitator, on the other hand, conceives his role in different terms.[30] He is not an expert in the traditional sense, but simply a more experienced group member with specific interpersonal skills and knowledge. He feels free to reveal how he feels about things and people, which minimizes the chance of a strong dependency relationship developing. As the participants in the group gradually come to see him as a human being, rather than an "authority" figure, he becomes to an ever greater extent a part of the group. As a result, participants typically learn as much from other members of the group as they do from the leader.

Since the time Frank's article was published (1964) the complexion of human relations training has changed. The increased emphasis on personal growth has blurred the distinctions between therapeutic or corrective change and positive growth. It also appears that personal growth-oriented groups are capable of bringing

T-Groups and the Laboratory Movement: An Overview, 126 AM. J. OF PSYCHIATRY 823, 827-28 (1969).

30 Rogers uses the term "facilitator" since a group leader's task is more to facilitate the expression of thoughts and feelings than to "lead." C. ROGERS, *supra* note 1, at 6.

about as deep and significant changes in group members as any traditional therapy. At the same time the idea that all psychotherapy and human relations training should be considered as a form of education is gaining increased acceptance. Szasz and others have attacked the medical model upon which traditional psychotherapy has been based.[31] This trend will probably continue as more people come to realize that education is more than simply the imparting of knowledge or the development of one's cognitive abilities.

Whether or not one agrees that psychotherapy and human relations training are a form of education, one must recognize that the question is not easily resolved. Not only is it open to question whether human relations training should be regarded as "therapy" but it is also problematic whether the medical model should be applied at all to the field of psychotherapy. Rather than rushing to any particular conclusion, a wiser course would be to continue inquiry and research in this area.

B. *The Value of Human Relations Training*

In determining whether to regulate it is important to weigh positive value versus risk of harm. One needs therefore to examine the contributions that human relations training has to make, and to discuss some of the areas in which it has been successfully used.

Ken Benne has noted that

> . . . the fact that millions of people are responding [to the offerings of human relations trainers] validates the *need* for the kind of education and re-education which human relations training at its best does provide. Men and women, young and old, do need help in gaining more valid understandings of themselves and others.[32]

Fulfilling this "need" may well be the most important contribution that human relations training has to make.

31 T. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT 296-97 (1961); Leifer, *The Medical Model as Ideology*, 9 INT'L J. OF PSYCHIATRY 13 (1970-71).

32 Benne, *The Tearing Down of Walls*, BOSTON U. LITERARY CURRENTS, Dec. 3, 1970, at 8-9.

Steele has suggested that human relations training has brought about an expansion of that "segment of our society that feels comfortable thinking and talking in psychological and process terms."[33] It has also been a force for social invention. It has helped individuals see that they have ability to change their behavior, and that the tools for learning to do so lie within each individual. Through the development of specific techniques and exercises to facilitate personal growth, human relations training has contributed much to the field of psychotherapy.[34]

Four years ago Carl Rogers estimated that "during 1970, 750,000 individuals will participate in some type of intensive group experience."[35] Hundreds of "growth centers" such as Esalen have sprung up around the country, whose main purpose is to conduct "work-shops," "laboratories," seminars, and other programs ranging from personal growth to organizational development. Esalen annually attracts an estimated 25,000 people.[36] Many universities offer different types of group experiences as a regular part of the curriculum. This growing popularity is evidence that many people are finding — or at least expect to find — human relations training a valuable experience.

T-groups, encounter groups, and other types of groups have been used in a wide variety of institutional settings with significant positive results. Industry especially has made use of human relations training. Rogers described a particular application of the process by TRW Systems, a large aerospace corporation, which used small group methods in attempting to work through some of the problems being caused by a merger.[37] In educational institutions human relations training has also been effective. In a California school system a series of encounter groups were conducted in order to help resolve administration-teacher-student conflicts, and achieved positive results.[38] T-groups have also been used as an

33 Steele, *The Socket-Wrench Saga,* 9 INT'L J. OF PSYCHIATRY 212 (1970-71).

34 *Id.* at 214.

35 C. ROGERS, *supra* note 1, at 149.

36 J. HOWARD, PLEASE TOUCH: A GUIDED TOUR OF THE HUMAN POTENTIAL MOVEMENT 21 (1970).

37 C. ROGERS, *supra* note 1, at 135-36.

38 This program is discussed more fully in C. ROGERS, FREEDOM TO LEARN 327-42 (1969). *See also* Bessell, *Magic Circles in the Classroom,* in R. Golembiewiski & A. Blumberg, *supra* note 13, at 349; Miles, *The T-Group and the Classroom,* in T-GROUP THEORY, *supra* note 13, at 452; W. SCHUTZ, *supra* note 14, at 190-209.

essential component in a community development program involving an entire town.[39]

A fascinating use of the T-group was made in a psychiatric hospital. Patients from both the open and closed wards in the hospital, some of whom were diagnosed as severely disturbed, participated. The program was considered successful.[40] Human relations training has also been used in settings varying from religious groups[41] to interracial conflict resolution.[42]

Empirical studies have produced evidence that human relations training does produce positive changes in attitudes, values, behaviors, and self-image.[43] Gibb has said that "changes do occur in sensitivity, feeling management, directionality of motivation, attitudes toward others, and inter-dependence." In other studies, however, it has been pointed out that "it still cannot be said with any certainty whether T-groups lead to greater or lesser changes in self-perceptions than other types of group experience, the simple passage of time, or the mere act of filling out a self-description questionnaire."[44] Still, Carl Rogers concludes:

> I believe it is clear that research studies, even though they need to be greatly extended and improved, have demolished some of the prevalent myths about encounter groups, and

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39 Klein, *Sensitivity Training and Community Development*, in PERSONAL AND ORGANIZATIONAL CHANGE THROUGH GROUP METHODS: THE LABORATORY APPROACH 184 (E. Schein & W. Bennis eds. 1965).

40 Johnson, Hanson, Rothaus, Morton, Lyle & Moyer, *The Uses of the Laboratory Method in a Psychiatric Hospital*, in E. Schein & W. Bennis, *supra* note 39, at 114.

41 *See* C. ROGERS, *supra* note 1, at 138.

42 *See id.*; W. SCHUTZ, *supra* note 14, at 213-15.

43 T-GROUP THEORY, *supra* note 13, at 395-441. *See* A. Bergin & S. Garfield, *supra* note 26, at 839-62; House, *T-Group Education and Leadership Effectiveness: A Review of the Empiric Literature and a Critical Evaluation*, in R. Golembiewski & A. Blumberg, *supra* note 13, at 435; Luke & Seashore, *Generalizations on Research and Speculations from Experience Related to Laboratory Training Design*, in R. Golembiewski & A. Blumberg, *supra* note 13, at 430; Campbell & Dunnette, *supra* note 26. *See generally* M. LIEBERMAN, I. YALOM & M. MILES, ENCOUNTER GROUPS: FIRST FACTS (1973); C. ROGERS, *supra* note 1, at 126; Bebout & Gordon, *supra* note 28, at 83; T-GROUPS: A SURVEY OF RESEARCH (C. Cooper & I. Mangham eds. 1971); Bunker & Knowles, *Comparison of Behavioral Changes Resulting from Human Relations Training Laboratories of Different Lengths*, 3 J. OF APPLIED BEHAVIORAL SCI. 505 (1967); Bunker, *Individual Applications of Laboratory Training*, 1 J. OF APPLIED BEHAVIORAL SCI. 131, 140 (1965); Miles, *Human Relations Training: Processes and Outcomes*, 7 J. OF COUNSELING PSYCHOLOGY 301, 305 (1960).

44 Campbell & Dunnette, *supra* note 26, at 98-99.

> have established the fact that they do bring about much in the way of constructive change.[45]

Two exhaustive studies of encounter groups have been conducted recently. The Group Experience Project (GEP) in Stanford, California studied participants in groups conducted by 16 professional leaders who used varying personal growth techniques.[46] A striking feature of the GEP results was their lack of uniformity. The authors' overall conclusion was that encounter groups were modestly productive. However, the results from group to group were markedly non-uniform. In one group, for instance, all members reported an increase in self-esteem, while only 15% of the members of another group reported such a change.[47] Group dropout rates ranged from 0 to 40 percent.[48] The authors found that certain differences in the personal characteristics of group leaders accounted for much of this variation. Leaders who were individually focused, who provided a moderate amount of emotional stimulation, who helped members understand the meaning of their experience, and who provided a moderate degree of management had uniformly positive results. Leaders whose style was intrusive, challenging, and authoritarian produced uniformly poor results.[49]

In contrast to the Stanford project, the Talent in Interpersonal Exploration Groups Project (TIE) in Berkeley, California[50] was conducted with group leaders who were almost entirely nonprofessionals. These leaders were chosen on the basis of personal qualities and were put through an intensive three-month training program. The four-year long project involved more than 1,500 participants. In their discussion of the results the researchers concluded:

> We have found significant positive changes in members almost wherever we looked. Self-esteem increases, the self-concept changes in many positive directions, self-actualizing tendencies are greater, alienation is reduced, and individual

45 C. ROGERS, *supra* note 1, at 134.
46 M. LIEBERMAN, I. YALOM & M. MILES, *supra* note 43.
47 *Id.* at 118.
48 *Id.*
49 *Id.* at 240.
50 Bebout & Gordon, *supra* note 28.

> problems are lessened; interpersonal relations become more empathic and improve, and interpersonal values change perhaps toward a more realistic supportiveness; people become close with each other and feel less lonely . . . .
> Our present conclusion is that encounter groups, when designed to provide a supportive, group-centered climate for personal growth, do produce significant positive changes and have considerable impact.[51]

Although the tremendous popularity of human relations training and its use in a wide variety of settings attest to its value in the eyes of those participating, there is small likelihood of demonstrating its value beyond all scientific doubt in the near future. Isolation of the factors which produce personality change is extraordinarily difficult, since group participants are constantly subject to a diversity of pressures originating outside of the group, as well as being affected by the immensely complex process of personal interaction in the group itself.[52] Adequate methodological tools simply do not exist. Nonetheless, what evidence we do have indicates that T-groups, encounter groups and other types of groups foster constructive growth in a number of areas.

C. *The Dangers of Human Relations Training*

Human relations training, especially the encounter group, frightens many people. Stories of participants suffering grave psychological harm and of "nude marathons" spread rapidly and become distorted. In 1969 Representative Rarick (D.-La.) reflected such fears in a speech before the House of Representatives:

> Mr. Speaker, the accelerated use of "sensitivity training" as a tool to indoctrinate the masses for a "planned change" in the United States has resulted in confusion, frustration, and wholesale disorientation among our unsuspecting people.
> Sensitivity training has been successfully used by the Bolsheviks as a brainwashing technique to erode an individual's will to resist, to destroy moral values, and as a method of controlling enslaved millions.[53]

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51 *Id.* at 117-118.

52 *See* R. HARRISON, PROBLEMS IN THE DESIGN AND INTERPRETATION OF RESEARCH ON HUMAN RELATIONS TRAINING (1967).

53 115 CONG. REC. 15322 (1969).

While Mr. Rarick's warning may leave most of us unshaken, there has been more moderate and thoughtful criticism that necessitates our taking a serious look at the risks involved in human relations training. Documenting harm, determining its cause, and establishing techniques for preventing it, however, involve difficulties similar to those outlined in demonstrating the positive value of training. Also, demonstration of some risk of harm is not conclusive; risk is inherent in all human activity. The question is one of degree.

The potential for psychological damage within the group experience itself has been thoughtfully explored by Alan Stone.[54] Stone is concerned with the potential danger of attacking a person's ego defenses in an attempt to force him out of role playing and in the name of "saying what one really feels." This tendency is part of what he considers the anti-intellectual current of the Esalen-style group in particular. Stone writes:

> This intense assault on the abiding configurations of the mental apparatus must surely be a powerful disruption, if not a catalyst for change. One can only hope that of those subjected to such an assault there are none who are allowed to remain as outsiders. Such disruption without the concomitant opportunity for intimacy and group support would surely be one of the most dangerous psychotherapeutic contests yet devised.[55]

The type of situation Stone is concerned with can occur in a group when one member may be obviously feeling anger, but suppressing it. The group may badger him and become irritated with him until he vents that anger. While this might prove to be a tremendously positive experience, it also could prove disastrous where the member is unable to deal with the expressed anger. Such an "attack" approach is part and parcel of Synanon,[56] but is antithetical to the central values of human relations training. Leaders in the field have continually stressed the importance of

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54 Stone, *The Quest of the Counterculture,* 9 INT'L J. OF PSYCHIATRY, 219-26 (1970-71).

55 *Id.* at 224.

56 "The Synanon group . . . emphasizes the expression of anger; the game is 'put' on each member in turn, and the other members systematically explore and attack him . . . ." M. LIEBERMAN, I. YALOM & M. MILES, *supra* note 43, at 12.

respecting a person's defenses and of attempting to create a climate of support and trust so that the individual himself chooses to drop those defenses.[57]

Indirectly related to this issue is the problem of voluntarism. In some cases industry and educational institutions have made human relations training a mandatory part of their training programs. Where it is not mandatory, it is often recommended in such a way that an employee knows that his next promotion is directly dependent upon attending. Such coercion in any form is directly contrary to the fundamental tenets of human relations training. Most responsible group facilitators would acknowledge that this form of training is not for everyone, and that coercion creates a risk that a person who cannot cope with the environment of an intensive small group will be hurt.[58] In addition, such coercion is often counterproductive, since unwilling members, through their resistance, can block the learning of other participants.

The potential of groups, especially those at the "encounter" end of the spectrum, to elevate feelings over intellect, experiencing over reflection and analysis, is well known. Whether one considers this a negative force depends upon one's value system. From a theoretical standpoint serious practitioners of human relations training have continually stressed the need for reflection and analysis. The extent to which these are lacking indicates the degree to which a group is an aberration from standard practice.[59]

Human relations training is also said to undermine the development of deep and long-lasting emotional relationships. Where strong emotions are quickly elicited and deep relationships are quickly entered into and dissolved (so-called "instant intimacy"), there is the threat that strong emotional ties of an enduring qual-

57 Harrison, *Defenses and the Need to Know*, in R. Golembiewski & A. Blumberg, *supra* note 13, at 85.

58 One might respond to the problem with a statutory ban on coercing another into group membership. Even if such a regulation proved administrable — and that is doubtful — one should note the difference between it and laws controlling the content of the group activity or restricting those who may act as group leaders.

59 Experiencing alone is usually not considered sufficient for significant personality change, although little research has been done on this question. In fact, there is some reason to think that it may be sufficient in certain instances to grow through experiencing without reflection, especially where an individual has an intense "peak experience." *See* AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE, ENCOUNTER GROUPS AND PSYCHIATRY 20 (1970).

ity will lose importance, and one's emotions will become merely superficial, discardable commodities.

The empirical evidence of the deleterious effects of human relations training is not extensive, although recent studies have placed specific emphasis on this area. Much of what does exist cannot strictly be categorized as research and takes the form of anecdotal reports describing instances in which people have supposedly been hurt by a group experience. This type of evidence has appeared in research journals and in the popular media, and, unfortunately, it is these stories which color the public's perceptions of human relations training. In the *New York Times Magazine* of January 3, 1971, for example, Bruce Maliver describes a woman's suicide and attributes it to an irresponsible group practitioner. He describes and takes a dim view of a workshop exercise conducted by William Schutz in which he claims a "dramatic psychotic episode" occurred.[60] In *Psychology Today* Everett Shostrom cites four examples of harm supposedly precipitated by encounter groups.[61] Ralph Crawshaw adds three clinical experiences to the list of anecdotes.[62]

Each of these authors explains how these episodes would have been far less likely were the encounter movement adequately regulated. From these isolated instances the authors argue that group leaders should either be licensed psychologists or psychiatrists, or should be supervised by them. While Maliver, Shostrom and Crawshaw assume that the group experience precipitated the harm in each case, that presumption sometimes is questionable.[63] The value of anecdotal reports lies mainly in their being suggestive of problem areas and directions in which research might go.

60 B. Maliver, *Encounter Groupers Up Against the Wall*, N.Y. Times, Jan. 3, 1971, § 6 (Magazine), at 4.

61 Shostrom, *Group Therapy: Let the Buyer Beware*, PSYCHOLOGY TODAY, May 1969, at 37.

62 Crawshaw, *How Sensitive is Sensitivity Training?* 126 AM. J. OF PSYCHIATRY 868 (1969). *See* Jaffe & Scherl, *Acute Psychosis Precipitated by T-Group Experiences*, 21 ARCHIVES OF GENERAL PSYCHIATRY 443. *See also* Gottschalk, *Psychoanalytic Notes on T-Groups at the Human Relations Laboratory, Bethel, Maine*, 7 COMPREHENSIVE PSYCHIATRY 472 (1966); Storrow, *What Happened at Bethel: A Personal View of Human Relations Training*, 138 J. OF NERVOUS AND MENTAL DISEASE 491 (1964).

63 Yalom & Lieberman investigated a suicide which had been attributed to a group experience and found that it had actually resulted from factors unrelated to the group. *See* Yalom & Lieberman, *A Study of Encounter Group Casualties*, 25 ARCHIVES OF GENERAL PSYCHIATRY 16 (1971).

When we turn to the statistical data that does exist, the conclusions are rather mixed and difficult to interpret. The American Psychiatric Association Task Force Report on *Encounter Groups and Psychiatry* provides information drawn from statistical records:

> One systematic study of the psychiatric casualties at a residential two-week National Training Laboratory at Bethel, Maine, revealed that the psychiatric casualty rate as measured by hospitalization, overt psychosis or a need for psychiatric attention was in fact very slight, (approximately 0.5% of the participants). The NTL Institute records indicate that of 14,200 participants in summer laboratories and industrial programs, only 33 (0.2%) found the lab so stressful that they had to leave the program prior to completion. At another NTL lab, however, one of the authors (I.Y.) noted that approximately 10% to 15% of all the participants consulted the lab counselor, a psychiatrist, for such complaints as anxiety, depression, agitation and insomnia. Three observers report on four two-week laboratories: of 400 participants, six individuals developed acute psychotic reactions. In each group the credentials and clinical training of the group leader were impeccable.[64]

In addition, the Task Force cites letters from various sources indicating harmful effects from human relations training. Thus, in "a T-group for psychiatric residents . . . three (of eleven) members suffered psychotic breakdowns, two during the course of the meetings and one seven months after the meetings terminated."[65]

The Task Force also discusses a study conducted by the Committee on Mental Health of the Michigan State Medical Society. The study was a response to reports of psychotic episodes and increases in various types of mental problems supposedly caused by sensitivity training laboratories. Unfortunately, the details of the study are not supplied, nor the methodology, and all that we know is that "[t]he committee concluded that the hazards were so considerable that all group leaders should be professional experts trained in the fields of mental illness and mental health."[66]

The Michigan Committee's conclusion that the hazards of sensitivity training were considerable has not been supported by data

64 AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE, *supra* note 59, at 13.
65 *Id.* at 13-14.
66 *Id.* at 14.

gathered by other groups. The APA-sponsored Task Force on Evaluation of Therapeutic Procedures, which has been in existence for over two years, "has looked for and not been able to come up with documentable evidence of harm done by encounter groups."[67] Frank H. Boring, former Chairman of the APA Committee on Scientific and Professional Ethics and Conduct, notes that in the last several years very few complaints have been registered with his committee concerning human relations training and of these few, most have come from psychologists, not participants.[68] Similarly Michael Murphy, President of Esalen Institute, states that Esalen has been offering groups of various types for nine years and has had few reports of psychic damage.[69]

These statistical data and reports give an impressionistic picture of the extent and type of harm resulting from human relations training. The information is of limited value and it is usually difficult to generalize beyond a specific study. A number of more controlled studies do exist. Cadden found that a T-group experience with medical students yielded "no evidence to suggest the precipitation of emotional illness by group process experience; in fact, psychiatric consultations are one-half those of last year and one-third those of each of the previous two years."[70] Lubin and Zuckerman found that T-groups were not significantly stressful in terms of anxiety, depression, or hostility.[71]

Ross, Kligfeld, and Whitman conducted a questionnaire study directed to the entire membership of the Cincinnati chapter of the Ohio Psychiatric Association and all psychiatric residents in the city.[72] The researchers sought to find out whether participants in sensitivity groups had sought psychiatric help as a result of psychotic episodes or personality disorganization caused by their

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67 Strassburger, *Ethical Guidelines for Encounter Groups*, APA MONITOR, July, 1971, at 3.

68 Telephone interview with Frank Boring, Jan. 28, 1972.

69 Letter from Michael Murphy, Nov. 23, 1971, on file with the HARVARD JOURNAL ON LEGISLATION.

70 Cadden, Flach, Blakeslee & Charlton, *Growth in Medical Students Through Group Process*, 126 AM. J. OF PSYCHIATRY 862, 866 (1969).

71 Lubin & Zuckerman, *Level of Emotional Arousal in Laboratory Training*, 5 J. OF APPLIED BEHAVIORAL SCI. 483 (1969).

72 Ross, Kligfeld, & Whitman, *Psychiatrists, Patients, and Sensitivity Groups*, 25 ARCHIVES OF GENERAL PSYCHIATRY 178 (1971).

group experiences. Nineteen such people were found. The authors estimated that about 2,900 people had participated in sensitivity training in the area, indicating a casualty rate of 0.66 percent. The casualty rate for more structured, task-oriented management groups (one of the categories within the broad spectrum of groups examined) was only 0.28 percent. In their explanation of what caused the negative outcomes the authors stated:

> The most common psychodynamic formulation involved some variant of attack on the patient's habitual modes of coping. Two were specifically described as having their compulsive defenses attacked, and two specifically as having their self-esteem attacked by verbal diatribes from the group.[73]

Their conclusion was that "the dangers [of sensitivity training] are not alarmingly great and that advantages are also there to be capitalized upon."[74]

A study by Batchelder and Hardy represents an excellent effort to determine potentially negative outcomes. Sensitivity training laboratories of differing lengths and formats were conducted over a five-year period under the auspices of the National Council of YMCA's. Thirty percent of the entire YMCA staff was involved in sensitivity training of seven days or more. The amount of severe psychological disruption was found to be minimal.[75]

Carl Rogers also has found evidence that little danger is involved in human relations training. In a systematic questionnaire follow-up of more than 500 encounter group participants, Rogers asked for any possible negative reactions, and the respondent was encouraged to give his own free response. Three to six months after each individual's group experience, only two people answered that the experience was "mostly damaging and had changed their behavior in ways they did not like."[76]

In the Group Experience Project (GEP) particular emphasis was placed on examining potential casualties. Lieberman, Yalom, and Miles state:

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73 *Id.* at 179.

74 *Id.* at 180.

75 R. BATCHELDER & J. HARDY, USING SENSITIVITY TRAINING AND THE LABORATORY METHOD 28-29 (1968).

76 C. ROGERS, *supra* note 1, at 126.

> A casualty was defined as an individual who, as a direct result of his experience in the encounter group, became more psychologically distressed and/or employed more maladaptive mechanisms of defense. Furthermore, to be so defined this negative change must not be transient, but enduring as judged eight months after the group experience.[77]

Of 104 suspected casualties 79 were contacted and 16 actual casualties were identified, representing 7.8 percent of the participants. A wide range of injury, both in severity and type, was found, varying from psychotic decomposition to a mild deterioration in personal life.[78]

In attempting to determine the causal factors which brought about the harmful results, it was found that the type of leader behavior was significantly related to casualties. Yalom and Lieberman found that "impersonal" leaders (distant, aggressive stimulators) and "energizer" leaders (characterized as giving "intense emotional stimulation") conducted groups with high casualty rates. These casualties, in addition, tended to be more severe. On the other hand, "provider" leaders produced the smallest percentage of casualties (these leaders were individually focused, gave love as well as information and ideas, and exuded a quality of enlightened paternalism).[79]

The authors identified five broad events which brought about harmful results: (1) attack by the leader or the group; (2) rejection by the leader or the group; (3) failure to attain unrealistic goals; (4) "input overload," *e.g.*, stirring up unresolved conflicts which the participant is unable to work through; and (5) "group pressure" effects. Yalom and Lieberman felt that their estimation of the casualty rate was probably conservative. They listed three grounds: (1) the manner of looking for casualty suspects was not perfect; (2) they were unable to contact some of the casualty suspects; (3) the project design probably operated to decrease the risks for the participants since all groups were observed and tape-recorded, and the leaders knew they were being evaluated.[80]

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77 M. LIEBERMAN, I. YALOM, & M. MILES, *supra* note 43, at 171.

78 *Id.* at 167-210.

79 *Id.* at 246.

80 *Id.* at 170, 193.

The Talent in Interpersonal Exploration Groups (TIE) Project in Berkeley, California, yielded radically different results.[81] Bebout and Gordon considered responses from ratings and comments made by participants. "A response was considered potentially negative if *any* indication of a complaint, bad experience, distress, disappointment, continuing or increased concern with a specific problem, or if any negative ratings occurred (including 'No Change' ratings with or without comment)." There were 20,400 items which might have provided the opportunity for a negative response, and, out of all responses, the authors found only 112 which indicated potentially harmful outcomes.[82] After categorizing the responses, Bebout and Gordon concluded: "[W]ith the available data, we have not been able to identify a single bona fide clinical casualty resulting from a group, though many egos are bruised and lives changed."[83]

In comparison with GEP, the casualty rate for TIE, less than one percent, is striking. It is unlikely that the difference can be attributed to criteria or adequacy of measurement since both projects were comparable in this regard. Two obvious differences between the projects appear likely to account for the discrepancy. The TIE Project employed a "fail-safe" approach which minimized anxiety levels, avoided personal attacks on participants, and used program consultants with problem personalities and situations.[84] In the GEP Project such safeguards were absent.[85]

The second difference is that only non-professional leaders were used in the TIE Project, and participants were informed of this fact.[86] Group members may tend to place trust in a professional because he is credentialed, even when his actions are destructive. Rather than trusting his own instincts, the member feels that the professional must be right, and therefore lets down his defenses.

An extremely interesting aspect of virtually all the data ex-

81 Bebout & Gordon, *supra* note 28, at 83-118.

82 *Id.* at 105-06.

83 *Id.* at 109.

84 *Id.* at 85.

85 Yalom & Lieberman, *supra* note 63, at 20-22.

86 Telephone interview with Debra Blatter, Research Assistant to Dr. James Bebout, May 7, 1974.

amined is that the leader's ability to diagnose severe emotional disturbances does not appear to be related to the level of danger. Indeed, comparison of the GEP and TIE results indicates a reverse correlation. The diagnostic ability of the professional leaders in the GEP Project (and it seems reasonable to assume that it was quite high) did not operate to prevent casualties, nor did it help the leaders identify casualties. On the contrary, fellow group members were the best casualty identifiers.[87] When a leader follows a "fail-safe" approach, the need for diagnosing emotional disturbances seems to disappear, and it does so without a concomitant loss in effectiveness in bringing about positive change.

These studies appear to indicate that the danger involved in human relations training is often exaggerated. The research also indicates that risk can be further minimized by adopting the "fail-safe" approach of the TIE Project. The type of behavior that most often seems to precipitate harm is some form of attack by either the leader or the group on a person's coping defenses. Ability to diagnose severe emotional disturbance does not seem to be helpful in preventing this type of attack, while the presence of certain personal qualities in the leader himself does seem to be related to a lower incidence of attacks.[88]

The danger that has been associated with human relations training may in fact be smaller than the danger involved in psychotherapy. Truax and Mitchell, for instance, have asserted that "[t]wo out of three of the [practicing therapist's] colleagues, he can be quite certain, are ineffective or harmful."[89] Allen Bergin has devoted considerable attention to the negative effects of psychotherapy, which he refers to as the "deterioration effect," and concludes that "deterioration occurs in a very high proportion of the [cases] studied, and that it is more frequent among therapy [cases] than control [cases]."[90]

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87 M. LIEBERMAN, I. YALOM & M. MILES, *supra* note 43, at 175.

88 *See* text at note 79 *supra.*

89 Truax & Mitchell, *Research on Certain Therapist Interpersonal Skills in Relation to Process and Outcome,* in A. Bergin & S. Garfield, *supra* note 26, at 340.

90 A. Bergin & S. Garfield, *supra* note 26, at 248. For other evidence of the negative effects of psychotherapy, *see id.* at 246-52; E. POWERS & H. WITMER, AN EXPERIMENT IN THE PREVENTION OF DELINQUENCY: THE CAMBRIDGE-SOMERVILLE YOUTH STUDY (1951); C. ROGERS & R. DYMOND, PSYCHOTHERAPY AND PERSONALITY CHANGE (1954); Bergin, *Some Implications of Psychotherapy Research for Therapeutic Prac-*

Whether society decides that the amount of risk present in human relations training is acceptable will depend on how much it values the potential contribution human relations training has to make to society. The level of risk involved in human relations training is by no means clear. Some think it unacceptably high and argue that traditional statutory regulation is therefore needed. Before jumping to the regulatory conclusion, however, one should give the problems of regulation a thoughtful analysis.

II. The Question of Regulation

Traditionally, statutory regulation of a profession tends to take one of two forms: licensing or certification of practitioners. I have been able to find no state law explicitly applying either of these regulatory devices to human relations training group leaders. As discussed earlier, however, a number of states are considering such measures; doubtless more will. Since we now have the opportunity to write on a relatively clean slate, the problems of regulatory legislation should be given thorough consideration.

Although statutory regulation can be seen simply as an exercise of authority for the purpose of social control, such a view misses an important, broader purpose of legal regulation. This broader purpose has been described by Lon Fuller as "ordering and facilitating the interactions of citizens with one another,"[91] and he has pointed out that, if we view regulation in this perspective, ". . . it is apparent that the making of law involves the risk that we may be unable to foresee in advance the variety of interactional situations that may fall within the ambit of a preformulated rule."[92] Regulation by statute, then, involves hidden dangers which should be recognized and considered. One must therefore keep in mind that the public may in some cases benefit most when regulatory laws are absent.

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tice, 3 Int'l J. of Psychiatry 136, 137 (1967); Truax, *Effective Ingredients in Psychotherapy: An Approach to Unraveling the Patient-Therapist Interaction*, 10 J. of Counseling Psychology 256, 261 (1963).

91 Fuller, *Human Interaction and the Law*, in R. Wolff, The Rule of Law 171, 196 (1971).

92 *Id.* at 203.

One should recognize, moreover, that non-statutory controls may also be available. The courts can exercise judicial control through malpractice suits or actions for misrepresentation. Insurance companies can withhold professional liability insurance unless certain standards of competence are met. Internal self-regulation can be achieved through the development of standards of competence, a code of ethics, and disciplinary procedures for their enforcement. Consumer education can also operate to regulate human relations training through publicizing standards of competence and circulating lists of trainers. These are but a few of the non-statutory possibilities.

A discussion of statutory regulation needs to address several basic questions. First it is necessary to define the scope of "human relations training." Given a legislative finding of significant danger, the form of regulation which will minimize danger becomes a relevant inquiry. We must therefore attempt to determine the cause of harm — whether it lies with the trainer or the group, whether it results from specific techniques or personal qualities. We must then determine what standards will ensure that the harm will be minimal. In setting those standards the interest in maximum public protection must be balanced against the interest in providing an adequate supply of group leaders, and therefore of groups. The problem of standards will involve considering what criteria should be used to select group leaders. Even if we can determine which criteria are relevant to effective performance, we must also recognize that those criteria may not be subject to standardized measurement.

This discussion will focus on the two traditional forms of regulation noted earlier, licensing and certification. In general, licensing statutes define the practices which professionals are authorized to perform, and include a specification of the character, education, and training which are the prerequisites to the granting of a license. Licensing laws generally include grounds and procedures for disciplinary action of some sort, whether it be suspension or revocation of the license, or criminal penalties. Such laws typically restrict the practice of the profession being regulated to those specifically licensed or otherwise excepted from the restriction.[93]

93 Kayton, *Statutory Regulation of Psychologists: Its Scope and Constitutionality*, 33 ST. JOHN'S L. REV. 249, 250 (1959).

Unlike licensing, certification does not prohibit the practice of the profession being regulated. It is only the use of some designated title or titles, which typically describe or are related to the profession, which is restricted.[94]

The primary purpose of either form of regulation is to protect the public from incompetent and unethical practitioners, as well as from charlatans, quacks, and frauds.[95] A less publicized effect is to make entry into the profession more difficult; the resulting shortage of members ensures the financial well-being of those few who are licensed or certified. Professional associations feel that statutory regulation is a symbol of respectability and demonstrates that the profession is well-established.[96] With such recognition, professionals feel that there is less difficulty in attracting high-caliber recruits. Finally, some feel that legal regulation helps to define a professional field more clearly.[97]

A. *One Regulatory Solution: Absorption*

States might choose to treat human relations training as a discrete area for regulation, or subsume it within another regulated profession. An extremely unlikely but theoretically possible method would be to treat human relations training as the practice of medicine. In many state laws the treatment of mental afflictions or diseases of the mind are included within the parameters of the practice of medicine.[98] If one chose to consider encounter

94 Note, *Regulation of Psychological Counseling and Psychotherapy*, 51 COLUM. L. REV. 474, 482-83 (1951).

95 Kayton, *supra* note 93.

96 *Joint Report of the APA and CSPA Committees on Legislation*, 10 AM. PSYCHOLOGIST 727, 729 (1955).

97 This was, for instance, one of the purposes behind the recent Massachusetts legislation regulating psychology. Interview with Dr. Stanley Rosenzweig, President, Massachusetts Psychological Association, Jan. 28, 1972.

98 The licensure acts of twenty-six jurisdictions, however, expressly apply to the treatment of both mental and physical afflictions and therefore may include psychotherapy within their scope. The statutes of the remaining jurisdictions do not expressly include the treatment of mental ailments within their definitions of the practice of medicine. One statute, however, defines "healing art" as the treatment of both mental and physical ills and it has been held by the highest court of this state that such practice by a person who does not hold an applicable "healing art" license constitutes the illegal practice of medicine. In the others, the practice of

groups as being therapeutic and as dealing with problems related to mental illness, leading such groups could be construed as the practice of medicine. However, many experts in the field would argue that human relations training is basically educational, and not a form of therapy.[99]

In any event, the issue has already been resolved in most states. More than 45 have passed legislation regulating psychology,[100] specifically including the practice of psychotherapy or counseling within the practice of psychology. At the same time, most such laws state that certification or licensing to practice psychology does not confer the right to practice medicine.[101] Thus for regulatory purposes the practice of psychotherapy is not the practice of medicine. Since human relations training is far more closely related to psychotherapy than to traditional medicine, there is little chance that it would be construed to be the practice of medicine under such statutes.

The likelihood that human relations training may be considered to fall within the ambit of the psychology laws is far greater. The APA's definition of the practice of psychology states:

> The practice of psychology within the meaning of this act is defined as rendering to individuals, groups, organizations, or the public any psychological service involving the application of principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, thinking, emotions, and interpersonal relationships; the methods and procedures of interviewing, counseling, and psychotherapy.[102]

Many states have adopted this definition either in toto, in part, or

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> medicine includes the treatment of diseases, human ills, or ailments, terms which may be broad enough to include both mental and physical conditions.

Regulation of Psychological Counseling and Psychotherapy, supra note 94, at 475-76.

99 *See* T. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (1961).

100 Citations to all relevant state statutes are on file with the HARVARD JOURNAL ON LEGISLATION.

101 Such a clause was recommended by the American Psychological Association in its *Joint Report, supra* note 96, at 747.

102 *A Model for State Legislation Affecting the Practice of Psychology, 1967: Report of APA Committee on Legislation*, 22 AM. PSYCHOLOGIST 1095, 1098-99 (1967) [hereinafter cited as *A Model for State Legislation*].

in slightly altered form. It would seem that human relations training falls within this definition.[103] However, in the opinion of many state psychological associations human relations trainers are not practicing psychology.[104] To the extent that those associations' views influence legislative practice, therefore, it is unlikely that human relations training would be considered the practice of psychology under a statutory definition like that above.

B. *The Problem of Definition*

Any plan of regulation through licensing must first define the class of activity which will be restricted to those possessing licenses. If only in the interests of predictability — of letting the citizen know what activity he may not undertake without a license — the definition must be clear-cut. Indeed, where criminal penalties for violation are involved, the need for clarity of definition may rise to a constitutional requirement.[105]

An unambiguous definition of "human relations training," however, is likely to be very elusive. The field encompasses a wide variety of activity for which consistent distinguishing characteristics do not exist. As a relatively recent phenomenon, human relations training has not evolved a set of common practices which mark it off as a discrete "field." Again, an analogy to the older, more established area of psychology is instructive. For all its efforts to regulate psychology, the New York State Department of Mental Hygiene found that "attempts had been made to draft a definition of the nature and scope of the practice of psychology but the efforts had completely failed."[106]

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103 House Bill 10654, 1971-72 Regular Sessions, New York State Assembly, would have explicitly included "sensitivity training" within the statutory definition of psychology. The bill was defeated.

104 Questionnaire survey of all State Psychological Associations conducted by author, February, 1972.

105 *See* United States v. Cardiff, 344 U.S. 174 (1952); Connally v. General Construction Co., 269 U.S. 385 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921); Trio Distribution Corp. v. Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957).

106 Memorandum to Governor Harriman, March 5, 1956 (Bill Jacket Collection, Albany, New York). *See* Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 747-48 (1957); *Regulation of Psychological Counseling and Psychotherapy*, *supra* note 94, at 481.

One might seek to resolve the definitional problem by casting the broadest possible net. The APA took this approach when it drafted its definition of the practice of psychology "in order to cover all activities of psychologists."[107] A different difficulty then arises, however. A "dragnet" statute will inevitably scoop up in the regulatory net persons and activities quite inappropriate for regulation, or at least for the sort of regulation written without them in mind. By subjecting those involved in "gray area" activity to the licensing requirement, one will probably exclude from that area persons quite competent to remain practicing within it. Of course the opposite problem would arise with highly specific, overdetailed legislation (even supposing one could draft it): persons practicing just outside the statutory limits may be so numerous as to destroy the law's effectiveness.

One should finally note that any statutory language which seems to paste over the definitional problem will act only to pass that problem on to courts and regulatory agencies. The line drawing problem is little easier for them; indeed, it is worse to the extent that they must base their rulings on second-guesses of legislative intent.

In any developing profession, where standard practice is not clearly defined, licensing will operate to rigidify current practice. For example, in Colorado the General Assembly passed a Child Health Associates Law to provide recognition, licensing and regulation of a new class of paramedical personnel. The legislation was highly detailed, regulating the activities of those subject to the law minutely and comprehensively, specifying where they could work, who was to supervise them, and what drugs they could prescribe. The result was to limit severely the possibility of innovation and improvement in this field and to limit the usefulness of the work that could be done.[108] Milton Friedman, citing the practice of medicine as an example, says of this problem:

> There are many different routes to knowledge and learning and the effect of restricting the practice of what is called medicine and defining it as we tend to do to a particular group,

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107 *A Model for State Legislation, supra* note 102, at 1098.

108 *See* Curran, *New Paramedical Personnel—To License or Not to License?*, 282 NEW ENGLAND J. OF MEDICINE 1085, 1086 (1970).

> who in the main have to conform to the prevailing orthodoxy, is certain to reduce the amount of experimentation that goes on and hence to reduce the rate of growth of knowledge in the area.[109]

It is for this reason that William Curran on the Harvard Medical School believes:

> In general, it is best in the evolution of professional groups to . . . move to licensure only after the professional group is fully matured, clearly defined in its responsibilities and capable within its own educational and training programs of meeting the reasonable manpower needs in its field of practice.[110]

An often proposed alternative to licensing is certification. In states with psychology certification laws, anyone may legally practice psychology, but only certified individuals may call themselves "psychologists." While this method does not facilitate control of practice, it has the advantage of less severely inhibiting innovation and experimentation. The effectiveness of such statutes depends on the public's knowledge of and respect for the title or titles being regulated; they are the practitioner's "Good Housekeeping Seal of Approval." Where the public is so informed, non-certified psychologists will receive less business and lower fees, and thus the marginal practitioner will be driven out of business. Where such knowledge and respect do not exist, a certification law is of little value.

Certification laws run little risk of constitutional difficulty. In *National Psychological Ass'n for Psychoanalysis Inc. v. University of the State of New York*,[111] for example, the plaintiffs claimed that the failure to define "psychology" amounted to an arbitrary restriction of the carrying on of a legitimate occupation, and hence was a denial of due process. The relevant part of the New York statute read: "no individual shall represent himself as a psychologist within the meaning of this act other than those certified and registered under the provisions of this act."[112] A person represents

109 M. FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962).

110 Curran, *supra* note 108, at 1086.

111 8 N.Y.2d 197, 168 N.E.2d 649, 203 N.Y.S.2d 821, *appeal dismissed*, 365 U.S. 298 (1960).

112 Law of April 17, 1956, ch. 737, § 1, [1956] Laws of New York 1627 (now N.Y. ED. LAW § 7601 (McKinney 1972)).

himself as a psychologist when he "holds himself out to the public by any title or description of services incorporating the words 'psychological,' 'psychologist' or 'psychology,' and under such title or description offers to render or renders services to individuals, corporations, or the public for remuneration."[113] The court upheld the statute:

> [S]ince the statute merely proscribes the *use of specific words to describe* the rendition of services, without making it criminal for non-certificants to render such services, no further definition of that term is constitutionally required or necessary . . . . The statute is easily compiled with by the nonuse of particular words, and hence it completely "satisfies the requirement that a criminal statute must be sufficiently definite . . . to give 'unequivocal warning' to citizens of the rule which is to be obeyed."[114]

Despite the absence of the definitional problem, certification involves one other consideration which should be mentioned. Historically a certification scheme is but a prelude to licensing. This trend has been followed in psychology: three of the earliest states to regulate (Connecticut (1945), Virginia (1946), and Kentucky (1948)) began with a certification scheme which has subsequently been amended to provide for licensing.[115]

C. *The Problem of Harm*

The right of the state to regulate any profession or occupation stems from its police power. The state can enact such regulations as necessary to protect the public health, welfare, safety or morals. While the states have great latitude in determining when a threat to these interests is present, it is only sound policy to be sure that

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113 *Id.*

114 National Psychological Ass'n for Psychoanalysis Inc. v. Univ. of the State of New York, 8 N.Y.2d 197, 205, 168 N.E.2d 649, 653, 203 N.Y.S.2d 821, 827 (1960).

115 Law of May 9, 1957, P.A. 269, [1957] Conn. Public Acts 341, *as amended* CONN. GEN. STAT. ANN. 20-186 to -195 (1969); Law of March 25, 1948, ch. 169, [1948] Ky. Acts of Assembly, *as amended* KY. REV. STAT. §§ 319.005-.990; Law of March 26, 1946, ch. 280, [1946] Va. Acts of Assembly 473, *as amended* CODE OF VA. §§ 54-102 to -102.14 (1950).

there is a public danger in need of regulation, and that proposed corrective legislation is indeed aimed at correcting that danger.

For an example of the problems which arise when a state decides to regulate a profession without adequate proof of the need for legislative intervention, we can again turn to psychology. In that field the possibility of harm has generally been assumed, just as it has been assumed that regulation is the best way to deal with this possibility. Claims of dangers involved have rarely been supported by empirical evidence of any great validity or reliability.[116] Certainly it has not been shown that statutory regulation is the only, or even the best, answer. One tends therefore to suspect that the main motive behind such laws has been to establish a small, elite group of professionals and protect them from competition. As the report of the committee responsible for promoting one of the first psychology laws in the country stated: "The committee feels, however, that a major step forward has been made toward raising the status of the profession in the State."[117]

It is my belief that the dangers of human relations training do not warrant the exercise of the police power of the state. Even if significant harm were demonstrated, I would contend that not enough is known about its causation to make legislative interference advisable. Our experience with the regulation of psychology should lead us to reject regulatory legislation, offered ostensibly to protect the public, without adequate proof of significant harm. In commenting on the problem of unnecessary governmental regulation, Milton Friedman has argued:

> The only way that I can see to offset special producer groups is to establish a general presumption against the state undertaking certain kinds of activities. Only if there is a general recognition that governmental activities should be severely limited with respect to a class of cases, can the burden of proof be put strongly enough on those who would depart from this general presumption to give a reasonable hope of limiting the spread of special measures to further special interests.[118]

116 *E.g.*, NEW YORK STATE PSYCHOLOGICAL ASS'N, MEMORANDUM IN SUPPORT OF THE PSYCHOLOGY LICENSING BILL — ASSEMBLY 10654, SENATE 8837 (1972).

117 Finger, *The Certification of Clinical Psychologists in Virginia*, 1 AM. PSYCHOLOGIST 395, 397 (1946).

118 M. FRIEDMAN, *supra* note 109, at 144.

D. *The Problem of Standards and Criteria*

In discussing whether human relations training should be regulated, the question of standards and criteria is crucial: we want to know what sort of qualities, skill techniques and other factors are important in ensuring group leader competence. This difficult problem has too often been disposed of in laws which assume that academic programs ensure whatever qualities are necessary. Furthermore, it has been assumed that only such academic training can produce competent practitioners. It is time to heed the words of Howard Mumford Jones: "The problem of graduate training, too little known, too little studied, too superficially dealt with, too potent in its final effects upon world culture to be left to technologists and specialists, must be studied by thoughtful Americans."[119]

Again analogy to psychology is instructive. In many states to practice psychotherapy an individual must possess a doctoral degree in clinical psychology or its equivalent (unless one is exempted from the operation of the statute through being a physician or psychiatric social worker). In other states, to practice psychotherapy as a "certified psychologist," one must hold a Ph.D. in psychology. Academic credentials constitute the single most important criterion of qualification in statutory regulations.

Many commentators, however, feel that the traditional doctoral programs are largely irrelevant to and ill-prepare one for the practice of psychotherapy.[120] Charles Truax and Kevin Mitchell, two psychologists who have done extensive work in this area, have concluded:

> From existing data it would appear that only one out of three people entering professional training have the requisite interpersonal skills to prove helpful to patients. Further, there is no evidence that the usual traditional graduate training program has any positive value in producing therapists who are

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119 H. JONES, EDUCATION AND WORLD TRAGEDY 178 (1946).

120 *See generally* Carkhuff, Kratochvil & Friel, *Effects of Professional Training: Communication and Discrimination of Facilitative Conditions*, 15 J. OF COUNSELING PSYCHOLOGY 68 (1968); Freedman, *The Great Training Robbery???*, 36 AM. J. OF ORTHOPSYCHIATRY 590 (1966); Note, *Ideal Training Programme for Psychotherapists*, 45 INT'L J. OF PSYCHOANALYSIS 141 (1964).

> more helpful than nonprofessionals. In short, current procedures for selection and training are indefensible. Out of habit we still cling to them and perpetuate them even when the evidence is clear. Moreover, the chances that a trainee will be taught by a therapist who is himself either ineffective or harmful are two out of three.[121]

The problem with most academic programs, particularly in clinical psychology, is that inadequate consideration has been given to the factors that make one an effective psychotherapist. These programs originally were developed as academic subjects with primary emphasis upon stimulating scholarship and encouraging original research, unlike the allied health professional training programs, which developed from a practical base. Thus, it is not surprising that Kelly and Fiske, in a massive five-year study to assess the performance of a group of clinical psychologists, found that academic and research competence could be reasonably well predicted by different measures, but that therapeutic competence was uncorrelated with academic performance.[122] An examination of the literature in order to determine what the relevant standards and criteria should be is of little help. Not much is definitely known about therapist effectiveness or harmfulness or the causes of either. Psychologists and psychiatrists often assume that experience, therapist-patient similarity, intelligence, sex, and other qualities are positively related to therapeutic outcome, but the empirical evidence is inconclusive.[123] Many studies are contradictory.

Truax and Mitchell have conducted one of the most thorough reviews of the research on the interpersonal skills of the therapist and their relation to client change. They believe that three characteristics, genuineness, nonpossessive warmth, and accurate empathic understanding, are important in the therapeutic relationship.[124] Truax and Mitchell found that Freud, Fromm-Reichmann, Otto Rank, Alfred Adler and most other psychoanalysts who were phenomenologically oriented, as well as theorists and practitioners

121 A. Bergin & S. Garfield, *supra* note 26, at 337.

122 E. KELLY & D. FISKE, THE PREDICTION OF PERFORMANCE IN CLINICAL PSYCHOLOGY 182 (1951).

123 *See generally* Truax & Mitchell, *Research on Certain Therapist Interpersonal Skills in Relation to Process and Outcome*, in A. Bergin & S. Garfield, *supra* note 26, at 299.

124 *Id.* at 302.

of behaviorism, agreed that these characteristics were important.[125] They also found that therapists possessing these characteristics were effective with a wide variety of clients, from underachievers to a mixed variety of hospitalized patients, and in both individual and group psychotherapy.

Some of the current research indicates that several other variables may be of importance. These include how often and in what manner a therapist confronts a patient, how often a therapist focuses on a client's defense mechanisms, and the extent to which a therapist looks at the sources of threat and anxiety in a client.[126] One of the most significant aspects of these studies is the consistent finding that therapists who do have the qualities of genuineness, nonpossessive warmth, and accurate emphatic understanding (as well as skill in confrontation, etc.) performed best. On the other hand, some studies indicate that therapists who do not possess a high level of these basic qualities or skills account for the vast majority of deteriorated cases.[127]

If we examine graduate training programs in clinical psychology, we will find that little emphasis is placed on these qualities. Bergin and Solomon, for instance, found that empathic skill is not related to intelligence or performance on the "psychologist" subscale of the Graduate Record Examination.[128] And Melloh found that grades received by 28 counselor trainees in a clinical course were unrelated to their level of empathic understanding.[129]

There is actually some evidence that the student's effectiveness as a therapist decreases over the course of graduate education. Carkhuff found this to be true of two clinical training programs he examined and which were approved by the APA. In one program trainees declined (although the amount of the decline did not achieve statistical significance) in levels of empathy, regard, genuineness, concreteness, and self-disclosure from the beginning to advanced states of training. In the second program he found that those trainees who dropped out of the program were in every case functioning more effectively as therapists (based on the above

125 *Id.* at 314.
126 *Id.* at 331-32.
127 *Id.* at 310-11.
128 *Id.* at 911.
129 *Id.*

qualities), indicating that some of the best potential counselors leave.[130]

Similar problems exist in the medical profession. Psychiatrists themselves have long complained that medical training involves too many courses totally irrelevant to their needs as psychiatrists. Some have claimed that traditional medical training fosters anti-therapeutic attitudes towards patients, in that the therapist tends to deal in an authoritarian, mechanistic and emotionally unrelated fashion with his patients.[131] David Shakow claims that medical training tends to be psychologically insensitive and somatically permeated.[132]

There is substantial evidence, then, that the doctoral degree is an inadequate criterion on which to base judgments of therapeutic effectiveness. Post-graduate degrees simply have not been shown to lead to competence in the traditional therapeutic professions. In human relations training, a field in which personal traits play an even greater role, this information seems to imply rather strongly that a doctoral degree will in no way guarantee competence in the human relations trainer. Fortunately, since human relations training has remained outside the mainstream of traditional education, standards of competence have not been so academically oriented. For instance, the Adult Education program in the School of Education at Boston University offers a two-year sequence of courses to train students to become competent facilitators of small groups.[133] The emphasis is on performance-based criteria, not knowledge of theory or ability to do research.

Some professionals active in human relations training do still believe that traditional criteria are appropriate. Martin Lakin, for

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130 *See* Carkhuff, *Differential Functioning of Lay and Professional Helpers*, 15 J. OF COUNSELING PSYCHOLOGY 117 (1968); Carkhuff, Kratochvil, & Friel, *supra* note 120.

131 Welsch, *Qualifications for Psychotherapists: Symposium, 1954*, 26 AM. J. OF ORTHOPSYCHIATRY 35, 37 (1956).

132 Shakow, *Psychology and Psychiatry: A Dialogue*, 19 AM. J. OF ORTHOPSYCHIATRY 191, 382 (1949).

133 Boston University School of Education, Department of Administration and Supervision, Group Process Training Sequence (1971). A similar program has been developed by the Netherlands Institute of Preventive Medicine and the Netherlands Association of Trainers in Social Relations. Letter from Dr. Marjan Schroeder, Netherlands Department of Mental Health, Nov. 8, 1971, on file with the HARVARD JOURNAL ON LEGISLATION.

instance, believes that for work with the public a trainer should have an advanced degree from a recognized institution, background preparation in personality dynamics, a knowledge of psychopathology, group dynamics, social psychology, and sociology, an internship, and extensive supervised experience.[134] In a response to Lakin, Donald Clark, who recently completed a year-long study of sensitivity training and its implications for education, commented: "I do not know of any evidence demonstrating that these ingredients have produced good group therapists or that they would produce good leaders for sensitivity training groups."[135] He went on to say that his worst two experiences were in groups led by clinical psychologists, and he made a plea that we "try defining competence in terms of ever-changing practice rather than in terms of completed schooling."[136]

The research to date has not demonstrated any relationship between diagnostic ability and risk of emotional harm in a group. In the GEP study, it was found that the leader's estimate as to whether a member was hurt was one of the least reliable methods of identifying casualties.[137] Of 20 subjects whose leaders judged them most likely to be hurt only three were casualties. Some of the most severe casualties, on the other hand, were entirely missed by the leaders. The most reliable method of casualty identification was peer evaluation — peers who did not have extensive diagnostic training.[138]

Bergin has concluded that certain people are inherently helpful or have developed natural talents in the area of psychotherapy.[139] In fact, it might be possible to train such people in a relatively brief period to function as effective therapists. Significant research in this area has been done, and the results have been uniformly positive.[140] Rioch reported a study in which eight college-educated housewives were given part-time training over a two-year period

134 Lakin, *Some Ethical Issues in Sensitivity Training*, 24 AM. PSYCHOLOGIST 923, 925 (1969).

135 Clark, *Response to Lakin*, 25 AM. PSYCHOLOGIST 880, 881 (1970).

136 *Id.* at 882.

137 M. LIEBERMAN, I. YALOM & M. MILES, *supra* note 43, at 175.

138 *Id.* at 176.

139 A. Bergin & S. Garfield, *supra* note 26, at 245.

140 J. Durlah, The Use of Nonprofessionals as Therapeutic Agents: Research, Issues and Implications, 1971 (unpublished doctoral dissertation in Vanderbilt University Library).

to provide psychiatric help.[141] Four senior psychotherapists judged the trainee's performance to be comparable to that of more highly trained therapists. The conclusion of the study was that these women could perform effective therapy with adolescents and adults in mental health agencies, and could also work in less well-controlled situations with supervision.

Another interesting study which extended the line of thought suggested by Rioch was conducted by Poser.[142] He found that lay therapists significantly outperformed professionals in treating chronic schizophrenics, and concluded that "traditional training in the mental health professions may be neither optimal nor even necessary for the promotion of therapeutic behavior change in mental hospital patients."[143] Other programs and studies have produced similar results, and indicate that radically redesigned and differently focused training programs are needed.[144]

In general, professionals and theoreticians in the field of human relations training have taken a performance-based approach to training and have emphasized the importance of interpersonal skills in becoming an effective trainer, although the importance of cognitive knowledge and research skills has also been recognized. Human relations training programs have attempted to implement many of the features that were previously described as important in training psychotherapists.[145] They have emphasized

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141 Rioch, Elkes & Flint, *Pilot Project in Training Mental Health Counselors*, PUBLIC HEALTH SERVICE PUBLICATION No. 125 at 1 (1965).

142 Poser, *The Effect of Therapists' Training on Group Therapeutic Outcome*, 30 J. OF CONSULTING PSYCHOLOGY 283 (1966).

143 *Id.* at 289.

144 *See* C. ROGERS, *supra* note 1, at 149-57; Anker & Walsh, *Group Psychotherapy, A Special Activity Program, and Group Structure in the Treatment of Chronic Schizophrenics*, 25 J. OF CONSULTING PSYCHOLOGY 476 (1961); Appleby, *Evaluation of Treatment Methods for Chronic Schizophrenia*, 8 ARCHIVES OF GENERAL PSYCHIATRY 8 (1963); Beck, Kantor & Gelineau, *Follow-up Study of Chronic Psychotic Patients "Treated" by College Case-Aid Volunteers*, 120 AM. J. OF PSYCHIATRY 26 (1963); Carkhuff & Truax, *Lay Mental Health Counseling: The Effects of Lay Group Counseling*, 29 J. OF CONSULTING PSYCHOLOGY 426 (1965); Carkhuff & Truax, *Training in Counseling and Psychotherapy: An Evaluation of an Integrated Didactic and Experiential Approach*, 29 J. OF CONSULTING PSYCHOLOGY 333 (1965); Guerney, *Filial Therapy: Description and Rationale*, 28 J. OF CONSULTING PSYCHOLOGY 304 (1968); Harvey, *The Use of Non-Professional Auxiliary Counsellors in Staffing a Counselling Service*, 11 J. OF COUNSELING PSYCHOLOGY 348 (1964); Stover & Guerney, *The Efficacy of Training Procedures for Mothers in Filial Therapy*, 4 PSYCHOTHERAPY: THEORY, RESEARCH, & PRACTICE 110 (1967).

145 *See* Boston University School of Education, *supra* note 133.

providing feedback to the trainee on how he is affecting his client and have deemphasized theory and traditional academic study. These programs reflect the belief that the personality of the human relations trainer (and its development) is far more important than his technique, but recognize that certain techniques in the hands of a trainer with the requisite personal qualities make that trainer even more effective.

E. *The Problem of Accreditation*

Where performance-based criteria are acknowledged to be important as a basis for accreditation, the problem arises of developing tests and other methods by which those criteria can be accurately measured. In this area considerable work has been done to develop measures of genuineness, nonpossessive warmth, and accurate empathic understanding. Trained judges, observing psychotherapeutic interviews and rating various facets of the interviewer's performance according to uniform scales, can make fairly consistent approximations of the degree to which an interviewer possesses these personal characteristics.[146] The element of subjectivity present in such tests, however, would lead many to contend that they are unsuited for inclusion in a scheme of statutory regulation.

In order to measure qualities which are not discrete and skills which are not easily measured objectively, several organizations and associations have attempted radical departures from past reliance on academic degrees and written exams. An innovator in this area has been the Association of Religion and Applied Behavioral Science, whose Executive Director, William Yon, states:

> First of all, I am not much impressed by the traditional accreditation methods which, in effect, declare a person to be competent in the practice of a given profession, based not on his demonstrated competency, but on the fact that he has managed to "do" certain required academic courses. The approach of this Association, therefore, has been to try to avoid telling people "it's okay for you to be a trainer" but to facili-

146 *See* Barrett-Lennard, *Dimensions of Therapist Response as Causal Factors in Therapeutic Change*, 76 PSYCHOLOGICAL MONOGRAPHS: GENERAL & APPLIED 43 (1962).

> tate a process of peer evaluation that enables the Association at some point to recognize those who are already functioning competently, and whose competence can be publicly demonstrated.[147]

The newly created International Association of Applied Social Scientists, an outgrowth of NTL, is also working toward the development of more effective accreditation procedures,[148] in which performance criteria will be emphasized, as well as experience and self-discipline. Herb Shepard, one of the leading theorists and practitioners involved in human relations training, recommends the development of a feedback system whereby the public could obtain information from fellow professionals and clients of a person's qualifications and evidence as to how he has performed.[149]

Carl Rogers echoes this point of view. He comments that it is impossible to "train" an individual in the qualities that will make a good group facilitator. If no diploma, certificate, or license is awarded, however, and a system exists whereby potential participants can review a leader's work, then the demand for a person's services as a human relations trainer will depend upon his performance.

Implicit in these alternative approaches to accreditation is a respect for the public's ability to determine a person's qualifications that most professionals are unwilling to give. We should be wary of the traditional argument that only government-accredited professionals can judge the abilities of their peers or would-be peers. If this approach is deemphasized, there will be an increasing emphasis on educating the public as to what to look for in an effective human relations trainer.

Conclusion

The value of human relations training for society, though presently indeterminate, is potentially significant. Technological

147 Letter from William Yon, Nov. 10, 1971, on file with the HARVARD JOURNAL ON LEGISLATION.

148 K. Benne & S. Ruma, The International Association of Applied Social Scientists, 1971 (unpublished manuscript on file with the author).

149 Interview wth Herb Shepard, in New Haven, Conn., Jan. 7, 1972.

change, alienation, social mobility, bureaucratization, and the rigidity of traditional social institutions tend to cause individuals to lose their sense of belongingness, their sense of stability, and their sense of intimacy. The small group represents a place where these needs cannot only be met, but where new methods for dealing constructively with interpersonal problems in modern society can be learned.

Human relations training provides us with a tool for learning to adapt to change, and it has provided many techniques that have proven useful in psychotherapy. The research evidence indicates that human relations training can be useful for personal, group, and organizational growth. Of course, human relations training has the capacity for bringing about harm as well as benefit. It is this dual potentiality that makes the question of regulation vital. A thorough examination of the relevant issues is necessary, something which has too often been neglected in the regulation of other professions.

Such an examination leads me to conclude that, for the present and for the forseeable future, human relations training should not be subjected to the traditional forms of legislative control. What little is known about the harmfulness of T-groups, encounter groups and other types of small groups indicates that no great danger is involved. The cause of the danger which does exist is problematical, but there is evidence that harm is most often engendered by leaders who lack certain specific personal qualities and associated interpersonal skills. Those skills are not developed, nor their absence detected, by the kinds of training which accreditation statutes traditionally require. Interestingly enough, empirical evidence indicates that psychotherapy is at least as harmful as human relations training, and this despite supposedly high standards in the medical and psychological professions.[150]

Simply put, the profession of human relations training is not yet sufficiently defined. Standards and criteria for determining a person's competence have not been adequately formulated. Adequate training programs have not been thoroughly developed and tested. Each of these factors needs to be resolved before regulation might wisely be considered.

150 *See* text at notes 89 & 90 *supra.*

Instead, significant efforts needs to be exerted toward examining these problems. Well-designed and well-conducted research needs to be carried out to determine the risks involved in human relations training, the causes of those risks, and how they are best minimized. Standards and criteria need to be developed which reflect the effectiveness of a group leader. Accreditation procedures need to be developed which accurately measure these standards and criteria, while at the same time continuing to facilitate the development of the group leader's effectiveness.

These efforts will be seriously impeded if a legal framework is established to regulate human relations training. The better course is to encourage the development of training programs both within and without the academic setting. In addition, the development of professional associations ought to be encouraged. If these associations can work together to develop performance-based criteria of competence, the quality of human relations training available to the public will be improved. Leaving human relations training free of traditional statutory regulation may also further the interests of the public in a second sense. An emphasis on informal, performance-based criteria in human relations training may provide a valuable model from which members of the other "helping" professions could benefit.

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STATUTE

A STATUTORY FRAMEWORK FOR STATE ECONOMIC DEVELOPMENT PROGRAMS

I. INTRODUCTION

Of late, governmental policymakers have begun to understand more fully the complex inter-relationships between man and his world. Nowhere is this point made more graphically than in the context of economic development and industrialization. An attempt to bolster the economy of a particular area may have the desirable effects of improving the local standard of living, reducing unemployment, and fostering community development, but it may also carry the risk of such undesirable effects as air and water pollution, suburban sprawl, and urban blight. Moreover, the effect of such development is by no means localized. Pollution from a riverside factory may be carried miles from its origin; pollution from factory chimneys is at the mercy of the wind; commuting workers may burden the municipal services of communities far from the place of work, to say nothing of such related problems as automotive emissions and fuel use. Because such economic activity has far reaching effects, modern society can no longer afford to deal with economic development and redevelopment on a local level.

America has long relied upon local initiative and the power of the market place to determine the pattern of economic development. While this method has met with success in fostering the economic growth of this country, modern society has already begun to feel the pernicious effects of unplanned, unguided, and unthinking growth. A governmental structure is needed that can plan for and guide economic development. Complete governmental control of economic decisionmaking, however, runs counter to American experience and philosophy. We are in need of a system in which government draws the broad outlines but leaves the actual decisionmaking to private initiative, channelled to the appropriate objectives through governmental policies and incentives.

What level of government is appropriate for dealing with economic development? Centralized governmental planning and decisionmaking do not seem promising. The federal government is simply not close enough to the needs of a particular area to plan for it effectively. Inter-state regional planning, while presenting interesting possibilities for the future, is a concept which will take a good deal of time to develop; economic development planning cannot wait.

In keeping with the traditions of local initiative, much of the existing responsibility for economic development is placed upon the shoulders of municipal governments and agencies. The usual development tool is municipal bond financing of land acquisition and construction of industrial buildings which are then leased to industrial tenants. While these bonds have been a popular and successful means of financing local growth, their use has been the center of controversy. The original conception of these bonds[1] was that of promoting the establishment of small local industries to complement existing agriculture and industry. Before long, however, established industries began to become interested in bond financing as a means of low cost relocation and expansion.[2] Complaints began to be heard about inter-state and intra-state piracy of existing industry, and there were rumors of abuse of the financing mechanism by municipalities and corporations.[3] As a culmination of the controversy, Congress intervened to alter the taxation of municipal industrial development bonds in order to eliminate the abuses which had been perceived.[4]

Abuse of the financing mechanism is not the only drawback of municipal development programs. The repercussions of one municipality's development may act to the detriment of neighboring municipalities. In addition, the development decisions of indi-

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1 Mississippi was the innovator of local bond financing of industrial development with its "Balance Agriculture with Industry" program enacted in 1936. Act of Sept. 19, 1936, S.B. No. 1 [1936] Miss. Gen. Acts 1st Extra Sess. 1. The program has been substantially revised and may be found in its present form in MISS. CODE ANN. §§ 57-3-1 to -33 (1972).

2 U.S. INTER-GOVERNMENTAL ADVISORY COMMISSION, INDUSTRIAL DEVELOPMENT BOND FINANCING 17-35 (1963) discusses at length the evils of local bond financing and some prospective solutions.

3 *Id.*

4 INTERNAL REVENUE CODE OF 1954, § 103(c), added June 28, 1968.

vidual municipalities acting in their own self interest may not lead to the most effective development of a region as a whole. In the interests of overall development, primary planning and control responsibilities should not be allocated to the municipal level of government. On the other hand, municipal agencies have a prime potential as operative agencies of a development program in the context of a state, regional, or national plan.

Some state governments approach economic development from precisely this perspective. Municipalities are given power to issue bonds for development projects which meet certain criteria through the mechanism of a certificate of public convenience and necessity issued by a state agency.[5] If the criteria are well thought out, carefully framed, and consistently applied, a program of this nature is an effective way of assuring development in the best interests of the state. Unfortunately, many states have not adopted such a mechanism for monitoring local development efforts or have adopted such loose criteria or vested such broad discretion in municipalities that the benefit is not realized.[6]

States have several drawbacks as primary planning and operating agencies. As in the case of local governments, there may be a lack of uniformity in development and planning procedures. Economic development programs may result in inter-state competition for industry to the detriment of all.[7] Even states, especially along the coast and in river valleys, may lack the scope to see the big picture of development as it affects neighboring and downstream states.

The wider territorial jurisdiction of the states, however, render them more capable than municipal governments of coping with development programs affecting large areas. States can pay for more research on new techniques of economic development and have a wider pool of resources (staff, credit, researchers, etc.) than

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5 *Compare* the state supervision approaches of the following statutes: CONN. GEN. STAT. ANN. §§ 8-186 to -198 (Cum. Supp. 1973); HAWAII REV. STAT. §§ 48-1 to -7 (1968); ME. REV. STAT. ANN. tit. 30, §§ 5325-5343 (Supp. 1973); MO. ANN. STAT. §§ 100.010-.200 (Vernon 1971); MISS. CODE ANN. §§ 57-3-1 to -33 and 57-5-1 to -23 (1972); and MINN. STAT. §§ 474.01-.13 (1971).

6 *See, e.g.*, GA. CODE ANN. tit. 30, §§ 69-1501 to -1510; MASS. GEN. LAWS ANN. ch. 40D, §§ 1-1 to -18 (Supp. 1973).

7 U.S. INTER-GOVERNMENTAL ADVISORY COMMISSION, *supra* note 2, at 30.

local agencies can muster. In addition, as noted above, states can use local governments as effective operating agencies to carry out programs. Thus, the states seem to be the most likely governmental units for general supervision of economic development. They are large enough to have perspective concerning the impact of local development but close enough to the localities to be responsive to their needs.

II. State Economic Development Agencies

On the state level, the primary agency is usually the state economic (or industrial) development agency.[8] Although every state has such an agency, the scope and power of the organization varies widely from state to state. At a minimum the agency is likely to be involved in publicity, research, and promotional activities revolving around the compilation and dissemination of statistics and other information designed to encourage development within the state. Too many of these "window dressing" agencies exist,[9] and their very existence is an obstacle to effective change because legislators can point to the existing agency as a reason for not creating a new one. This is not to gainsay the value of existing research, publicity, and promotional plans which are an effective first step to development.

A vital second step is access or input to state economic planning. Some states make the economic development agency a separate economic planning organization,[10] while others provide for liaison with other state and local planning agencies.[11] Through the plan-

8 Economic development agencies may assume a variety of titles. Some of the more common are Economic Development Agency, Economic Development Department, Department of Industrial Development, Department of Business Development, Industrial Development Commission, and Department of Commerce.

9 A. Eichner, State Development Agencies and Employment Expansion 40-41 (1970).

10 *See, e.g.*, Ala. Code tit. 55, §§ 373(6e1)-(6e6) (Cum. Supp. 1971); Ill. Rev. Stat. ch. 127, §§ 46.1-47.23 (1973); Me. Rev. Stat. Ann. tit. 10, §§ 401-651 (1964), *as amended*, (Cum. Supp. 1973); Ohio Rev. Code Ann. §§ 122.01-.62 (Page 1969), *as amended*, (Page Supp. 1972); S.D. Compiled Laws Ann. §§ 1-16-1 to -8 (1967), *as amended*, (Supp. 1973).

11 To the extent that any state agency is required to develop statistics and generate research reports which might serve as input to planning decisions, it is involved in planning. Often the responsibility of cooperation among agencies is

ning process, the agency can develop a strategy for development and formulate policies and programs to fulfill objectives.

Planning without some means of enforcement is of little use, however. While the legislature may develop its own plans and strategies (such as land use regulation or environmental regulation) effective agency operation requires that some means of enforcing the state plan be provided. One mechanism is the control of municipal financing programs mentioned above. Another common mechanism is a state industrial finance agency, either a division of the economic development agency[12] or a separate entity,[13] which provides assistance to industrial projects sponsored by municipalities,[14] or local industrial development corporations[15] or both,[16] or develops projects on its own.[17] Such an agency may be funded by state bonds[18] or legislative appropriation,[19] and must provide assistance only to those projects which meet specified criteria.

Another area in which the state may be involved is in the super-

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made explicit. *See, e.g.*, COLO. REV. STAT. ANN. §§ 3-18-1 to -8 (1963), *as amended*, (Supp. 1967), (Supp. 1969); FLA. STAT. ANN. § 20.17 (Cum. Supp. 1973); IND. ANN. STAT. §§ 60-1219 to -1232 (Burns Cum. Supp. 1973); KAN. STAT. ANN. §§ 74-5000 to -5012 (1972); OHIO REV. CODE ANN. §§ 122.01-.12 (Page 1969), *as amended*, (Page Supp. 1972).

12 *See, e.g.*, ARK. STAT. ANN. §§ 9-504 to -544 (1947), *as amended*, (Cum. Supp. 1973); CONN. GEN. STAT. ANN. §§ 32-1 to -23m (Cum. Supp. 1973).

13 *See, e.g.*, GA. CONST. art. 7, § 2-5507; CAL. GOV'T CODE §§ 16480.-.8 (1963), *as amended*, (Cum. Supp. 1974); ILL. REV. STAT., ch. 48, §§ 831-847 (1973); ME. REV. STAT. ANN. tit. 10, §§ 701-852 (Cum. Supp. 1973); N.D. CENT. CODE §§ 6.09.1-01 to -04 (Supp. 1973); OKLA. STAT. ANN. tit. 74, §§ 851-874 (1965), *as amended*, (Cum. Supp. 1974); PA. STAT. ANN. tit. 73, §§ 301-314 (1971), *as amended*, (Supp. 1973).

14 *See, e.g.*, GA. CONST. art. 7, § 2-5507; CONN. GEN. STAT. ANN. §§ 8-186 to -200b (1958), *as amended*, (Cum. Supp. 1973); IND. CODE §§ 18-7-15-1 to -10, 18-7-17-1 to -2 (1971).

15 *See, e.g.*, DEL. CODE ANN. tit. 29, §§ 8601-8606 (Supp. 1970); ME. REV. STAT. ANN. tit. 10, §§ 701-852 (1964), *as amended*, (Cum. Supp. 1973); OKLA. STAT. ANN. tit. 74, §§ 851-874 (1965), *as amended*, (Cum. Supp. 1974).

16 *See, e.g.*, OHIO REV. CODE ANN. §§ 122.40-.62 (Page 1969), *as amended*, (Page Supp. 1972).

17 *See, e.g.*, N.H. REV. STAT. ANN. §§ 162-A:1 to :16 (1964).

18 *See, e.g.*, ALA. CODE tit. 55, §§ 373(6k)-(6w21) (Cum. Supp. 1971); CONN. GEN. STAT. ANN. §§ 32-1 to -23a, 8-163 to -169 (1958), *as amended*, (Cum. Supp. 1973); MINN. STAT. §§ 362A.01-.08 (1971); N.Y. PUB. AUTH. LAW §§ 1800-1834 (McKinney 1970), *as amended*, (McKinney Supp. 1973); OKLA. STAT. ANN. tit. 74, §§ 851-874 (1965), *as amended*, (Cum. Supp. 1974).

19 *See, e.g.*, GA. CONST. art. 7, § 2-5507; IND. CODE §§ 18-7-15-1 to -10, 18-7-17-1 to -2 (1971); ME. REV. STAT. ANN. tit. 10, 701-852 (1964), *as amended*, (Cum. Supp. 1973); PA. STAT. ANN. tit. 73, §§ 301-314 (1971), *as amended*, (Cum. Supp. 1973).

vision of development credit corporations and local industrial development corporations. Development credit corporations provide a credit source to assist in the financing of industrial development projects which would otherwise be unable to obtain capital. Local industrial development corporations are more intimately involved with the acquisition of sites, construction of buildings, and recruitment of industrial tenants. These corporations are often the agencies through which state financial assistance is channeled for the construction of industrial enterprises.[20]

This type of assistance is often limited by state constitutions. Many states have constitutional provisions which require that public funds be used solely for public purposes.[21] For this reason, state assistance is generally distributed through municipalities or non-profit corporations for development rather than directly to the prospective tenants.

III. Modifying and Implementing State Economic Development Programs

In modifying and implementing state economic development programs, the first step is to determine precisely which goals the state seeks to accomplish through such programs. These objectives need not be and, indeed, should not be uniform from state to state, as different areas have differing economic and social needs. But the purpose of the program — be it overall growth, selective growth, stability, regional growth, or unemployment control — should be clearly enunciated as a guide to administrators, citizens, and future legislatures in carrying out the program.

Second, the legislature must formulate the best possible administrative structure for carrying out the plan. One prerequisite for the most congenial growth of large areas is state control over municipal development programs, either through control of bond issues

20 *See, e.g.*, Pa. Stat. Ann. tit. 73, §§ 301-386 (1971), *as amended*, (Cum. Supp. 1973).

21 For examples of some constitutional problems, both state and federal, *see* Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938) (local bond issue constitutional); Mitchell v. N.C. Indus. Dev. Fin. Authority, 273 N.C. 137, 159 S.E.2d 745 (1968) (development and lease by state finance agency unconstitutional); and Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968) (loan guarantees by state finance agency constitutional).

by means of the certificate of public convenience mechanism or replacement of local bond financing with state aid. Of the two, the former should be the preferred solution since the retention of some degree of local initiative and community-sponsored growth is to be encouraged. Note that an effective development program need not utilize every development tool as long as those which are used are well thought out and capably administered. Each state should, however, include some sort of financing mechanism with which to actively channel local development into the most beneficial areas.

Once the administrative structure is resolved, the next problem is formulating criteria for government aid to development projects consistent with the development strategy. One of the most difficult problems is formulating an administrable standard. What, for instance, is the administrator to do with a standard that says projects are eligible in those municipalities which have a present or possible future economic problem?[22] Since the legislature is presently incapable of equipping its administrators with flawless foresight, it must instead come up with reasonably determinable present standards. A related problem is determining which criteria are relevant to beneficial development. The model suggests a number of criteria, but does not pretend to be applicable to all situations or to set out the only imaginable criteria. It should be sufficient that the legislature make a conscious effort to relate the criteria to the overall strategy of the state.

The procedure for compliance with these criteria has not been specifically addressed in the model but has been left to the discretion of individual states. As different states employ different administrative procedures, explicit incorporation of a certain procedure might have distracted the reader into consideration of the procedural issues to the detriment of the substantive issues the model seeks to illustrate.

Finally, the state must staff and fund its development program adequately, as a program is only as good as its execution. The legislature must appropriate sufficient funds for a capable staff and efficient volume of operations while the governor, under the

22 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 40D § 1-12 (1968); HAWAII REV. STAT. § 48-3 (1968).

scrutiny of the legislature, must select a capable director and insure a competent staff and adequate staff support.

IV. The Model Statutes: Commentary

The statutory framework set forth here consists of five parts: an Economic Development Act, a State Industrial Finance Act, a Municipal Industrial Finance Act, a Development Credit Corporation Act, and an Industrial Development Corporation Act.

There are reasons for this five-part approach. First, almost all states have enacted some of the measures set forth in these five statutes, and a few states have enacted almost all of them (or roughly equivalent measures). The measures so enacted, however, are often scattered through various code sections and are seldom arranged as comprehensive economic development legislation. Setting forth the major economic tools (except tax policy) in this manner makes it easier to see possible and actual relationships among the various measures. The five statutes may also help legislators to examine and compare their own state codes in light of a comprehensive economic development model, and may serve as a useful educational tool for explaining the role of such agencies in state and local government.

Second, as has been mentioned above, the economic needs and problems of each state are different. For that reason some aspects of the five statutes herein set forth may be of little interest to certain states and could be deleted or modified to meet their needs. One virtue of this approach is that, as development needs change, additional development tools can be added to cope with new problems. For the same reasons of diversity, the statutes are presented in a relatively simple form to allow for enlargement and modification according to state procedures and preferences.

In drafting these statutes a pragmatic rather than an idealistic approach has been taken. Existing state legislation has been examined and measures which have found acceptance in various states have been used as a basis for many of the provisions. The approaches suggested would thus seem to have the merit of both practical and political feasibility.

A STATUTORY FRAMEWORK FOR STATE ECONOMIC DEVELOPMENT PROGRAMS

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I. An Act to Create a Comprehensive State Economic Development Program[23]

§ 0.010 *Short Title:*

This Act shall be known and may be cited as the Economic Development Act.

§ 0.020 *Statement of Legislative Intent:*

Having perceived that many areas of the state are in a depressed economic condition, and recognizing that substantial community benefit, both economic and otherwise, may result from the location of new industrial enterprises in such areas, the legislature declares that the state government must take an active role in encouraging the growth of existing industry in and attracting new enterprises to economically depressed regions. In order to insure that the benefits of industrial development inure to those areas most in need, the state shall be responsible for the operation and administration of all state and local government programs for industrial development in accordance with the provisions of this Act.

Comment: This provision has three main purposes: (1) to provide a guide to the policy makers responsible for establishing the department and administering the act; (2) to allow for the easy education of legislators, administrators, and the general public as to the scope and purpose of the legislation; and (3) to provide

23 *Compare* Pa. Stat. Ann. tit. 73, §§ 301-386 (1971), *as amended*, (Cum. Supp. 1973) *with* Miss. Code Ann. §§ 57-1-1 to -179, 57-3-1 to -33, 57-5-1 to -23 (1972), *as amended*, (Cum. Supp. 1973), both of which represent effective compilations of state programs.

guidance to the judiciary in interpreting the provisions of the Act. The verbal formulation used here is typical of the legislative justifications for industrial development programs.

§ 0.030 *Department Created:*[24]

There is created in the executive branch of the state government under the administrative control of the Governor an agency to be called the State Department of Economic Development. (Note: Most states will want to insert an appropriate provision dealing with the disposition of any predecessor agency.)

COMMENT: The agency is constituted as a department of the state government for the following reasons: (1) the purposes and program responsibilities are sufficiently broad as to warrant department status and (2) since the governor is accountable to the public for the economic growth of the state, he should have direct administrative control over the operations of the development agency. The virtues of an independent agency may be obtained without restricting the administrative control of the governor (see § 0.050 and comment).

§ 0.040 *Director; Appointment; Duties:*

The operation of the Department shall be the responsibility of the Director of Economic Development, an officer of the state government appointed by the Governor with the advice and consent of the legislature. The Director shall serve a term coterminous with that of the Governor and shall perform all duties assigned by the Governor in carrying out the purposes of this Act.

COMMENT: Because the governor must work with the director, it is appropriate that the governor have primary responsibility for selecting this official.

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24 *Compare* the administrative structure of the agencies set out in the following statutes: ALA. CODE tit. 55, §§ 673(6e1)-(6e6) (Cum. Supp. 1971); CONN. GEN. STAT. ANN. §§ 32-1 to -23m (Cum. Supp. 1973); HAWAII REV. STAT. §§ 201-1 to -31 (1968), *as amended,* (Supp. 1973); IOWA CODE §§ 28.1-.16 (1971); MINN. STAT. §§ 362.07-.23 (1971); R.I. GEN. LAWS ANN. §§ 42-26-1 to -12 (1969), *as amended,* (Supp. 1973); TENN. CODE ANN. §§ 4-1401 to -1408 (1971), *as amended,* (Cum. Supp. 1973).

§ 0.050 *Advisory Board; Appointment; Duties:*

The performance of the Department shall be monitored by an advisory board consisting of the Governor and six citizens who shall serve without compensation other than a reasonable per diem and travel allowance as provided by the legislature. Appointments to the advisory board shall be made by the Governor on the basis of experience and interest in economic development and the representation of diverse economic regions and interests of the state. Members shall serve terms of six years except that the initial board shall serve terms of one, two, three, four, five, and six years respectively as determined by lot at the initial meeting of the board. In the case of a vacancy, a new member shall be appointed by the Governor to serve the remaining term of his predecessor. The advisory board shall meet at least twice annually and shall review the economic condition of the state, survey the operation of the Department, and prepare recommendations concerning the future course of industrial development operations.

COMMENT: An advisory board is provided for a variety of reasons: (1) to provide a mechanism for evaluating the performance of the department, for educating legislators, administrators, and the general public about development operations, and for providing feedback to the department; (2) to allow for representation of regional interests in forming development guidelines; and (3) to provide continuity and stability in the operation of the department through a system of staggered terms.

§ 0.060 *Department; Purpose:*

The fundamental purpose of the Department shall be to insure the growth and stability of the state's economy, encourage the location and expansion of industry in economically depressed areas, and reduce unemployment through the exercise of powers granted by this Act.

COMMENT: This provision defines the function of the department and the objective of the program.

§ 0.070 *Department; Duties:*[25]

The Department shall carry out operations under the following general headings:

(a) *Publicity*

The Department shall undertake a program of publicity in the public media in order to attract new enterprises and investment capital to the state.

(b) *Promotional Activities*

The Department shall compile and maintain files of information pertinent to industrial development including sites for new plants, financing, markets, labor supply, climate, transportation facilities, state and local taxation policies, and community attitudes toward development. The Department shall publish at regular intervals a prospectus for future development which shall list available sites on a comparable basis with other sites throughout the state. Upon request of a municipal government, county government, local industrial development corporation, or industrial developer, the Department shall prepare a detailed study of a specific site in the context of the development factors enumerated above and shall collect the reasonable cost of such study from the organization making the request.

(c) *Research Activities*

The Department shall compile and disseminate statistics relevant to the economic condition of the state and the process of economic development. The Department shall undertake research into the problems of economic development and develop constructive solutions and shall provide technical assistance to local groups in solving

25 *Compare* the development responsibilities of the agencies set out in the following statutes: ARIZ. REV. STAT. ANN. §§ 41-501 to -507 (Supp. 1973); ARK. STAT. ANN. §§ 9-504 to -544 (1947), *as amended,* (Cum. Supp. 1973); DEL. CODE ANN. tit. 29, §§ 8601-8606 (Supp. 1970); GA. CODE ANN. §§ 40-2101 to -2135 (Cum. Supp. 1972); ILL. REV. STAT. ch. 127, §§ 46.1-47.23 (1973); LA. REV. STAT. ANN. §§ 51:921-932 (1965), *as amended,* (Cum. Supp. 1974); MISS. CODE ANN. §§ 57-1-1 to -179 (1972), *as amended,* (Cum. Supp. 1973); N.J. STAT. ANN. §§ 52:27D-59 to -70 (Cum. Supp. 1973); N.Y. COMM. LAW § 1-157 (McKinney 1950), *as amended,* (McKinney Supp. 1973); OHIO REV. CODE ANN. §§ 122.01-.62 (Page 1969), *as amended,* (Page Supp. 1972); ORE. REV. STAT. §§ 184.105-.210 (1971); UTAH CODE ANN. §§ 63-31-8 to -9 (1953), *as amended,* (Supp. 1973).

local development problems. The Department shall encourage research into new processes and products which are especially relevant to the growth and expansion of industrial enterprises in the state.

(d) *Planning Activities*

The Department shall be responsible for preparing and implementing a comprehensive economic development plan for the state, shall supervise, assist, and encourage local planning efforts consistent with state planning objectives, and shall administer state and national programs of planning assistance to counties, municipalities, and planning regions.

(d') *Planning Activities (Alternative)*

The Department shall assist the state planning agency in preparing economic development plans on the state and local level.

(e) *State Industrial Finance Program*

The Department shall be responsible for the administration of the State Industrial Finance Program through the State Industrial Financing Agency.

(f) *Local Industrial Finance Program*

The Department shall review applications from counties and municipalities for certificates of public convenience and necessity prior to local bond issues for industrial development as provided in the Municipal Industrial Finance Act.

(g) *Development Credit Corporations*

The Department shall encourage the formation of development credit corporations as a means of providing capital for industrial development and shall oversee the operation of such corporations as provided in the Development Credit Corporations Act.

(h) *Industrial Development Corporations*

The Department shall encourage the formation of local non-profit industrial development corporations and shall certify such corporations for participation in the State Industrial Finance Program.

(i) *Cooperation with State Agencies*[26]

The Department shall cooperate with other agencies and departments in the state government in developing programs for attracting new industry and reducing unemployment.

(j) *Cooperation with Local Agencies*

The Department shall cooperate with and provide technical assistance to county governments, municipal governments, and local nonprofit development corporations in preparing and implementing local programs for economic development.

COMMENT: This provision defines the program responsibilities of the department and gives the department broad powers in controlling development operations. Only a few states have given the industrial development agency the broad responsibility of this Act.[27] Most states include only the provisions enumerated in sections (a), (b), (c), (d), (i), and (j) which do not allow for strong state control. Provisions of sections (e), (f), (g), and (h) are essential for statewide development to be truly under state control.

II. AN ACT TO CREATE A STATE INDUSTRIAL FINANCE PROGRAM

§ 1.010 *Short Title:*

This Act shall be known and may be cited as the State Industrial Finance Act.

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26 One of the gravest problems in existing economic development programs, and indeed, in state government generally, is the lack of cooperation among agencies working on the same problem from different perspectives. For example, economic development agencies approach the unemployment problem by recruiting industry and assisting in financing. State anti-poverty agencies and departments of labor approach the problem from a job training perspective. From the standpoint of development, a cooperative program combining recruitment, job training, and financing aid might have more potential in both attracting industry and reducing unemployment than either approach working alone. *See, e.g.*, MISS. CODE ANN. §§ 57-9-1 to -9 (1972). Other areas in which cooperation might be beneficial include education (especially vocational programs), community development, and urban redevelopment.

27 MISS. CODE ANN. §§ 57-1-1 to -179 (1972), *as amended*, (Cum. Supp. 1973); OHIO REV. CODE ANN. §§ 122.01-.62 (Page 1969), *as amended*, (Page Supp. 1972).

§ 1.020 *Statement of Legislative Intent:*

Having perceived that many areas of the state are in a depressed economic condition, and recognizing that the influx of new industrial enterprises may provide substantial relief, and having concluded that the availability of financing is a significant factor in the location of such enterprises, the legislature proposes to establish a financing mechanism in order to encourage industrial location in economically depressed areas of the state.

§ 1.030 *Agency Created:*[28]

There is created in the Department of Economic Development an agency to be called the State Industrial Finance Agency.

COMMENT: The agency is made a subdivision of the department in order to insure that its operation is consistent with state industrial development policy and to allow for effective staff support.

§ 1.040 *Board of Directors; Appointment; Meetings:*

The operation of the Agency shall be the responsibility of a board of directors consisting of the Director of Economic Development, who shall be the chairman, and six citizens appointed by the Governor, who shall serve terms of six years except that the initial board shall serve terms of one, two, three, four, five, and six years respectively as determined by lot at the initial meeting of the board. In the case of a vacancy, a new director shall be appointed by the Governor and shall serve the remaining term of his predecessor. Directors shall serve without compensation other than a reasonable per diem and travel allowance as provided by the legislature. Appointments shall be made by the Governor on the basis of experience and interest in economic development and the representation of diverse economic

28 *Compare* the administrative structure of the finance agencies in the following statutes: GA. CONST. art. 7, § 2-5507; ALA. CODE tit. 55, §§ 373 (6k)-(6w21) (Cum. Supp. 1971); IND. CODE §§ 4-23-5-1 to -12 (1971); ME. REV. STAT. ANN. tit. 10, §§ 701-852 (1964), *as amended,* (Cum. Supp. 1973); OHIO REV. CODE ANN. §§ 122.37-.62 (Page 1969), *as amended,* (Page Supp. 1972); PA. STAT. ANN. tit. 73, 301-314 (1971), *as amended,* (Cum. Supp. 1973); VT. STAT. ANN. tit. 10, §§ 251-265 (1973), *as amended,* (Cum. Supp. 1973); WASH. REV. CODE ANN. §§ 43.31A.010-.920 (Supp. 1972).

regions of the state, and at least one director shall be experienced in the operation of banking institutions. No member of the advisory board of the Department of Economic Development shall serve on the board of directors. The board shall meet as often as deemed necessary by the chairman and at least twelve times annually.

COMMENT: The director of economic development is made the chairman in order to provide effective liaison between the department and the agency, to allow the transmission of information from the agency to other divisions of the department, and to insure administrative control over the agency's operations. The composition of the board is intended to reflect regional development interests and expertise in the field of economic development.

§ 1.050 *Board of Directors; Duties:*

The duties of the board of directors shall be to accept applications for financial assistance from county governments, municipal governments, and industrial development corporations; to review such applications in light of the criteria established in this Act and of the general purposes of this Act; to administer the State Industrial Finance Fund so as to provide financial assistance for those projects which qualify; and to prepare recommendations for the Director of Economic Development concerning the more effective operation of the State Economic Development Program.

COMMENT: The duties of the board allow for a feed-back loop so that the directors can, with experience, create improvements in agency operations. The agency is expected to develop a staff of employees for the investigation and processing of applications and the actual mechanics of the financial assistance (bookkeeping, transfer of funds, etc.)

§ 1.060 *Industrial Finance Fund Created:*[29]

There is established in the State Treasury a fund to be called the State Industrial Finance Fund which shall be administered by the

29 *Compare* the financing provisions cited at notes 18 & 19 *supra.*

State Industrial Finance Agency. The fund shall consist of appropriations by the state legislature; contributions and grants from federal, state, and local governmental units; and donations from nonprofit industrial development corporations. The fund shall be a revolving fund such that income from projects financed by the State Industrial Finance Agency shall be returned to the fund.

COMMENT: While some states have opted to use bond revenues to finance the state industrial development program, the appropriations approach has more desirable features. It is easier to administer, has the attractive revolving feature, may be easily increased or decreased as conditions change, is not subject to the uncertainties of the market, and avoids current tax constraints on industrial development bonds.

§ 1.060′ *(Alternative) Economic Development Bonds; Authorization; Limitations:*

The operations of the Agency shall be financed through the sale of state general obligation bonds which may be issued by the Director of Economic Development as necessary to effectuate the purposes of this Act. At no time shall more than $ [————————][30] of bonds be outstanding. (Note: States adopting this financing approach will wish to add appropriate provisions governing the issue and repayment of these bonds.)

COMMENT: Given the current volume of state spending and concern over future expansion in this area, a financing approach which does not rely on tax revenues may be desirable. A bond financing approach is also desirable insofar as it allows those most interested in development to underwrite the costs without affecting the tax burden on those opposed to development, and allows for relatively rapid accumulation of revenue. Drawbacks to the

30 The amount of bonds authorized is a decision for each state to make in light of its own needs. Limits vary considerably. *See, e.g.*, VT. STAT. ANN. tit. 10, § 257 (Cum. Supp. 1973) ($35,000,000); CONN. GEN. STAT. ANN. §§ 32-22, 32-23j (Cum. Supp. 1973) ($135,000,000).

bond financing approach include possible constitutional conflicts, dependence on the market, and administrative costs.

§ 1.070 *Direct Loan Program; Authorization; Limitations:*[31]

The State Industrial Finance Agency is authorized to make direct loans to eligible agencies to finance industrial development projects which satisfy the criteria established by this Act. All loans shall be subject to the following limitations:

(a) Loans shall not exceed $5,000,000 for any one project.[32]
(b) Loans shall not exceed fifty (50) percent of project cost.[33]
(c) Loans shall be secured by a first mortgage on the project.
(d) The agency seeking the loan must finance at least ten (10) percent of project cost from its own resources and must demonstrate that sufficient private financing is available to complete the project.

COMMENT: A direct loan program has a narrow but concentrated impact in a small area. Such a program is useful in beginning a core industry around which spin-off and support industries may build with the assistance of a loan guarantee plan. Direct loans allow the state to respond quickly to especially pressing development needs and allow the actual addition of capital to the state's credit pool.

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31 *Compare* the programs in the following statutes: GA. CONST. art. 7, § 2-5507; CONN. GEN. STAT. ANN. §§ 32-1 to -23m (Cum. Supp. 1973); ILL. REV. STAT. ch. 48, §§ 831-847 (1973); KY. REV. STAT. ANN. §§ 154.010-.345 (1970); N.H. REV. STAT. ANN. §§ 162-A:1-16 (1964), *as amended,* (Supp. 1972); N.Y. PUB. AUTH. LAW §§ 1800-1834 (McKinney 1970), *as amended,* (McKinney Supp. 1973); OHIO REV. CODE ANN. §§ 122.37-.62 (Page 1969), *as amended,* (Page Supp. 1972); OKLA. STAT. ANN. tit. 74, §§ 851-874 (1965), *as amended,* (Cum. Supp. 1974); PA. STAT. ANN. tit. 73, §§ 301-314 (1971), *as amended,* (Cum. Supp. 1973); TEX. REV. CIVIL STAT. ANN. art. 5190.2 (Cum. Supp. 1974); WASH. REV. CODE ANN. §§ 43.31A.010-.920 (Supp. 1972); W. VA. CODE ANN. §§ 31-15-1 to -15 (1972).

32 The $5,000,000 limitation is becoming somewhat standard. One reason may be the limitation imposed by federal tax laws on industrial development bonds. *See* note 4 *supra.*

33 The percentage of project cost to which state benefits may be applied varies from 0% to 100% and is often left to agency discretion. A lower percentage may be specified in a direct loan program than in a loan guarantee program. The main reason for limiting direct loans is to conserve funds and to increase the number of projects which may be aided. Fifty percent may be a bit generous. *Compare* KY. REV. STAT. ANN. §§ 154.080, 154.120 (1970) (40-50%); OKLA. STAT. ANN. tit. 74, § 857 (Cum. Supp. 1974) (25%); N.Y. PUB. AUTH. LAW § 1803 (McKinney 1970), *as amended,* (McKinney Supp. 1973) (30%).

§ 1.080 *Loan Guarantee Program; Authorization; Limitations:*[34]

The State Industrial Finance Agency is authorized to guarantee the repayment of principal and interest of loans made to eligible agencies to finance industrial development projects which satisfy the criteria established by this Act. All loan guarantees shall be subject to the following limitations:

(a) Loan guarantees shall not exceed $5,000,000 for any one project.

(b) Loan guarantees shall not exceed ninety (90) percent of project cost.[35]

(c) Loan guarantees shall be secured by a second mortgage on the project.

(d) The agency seeking the loan guarantee must finance at least ten (10) percent of project cost from its own resources.

COMMENT: A loan guarantee program has a broader but more dispersed impact. Such a program allows the state to influence the allocation of private capital by making industrial development projects in certain areas more desirable as investments. Loan and loan guarantee programs are especially effective when used together, with a direct loan project forming the focal point for additional enterprises supported by loan guarantees.

§ 1.090 *Finance Program; Eligible Agencies:*

The following agencies shall be eligible for the programs established by this Act: municipal governments, county governments, and non-profit industrial development corporations.

COMMENT: Most states with state finance programs extend the benefits to local governments while fewer include local industrial development corporations as eligible development agencies.[36]

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34 *Compare* the programs in the following statutes: DEL. CODE ANN. tit. 29, §§ 8601-8606 (Supp. 1970); IND. CODE §§ 4-23-5-1 to -12 (1971); ME. REV. STAT. ANN. tit. 10, §§ 701-852 (1964), *as amended,* (Cum. Supp. 1973); OHIO REV. CODE ANN. §§ 122.37-.62 (Page 1969), *as amended,* (Page Supp. 1972); R.I. GEN. LAWS ANN. §§ 42-34-1 to -18 (1969), *as amended,* (Supp. 1973); VT. STAT. ANN. tit. 10, §§ 251-265 (1973), *as amended,* (Cum. Supp. 1973).

35 Ninety percent of project cost is the standard for loan (or mortgage) guarantee. *See, e.g.,* IND. CODE § 4-23-5-7(2) (1971); VT. STAT. ANN. tit. 10, § 257(a)(6) (Cum. Supp. 1973).

36 *See* notes 13-16 *supra.*

Where state constitutions allow, the inclusion of the corporations allows somewhat greater flexibility and encourages local participation in the industrial development process, especially in areas which are not effectively represented by local governments.

§ 1.100 *Finance Program; Computation of Project Cost; Use of Funds:*[37]

For the purpose of computing project cost under this Act, the following expenses shall be considered:

(a) acquisition of industrial sites;

(b) extension of utilities and other municipal services to industrial sites;

(c) construction of industrial buildings;

(d) acquisition and installation of capital equipment.

Funds acquired through the programs established by this Act shall be used exclusively for the above expenses.

COMMENT: The limitations of this section occupy a middle ground in the nationwide spectrum of development programs. Some states go further and include such items as moving expenses,[38] while others draw the line at shell buildings.[39]

§ 1.110 *Industrial Projects; Criteria for Eligibility:*[40]

Industrial projects for which assistance is requested under this Act shall meet the following criteria as determined by the State Industrial Finance Agency:

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37 *Compare* the permissible use of funds in the following statutes: GA. CONST. art. 7, § 2-5507; ALA. CODE. tit. 55, §§ 373(6k)-(6w21) (Cum. Supp. 1971); CONN. GEN. STAT. ANN. §§ 32-1 to -23m (Cum. Supp. 1973); ILL. REV. STAT. ch. 48, §§ 831-847 (1973); IND. CODE 4-23-5-1 to -12 (1971); OHIO REV. CODE ANN. §§ 122.37-.62 (Page 1969), *as amended,* (Page Supp. 1972); OKLA. STAT. ANN. tit. 74, §§ 851-874 (1965), *as amended,* (Cum. Supp. 1974); PA. STAT. ANN. tit. 73, §§ 301-314 (1971), *as amended,* (Cum. Supp. 1973); W. VA. CODE ANN. §§ 31-15-1 to -15 (1972).

38 *See* in the municipal context, N.M. STAT. ANN. § 14-31-1 (1968), *as amended,* (Supp. 1973). While New Mexico's is a municipal bond program, the issue of use of funds is pertinent to the state context.

39 *See* in the municipal context, N.J. STAT. ANN. §§ 40: 190-8 to -10 (1967).

40 *Compare* the criteria for obtaining assistance under the following statutes: GA. CONST. art. 7, § 2-5507; ALA. CODE tit. 55, §§ 373(6k)-(6w21) (Cum. Supp. 1971); DEL. CODE ANN. tit. 29, §§ 8601-8606 (Supp. 1970); ILL. REV. STAT. ch. 48, §§ 831-847 (1973); N.Y. PUB. AUTH. LAW §§ 1800-1834 (McKinney 1970), *as amended,* (McKinney Supp. 1973); OKLA. STAT. ANN. tit. 74, §§ 851-874 (1965), *as amended,* (Cum. Supp. 1974); PA. STAT. ANN. tit. 73, §§ 301-314 (1971), *as amended* (Cum. Supp. 1973).

(a) *Type of Enterprise*

Manufacturing and research and development enterprises shall be eligible for assistance. Commercial (both wholesale and retail), service, natural resource extraction (including lumbering, mining, and gas and oil drilling), and agricultural enterprises shall not be eligible.

(b) *Economic Need*

The area in which the project is to be located must be an area of depressed economic condition as evidenced by either a higher than average rate of unemployment or a lower than average median family income when measured against the state as a whole.

(c) *Economic Benefit*

The project must provide a substantial economic benefit as measured by the number of new jobs created or the contribution to the local economy in terms of new income.

(d) *Conformity with State and Local Development Objectives*

The project shall be consistent with state and local development objectives as evidenced by state economic development plans and land use regulations and by local community development plans and zoning regulations.

(e) *Conformity with Environmental Standards*

The project shall conform to local, state, and federal environmental standards.

(f) *Burden on Public Services*

The project shall not over-burden public services in the area in which it is to be located. Where a project requires an expansion of public services, adequate provision for expansion shall be made.

(g) *Repayment Provisions*

The project shall be leased to industrial tenants at a rate sufficient to repay principal and interest of all financial assistance obtained under this Act within a period of twenty years from the receipt of such assistance. The interest rate on direct loans shall be solely within the discretion of the State Industrial Finance Agency.

(h) *Provision for Tenant*

No project shall be eligible for assistance under this Act unless a financially responsible tenant has agreed in writing to occupy the project upon completion.

(i) *Availability of Other Financing*

Assistance under this Act is limited to projects which would not be completed but for such assistance. Projects wholly capable of outside financing shall be ineligible for assistance under this Act.

COMMENT: (a) Many states have had problems in defining the enterprises which qualify for benefits. Commercial and service enterprises generally do not qualify because of the relatively low start-up costs required and because such enterprises are thought to follow naturally from a solid industrial base. Whether or not this is so, there is a question as to whether the development of this class of enterprise is not better left to local development corporations and financial institutions. Natural resource extraction is omitted because in many cases the input of state money would serve little purpose. Loans to start coal mines, for example, are of little use if there is no market for coal. On the other hand, the state should be active in developing new methods of processing natural resources and thus increasing demand. The following examples indicate the nature of the line to be drawn:

Ineligible	*Eligible*
Coal mine	Coke processing plant
Oil drilling	Refinery
Lumbering	Wood processing plant
Farm	Packing plant or cannery

Where a proposed enterprise combines eligible and ineligible attributes, state benefits should be available for projects which are used solely for the eligible aspect of the enterprise. For example, a factory with a sales outlet could receive assistance in expanding productive capacity but not in building a new salesroom.

(b) One of the problems confronting the agency will be in determining the relevant area within which to measure a project's effect. One possible scheme would include an area within

a certain radius from the project, the size of the circle depending on the size of the project. Economic need is a difficult thing to measure, but the agency should at least make an effort. The two indices here selected have the virtue of being relatively easy to ascertain and are relevant to the objective of the Act.

(c) As in the preceding case, some index is necessary to determine the potential benefit of the project. Although the agency must deal with approximations and extrapolations, it must follow consistent patterns of analysis and use a uniform type of data.

(d) Land use is an area of increasing concern in modern society. The state can use its industrial finance program to set the example in enlightened land use and development.

(e) Although only compliance with minimum environmental standards is required, the agency should look for projects which go beyond the minimum.

(f) One of the commonly debated questions of industrial development is whether local citizens must suffer a decline in municipal services as a result of development. This statute provides a safeguard. Specific responsibility for expansion of public services where necessary is left to the agreement of the parties involved, subject to the approval of the Director of Economic Development.

(g) This provision merely attempts to define the period of repayment. The developing institution is free to arrange for a lease-purchase or sale agreement, providing that the state is repaid.

(h) This provision is a safeguard for both the developing institution and the state agency.

(i) The state industrial financing program is a means of developing new industrial capacity and not a means of low cost financing for established industry. The focus of the program should be new industry unable to gain financing.

§ 1.120 *Finance Program; Limitation; Credit of State Not Pledged:*

At no time shall financial assistance commitments from the state under this Act exceed the amounts in the State Industrial Finance Fund. In no case shall the credit of the state be pledged to any program established by this Act.

COMMENT: This provision allows some degree of legislative control over the volume of state financing and limits the program to money actually appropriated for that purpose. If the alternate financing scheme in § 1.060′ is used, this provision is omitted.

III. AN ACT TO CREATE A STATE SUPERVISED MUNICIPAL INDUSTRIAL FINANCE PROGRAM

§ 2.010 *Short Title:*

This Act shall be known and may be cited as the Municipal Industrial Finance Act.

§ 2.020 *Statement of Legislative Intent:*

Having perceived that many areas of the state are in a depressed economic condition, and recognizing that local government has a direct interest in improving the local economy, the state legislature proposes to authorize local government to become active in financing industrial development projects consistent with state economic development objectives.

§ 2.030 *Revenue Bonds; Authorization; Approval by Local Governing Body:*[41]

Municipal and county governments are hereby authorized to issue revenue bonds to finance industrial development projects as provided

41 *Compare* the revenue bond authorization and approval procedures in the following statutes: ALA. CODE tit. 37, §§ 511(20)-(32), 815-830(1) (1959), *as amended*, (Cum. Supp. 1971); COL. REV. STAT. ANN. §§ 36-24-1 to -23 (Supp. 1967), *as amended*, (Supp. 1971); FLA. STAT. ANN. §§ 159.25-.43 (1972); GA. CODE ANN. §§ 69-1501 to -1513 (1967), *as amended*, (Cum. Supp. 1972); HAWAII REV. STAT. §§ 48-1 to -7 (1968); ILL. REV. STAT. ch. 24, §§ 11-74-1 to -74.2-19 (1973); IND. ANN. STAT. §§ 48-8728 to -8755 (Burns Cum. Supp. 1973); IOWA CODE §§ 419.1-.15 (1971); KAN. STAT. ANN. §§ 12-1740 to -1749 (1964), *as amended*, (Cum. Supp. 1973); KY. REV. STAT. ANN. §§ 152.810-.930 (1970); LA. REV. STAT. ANN. §§ 51:1151-1165 (1965), *as amended*, (Cum. Supp. 1974); ME. REV. STAT. tit. 30, §§ 5325-5343 (Supp. 1973); MD. ANN. CODE art. 41, §§ 266A-266I (1971), *as amended*, (Cum. Supp. 1973); MICH. COMPILED LAWS ANN. §§ 125.1251-.1267 (1967); MINN. STAT. ANN. §§ 474.01-.13 (1971); MO. ANN. STAT. §§ 100.010-.200 (Vernon 1971); MISS. CODE ANN. §§ 57-3-1 to -33, 57-5-1 to -23 (1972); MONT. REV. CODES ANN. §§ 11.4101-.4110 (1967), *as amended*, (Cum. Supp. 1973);

by this Act. Revenue bonds shall be limited obligations of the municipality or county secured solely by a mortgage on the project for which they are issued and payable solely from revenues generated by the project. Under no circumstances shall the credit of the county or municipality be pledged to revenue bonds. Bond issues must be approved by a majority of the local legislative body following public hearings. If ten (10) percent of the electorate so petition, a special municipal or county election shall be required at which a majority vote shall be necessary to authorize the bond issue.

COMMENT: Revenue bonds have been the most common form of municipal industrial development program. One of the problems with such bonds is that their marketability is determined by the financial rating of the prospective tenant. Because the bonds do not affect the taxing power of the municipality, the legislative body alone is empowered to decide on a proposed bond issue, although there is a safeguard for disgruntled citizens to call for an election. This formulation would be contrary to the constitutions of states which require a vote on all bond issues.

§ 2.040 *General Obligation Bonds; Authorization; Election:*[42]

Municipal and county governments are hereby authorized to issue general obligation bonds to finance industrial development projects

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NEB. REV. STAT. §§ 18-1614 to -1623 (1970); NEV. REV. STAT. §§ 268-512-.568 (1973); N.M. STAT. ANN. §§ 14-31-1 to -13 (1968), *as amended*, (Supp. 1973); N.C. GEN. STAT. §§ 159A-1 to -25 (1972), *as amended*, (Supp. 1973); N.D. CENT. CODE §§ 40-57-01 to -20 (1968), *as amended*, (Supp. 1973); OHIO REV. CODE ANN. §§ 761.01-.14 (Page Supp. 1972), §§ 165.01-.20 (Page 1968), *as amended*, (Page Supp. 1972); OKLA. STAT. ANN. tit. 62, §§ 651-664 (1963); PA. STAT. ANN. tit. 73, §§ 371-386 (1971), *as amended*, (Cum. Supp. 1973); S.C. CODE ANN. §§ 14-399.21-.35:2 (Cum. Supp. 1973); S.D. COMPILED LAWS ANN. §§ 9-54-1 to -9 (1967), *as amended*, (Supp. 1973); TENN. CODE ANN. §§ 6-1701 to -1716 (1971), *as amended*, (Cum. Supp. 1973); TEX. REV. CIVIL STAT. ANN. art. 5190.1 (Cum. Supp. 1974); UTAH CODE ANN. §§ 11-17-1 to -17 (1972), *as amended*, (Supp. 1973); VT. STAT. ANN. tit. 24, §§ 2721-2737 (Cum. Supp. 1973); VA. CODE ANN. §§ 15.1-1373 to -1390 (Cum. Supp. 1971); W. VA. CODE ANN. §§ 13-2C-1 to -20 (1972), *as amended*, (Supp. 1973); WIS. STAT. § 66.521 (1971); WYO. STAT. ANN. §§ 15.1-92 to -100 (1965), *as amended*, (Cum. Supp. 1973).

42 *Compare* the following general obligation bond programs: KY. REV. STAT. ANN. §§ 152.810-.930 (1970); LA. REV. STAT. §§ 51:1151-1165 (1965), *as amended*, (Cum. Supp. 1974); MD. ANN. CODE art. 45A, §§ 1-3 (1971); N.D. CENT. CODE §§ 40-57-01 to -20 (1968), *as amended*, (Supp. 1973); TENN. CODE ANN. §§ 6-2801 to -2820, 6-2901 to -2916 (1971), *as amended*, (Cum. Supp. 1973). *See also* ARK. CONST. amend. 49.

as provided by this Act. General obligation bonds shall be supported by the full faith and credit of the municipality or county. General obligation bonds must be approved by a ⅔ vote of the electorate at a special election on the issue.

COMMENT: General obligation bonds present some desirable features for industrial development but have numerous drawbacks. One advantage is that the bonds' marketability does not depend on the tenant since the municipality or county is obligated to pay off the bonds. Problems are manifold, however, including municipal debt limits and constitutionality. Since such bonds do have the potential of affecting the taxing power of the municipality, an extraordinary majority of the electorate is usually required to approve their issue.[43]

Both forms of bond have their place in a local development scheme focused on establishing new industry, but constitutional constraints frequently limit the scope of bond programs, requiring some form of constitutional amendment to allow full utilization.

§ 2.050 *Bond Issues; Credit of State Not Pledged:*

Under no circumstances shall the credit of the state be pledged to municipal industrial development bond issues.

COMMENT: The provision protects the state from having to assume defaulted obligations of local government.

§ 2.060 *Certificate of Public Convenience and Necessity; Criteria:*[44]

No bonds shall be issued under this Act for any project which has not received a certificate of public convenience and necessity from the State Economic Development Agency. In order to obtain a certificate, projects must meet the following criteria:

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43 *See, e.g.*, TENN. CODE ANN. § 6-1710 (1971).

44 For a comparison of certification procedures, see note 5 *supra*.

(a) *Type of Enterprise*

Manufacturing and research and development enterprises shall be eligible for a certificate. Commercial (both wholesale and retail), service, natural resource extraction (including lumbering, mining, and gas and oil drilling), and agricultural enterprises shall not be eligible.

(b) *Economic Need*

The area in which the project is to be located must be an area of depressed economic condition as evidenced by either a higher than average rate of unemployment or a lower than average median family income when measured against the state as a whole.

(c) *Economic Benefit*

The project must provide a substantial economic benefit as measured by the number of new jobs created or the contribution to the local economy in terms of new income.

(d) *Conformity with State and Local Development Objectives*

The project shall be consistent with state and local development objectives as evidenced by state economic development plans and land use regulations and by local community development plans and zoning regulations.

(e) *Conformity with Environmental Standards*

The project shall conform to local, state, and federal environmental standards.

(f) *Burden on Public Services*

The project shall not over-burden public services in the area in which it is to be located. Where a project requires an expansion of public services, adequate provision for expansion shall be made.

(g) *Repayment Provisions*

The project shall be leased to industrial tenants at a rate sufficient to repay principal and interest on the bonds within a period of twenty years from the date of the bond issue.

(h) *Provision for Tenant*

No project shall be eligible for a certificate unless a financially responsible tenant has agreed in writing to occupy the project upon completion.

(i) *Availability of Other Financing*

Bond issues are limited to projects which would not be completed but for such assistance. Projects wholly capable of outside financing shall be ineligible for a certificate.

COMMENT: This provision allows for state control of the program. For comment on the criteria see § 1.110.

§ 2.070 *Bond Issues; Computation of Project Cost; Use of Funds:*[45]

For the purpose of computing project cost under this Act, the following expenses shall be considered:

(a) acquisition of industrial sites;
(b) extension of utilities and other municipal services to industrial sites;
(c) construction of industrial buildings;
(d) acquisition and installation of capital equipment.

Bond revenues may be used to finance 100% of project cost.

COMMENT: See § 1.100.

§ 2.080 *Bond Issues; Limitations:*[46]

All municipalities and counties shall be subject to the following limitations:

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45 *Compare* the computation of costs and use of funds under the following statutes: ALA. CODE tit. 37, §§ 815-830(1) (1959), *as amended*, (Cum. Supp. 1971); GA. CODE ANN. §§ 69-1500 to -1513 (1967), *as amended*, (Cum. Supp. 1972); IOWA CODE §§ 419.1-.15 (1971); MO. ANN. STAT. §§ 100.010-.200 (Vernon 1971); N.M. STAT. ANN. §§ 14-31-1 to -13 (1968), *as amended*, (Supp. 1973); OHIO REV. CODE ANN. §§ 761.01-.14 (Page Supp. 1972), §§ 165.01-.20 (Page 1968), *as amended*, (Page Supp. 1972); OKLA. STAT. ANN. tit. 62, §§ 651-664 (1963); VT. STAT. ANN. tit. 24, §§ 2721-2737 (Cum. Supp. 1973); W. VA. CODE ANN. §§ 13-2C-1 to -20 (1972), *as amended*, (Supp. 1973).

46 *Compare* the limitations on bond issues in the following statutes: FLA. STAT.

(a) Bond issues shall not exceed $5,000,000 for any one project.[47]

(b) Bond issues shall be secured by a first mortgage on the project for which the issue was authorized.

(c) Municipalities and counties are limited to developing one industrial development project at a time.

COMMENT: These limitations are designed to protect the local government from over-extending its resources and to protect the bondholders to the extent of the project's value.

§ 2.090 *Bond Issues; Technical Provisions:*

[Each state has its own provisions governing the issue and repayment of municipal bonds which should be included in this section.]

IV. AN ACT TO ALLOW THE FORMATION OF DEVELOPMENT CREDIT CORPORATIONS

§ 3.010 *Short Title:*

This Act shall be known and may be cited as the Development Credit Corporations Act.

§ 3.020 *Statement of Legislative Intent:*

Having perceived that many areas of the state are in a depressed economic condition, and recognizing that economic expansion may be limited by a lack of credit for economic development projects, the legislature proposes to allow for the formation of Development Credit Corporations to provide a mechanism for increasing the amount of private capital available for economic development.

ANN. §§ 159.25-.43 (1972); ILL. REV. STAT. ch. 24, §§ 11-74-1 to -74.2-19 (1973); ME. REV. STAT. tit. 30, §§ 5325-5343 (Supp. 1973); PA. STAT. ANN. tit. 73, §§ 371-386 (1971), *as amended*, (Cum. Supp. 1973); TENN. CODE ANN. §§ 6-1701 to -1716 (1971), *as amended*, (Cum. Supp. 1973). Compare also the financial limitations with INTERNAL REVENUE CODE OF 1954, § 103(c).

47 *See* note 32 *supra*.

COMMENT: Many states have already enacted legislation governing the formation of development credit corporations. This model is not so much intended to prescribe a specific corporate form or statutory structure as to serve the dual purposes of illustrating the place of development credit corporations in a state development program and of focusing attention on the objectives of the corporations themselves.

§ 3.030 *Development Credit Corporations; Authorization; Formation:*[48]

Development Credit Corporations may be formed as provided in either the general business corporations law or the general non-profit corporations law of this state subject to compliance with the provisions of this Act.

COMMENT: In allowing the formation of development credit corporations, some states have permitted both profit and non-profit structures.[49] The non-profit structures have allowed civic leaders who might not otherwise participate to become active in establishing new credit outlets.

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48 Forty-six states offer some form of development credit corporation structure. Some of the more interesting statutes are: ARK. STAT. ANN. §§ 67-1601 to -1626 (1966); FLA. STAT. ANN. §§ 289.011 to -.201 (1962), *as amended,* (Cum. Supp. 1973); ILL. REV. STAT. ch. 32, §§ 1001-1028 (1973); IND. CODE §§ 23-6-1-1 to -2-5 (1971); IOWA CODE §§ 496B.1-.20 (1971); KY. REV. STAT. ANN. §§ 155.010-.200 (1970); LA. REV. STAT. ANN. §§ 51:1101-:1107 (1965), §§ 12:951-:970 (Cum. Supp. 1974); MO. ANN. STAT. §§ 371.010-.250 (Vernon 1968), *as amended,* (Vernon Cum. Supp. 1974); NEB. REV. STAT. §§ 21.2101-.2117 (1970); OHIO REV. CODE ANN. §§ 1726.01-.13 (Page 1963), *as amended,* (Page Supp. 1972); VT. STAT. ANN. tit. 8, §§ 1801-1804 (1971).

49 Almost all states make some provision for local economic development corporations, either profit making or non-profit. *See, e.g.,* DEL. CODE ANN. tit. 6, §§ 7005-7009 (Cum. Supp. 1970), *as amended,* (Supp. 1972); ME. REV. STAT. ANN. tit. 13, §§ 901-986 (1964); LA. REV. STAT. ANN. §§ 51:1151-1165 (1965), *as amended,* (Cum. Supp. 1974); MD. ANN. CODE art. 45A, §§ 1-3 (1971); N.H. REV. STAT. ANN. §§ 162-A:1-:16 (1964), *as amended,* (Supp. 1972); N.Y. NOT-FOR-PROFIT CORP. LAW § 1411 (McKinney 1970), *as amended,* (McKinney Supp. 1973); R.I. GEN. LAWS ANN. §§ 7-6-2 to -18 (1969), *as amended,* (Supp. 1969); S.D. COMPILED LAWS §§ 47-22-1 to -78 (1967), *as amended,* (Supp. 1973); TENN. CODE ANN. §§ 6-2801 to -2820 (1971), *as amended,* (Cum. Supp. 1973). In addition, some states allow local initiative in the formation of local corporations to serve as agencies for municipal government.

§ 3.040 *Incorporators:*[50]

Twenty-five (25) or more persons, at least half of whom shall be citizens of the state, may form a Development Credit Corporation by filing articles of incorporation with the Secretary of State (or such other official as state law may provide). Each incorporator shall agree to purchase at least ten (10) shares of stock.

COMMENT: The legislative justification for development credit corporations is often framed in terms of benefitting diverse economic interests within the state, but little is done to assure that these interests are represented. A large number of incorporators and a subscription requirement is not, perhaps, the most effective way of dealing with the problem, but such a requirement at least renders the goal explicit. Another way to approach the problem is to require that the board of directors be selected in such a way as to focus on diverse economic interests throughout the state.

§ 3.050 *Articles of Incorporation:*[51]

In addition to any other requirements of law, the articles of incorporation for a Development Credit Corporation shall set forth the following:

(a) The name of the Corporation, which shall include the words "Development Credit Corporation".

(b) The purposes for which the Corporation is to be formed, which shall be within the purposes enumerated in this Act.

(c) The powers of the Corporation, which shall not exceed the powers enumerated in this Act.

COMMENT: Many states define the requirements of the articles

50 The required number of incorporators varies from one (NEB. REV. STAT. §§ 21-2051 and -2103 (1970)) to fifteen (ARK. STAT. ANN. § 67-1603 (1966)) to twenty-five (MISS. STAT. ANN. § 79-5-5 (1972)).

51 *Compare* the required provisions of the articles in the following: FLA. STAT. ANN. §§ 289.011-.201 (1962), *as amended,* (Cum. Supp. 1973); KY. REV. STAT. ANN. §§ 155.010-.200 (1970); NEB. REV. STAT. §§ 21.2101-.2117 (1970); N.M. STAT. ANN. §§ 51-23-1 to -15 (Supp. 1973).

of incorporation with great specificity.[52] Others prefer to allude to the general corporation law.[53] The latter approach is more appropriate in a model statute where the objective is to generalize over the nationwide experience.

§ 3.060 *Purposes:*

The purposes for which a Development Credit Corporation may be formed under this Act shall include the following:

(a) To promote and encourage the economic stability and prosperity of the state, reduce unemployment, and improve the standard of living of the citizens of the state.

(b) To encourage and assist the creation and location of new business and industrial enterprises within the state.

(c) To encourage and assist the rehabilitation and modernization of existing business and industrial enterprises within the state.

(d) To provide a supplementary source of credit for business and industrial enterprises which would otherwise be unable to obtain financial support.

COMMENT: The purposes of the corporations are usually spelled out with varying degrees of specificity in order to show the overall purpose and the means to that end.

§ 3.070 *Powers:*

A Development Credit Corporation is authorized to exercise the following powers and all other powers granted to corporations by law, subject to the limitations of this Act:

(a) To borrow money and otherwise incur indebtedness for any of its purposes and to issue its bonds, notes, or debentures, either secured or unsecured, and to offer such security in terms of mortgage or other lien on its property and other assets as deemed appropriate by the board of directors.

52 *See, e.g.*, ALA. CODE tit. 37, §§ 815-830(1) (1959), *as amended*, (Cum. Supp. 1971); ARK. STAT. ANN. §§ 67-1601 to -1626 (1966).

53 *See, e.g.*, NEB. REV. STAT. ANN. §§ 21-2101 to -2117 (1970); N.H. REV. STAT. ANN. §§ 162-A:1-:16 (1964).

(b) To loan money to and guarantee the financial obligations of any person or corporation in carrying out the purposes of this Act. No financial assistance of any kind shall be extended unless the financial assistance requested is not otherwise available from conventional financial institutions on reasonable terms.

(c) To purchase, hold, lease, or otherwise acquire, and to sell, lease, convey, mortgage, or otherwise dispose of real and personal property as deemed appropriate by the board of directors.

(d) To acquire, hold, sell, assign, or otherwise dispose of stocks, bonds, debentures, notes, and other securities of any person, corporation, or governmental unit and to exercise all rights, powers, and privileges of ownership.

(e) To accept loans, grants, subsidies, and other aid from any state or federal agency and to participate with any state or federal agency in making loans or other financial assistance available to any person or corporation in carrying out the purposes of this Act.

(f) To work in cooperation with the State Industrial Finance Agency and Department of Economic Development and to assist local development organizations in promoting the prosperity and economic welfare of the state.

COMMENT: The powers of a development credit corporation of special importance are those which define its power to obtain capital, hold property, and make loans. These powers are usually elaborated even in those development credit corporation statutes in which the other corporate powers are included by allusion to the general corporations law.[54]

§ 3.080 *Stated Capital Requirement:*[55]

The stated capital of the Corporation shall be at least $100,000, evidenced by shares having par value of at least ten (10) dollars per share.

54 *See* statutes cited at note 53 *supra.*

55 The capital requirement for a development credit corporation varies from $5,000 (OHIO REV. CODE ANN. §§ 1726.01-.13 (Page 1963), *as amended,* (Page Supp. 1972)) to $250,000 (OKLA. STAT. ANN. tit. 18, §§ 901-913 (Cum. Supp. 1973)). The bulk of development financing is expected to come from loans made by member institutions. While high stated capital requirements may discourage formation of development credit corporations, these requirements may nonetheless be needed to insure that the corporations have the financial resources to meet their project obligations.

COMMENT: Because of the nature of development credit corporations, a large amount of capital is required; hence the large stated capital figure. On the other hand, broad participation of the state's citizens is desirable; hence the low par value.

§ 3.090 *Shareholders:*

All persons and all corporations doing business in the state are authorized to become shareholders of Development Credit Corporations and to exercise all powers, privileges, and rights thereby entailed. Financial institutions are not authorized to become shareholders.

COMMENT: Since financial institutions are expected to participate in other ways, they are ineligible to own shares (see § 3.100). Due to the variety of institutions that can be termed "financial" and the diversity of state regulation of such institutions, specific definition of "financial institutions" is best left to the individual states.

§ 3.100 *Members:*

Financial institutions may become members of a Development Credit Corporation by agreeing to lend money to the Corporation upon its call, in accordance with the purposes of this Act. Under no circumstances shall a financial institution be called upon to lend more than $250,000 to a Corporation.

COMMENT: Financial institutions become members and generate most of the operating capital through loans to the corporation. In some respects, the structure is analogous to a high risk pool established by insurance companies acting together.

§ 3.110 *Initiation of Operations; Approval by Director of Economic Development:*[56]

No Development Credit Corporation may begin operations under this Act without first receiving a certificate of public convenience

56 A variety of state officers may be called upon to certify or approve a development credit corporation including the secretary of state (*e.g.*, FLA. STAT. ANN. § 289.021 (1962), *as amended*, (Cum. Supp. 1973)); superintendent of banks (*e.g.*,

and necessity from the Director of Economic Development. Such certificate shall be granted at the discretion of the Director and in no case shall such a certificate be granted until at least ten financial institutions have agreed in writing to become members[57] of the Corporation seeking the certificate.

COMMENT: This provision allows for state supervision. The requirement of ten financial institutions is intended to insure that the corporation has sufficient funds for effective operation.

§ 3.120 *Board of Directors; Duties; Election:*

The affairs of a Development Credit Corporation shall be governed by a board of directors consisting of fifteen persons who shall be at least eighteen years of age and citizens of the United States. The Director of Economic Development or his delegate shall be a non-voting member of the board.

At the first meeting of the shareholders and members and at each annual meeting thereafter, the shareholders shall elect six directors and the members shall elect the remaining nine. For the purposes of this election each share shall count as one vote. The votes of a member shall be apportioned on the basis of one vote for each one thousand (1,000) dollars which the member has loaned or agreed to loan the Corporation.[58]

The directors shall meet as necessary to carry out the business of the Corporation.

COMMENT: The Director of Economic Development or his dele-

ARIZ. REV. STAT. ANN. § 10-960 (Cum. Supp. 1973)); bank commissioner and state banking board (*e.g.*, ARK. STAT. ANN. §§ 67-1601 to -1626 (1966)); governor and attorney general (*e.g.*, MISS. CODE ANN. § 79-5-5 (1972)); and governor (*e.g.*, KY. REV. STAT. ANN. § 155.050 (1970)); as well as the economic development commission (*e.g.*, IOWA CODE § 496B.16 (1971)).

57 The requirement of financial institution commitments prior to operation is common in those programs which make use of the membership device. *See, e.g.*, FLA. STAT. ANN. §§ 289.011-.201 (1962), *as amended*, (Cum. Supp. 1973); IDAHO CODE §§ 26-2401 to -2418 (1949); LA. REV. STAT. ANN. §§ 12:951-970 (Cum. Supp. 1974).

58 Voting schemes similar to the one suggested here are relatively common. *See, e.g.*, OHIO REV. CODE ANN. § 1726.07 (Page 1963), *as amended*, (Page Supp. 1972). Such schemes have the virtue of allowing members, who have the most to lose, to play a leading role in management. There may be a problem in states such as Illinois where cumulative voting is constitutionally required. *See* Wolfson v. Avery, 6 Ill. 2d 78, 126 N.E.2d 701 (1955).

gate sits with the board in order to provide liaison between the state development agency and the corporation.

§ 3.130 *Loan Committees; Authorization; Appointment:*[59]

The board of directors is authorized to establish loan committees to investigate and evaluate individual projects which request financial aid and to submit reports to the board for disposition.

COMMENT: Loan committees may be especially useful to development credit corporations operating on the statewide level in larger states by providing detailed review of many projects. The arrangement allows the board of directors to concentrate on broad development policy and pass the detailed work to the loan committee.

§ 3.140 *Financial Assistance; Criteria:*

Projects for which assistance is requested under this Act shall meet the following criteria as determined by the board of directors or a duly established loan committee of a Development Credit Corporation.

(a) *Economic Need*

The area in which the project is to be located must be an area of depressed economic condition as evidenced by either a higher than average rate of unemployment or a lower than average median family income when measured against the state as a whole.

(b) *Economic Benefit*

The project must provide a substantial economic benefit to the locality in which it is to be located.

(c) *Conformity with State and Local Development Objectives*

The project shall be consistent with state and local development

59 In some cases loan committee structure may be mandated by the state. *See, e.g.*, IND. CODE §§ 23-6-1-1 to -2-5 (1971); MD. ANN. CODE art. 23, §§ 412-429 (1973), *as amended*, (Supp. 1973).

objectives as evidenced by state economic development plans and land use regulations and by local community development plans and zoning regulations.

(d) *Conformity with Environmental Standards*

The project shall conform to local, state, and federal environmental standards.

(e) *Burden of Public Services*

The project shall not over-burden public services in the area in which it is to be located. Where a project requires an expansion of public services, adequate provision for expansion shall be made.

(f) *Repayment Provisions*

The project must generate sufficient revenue to repay principal and interest of all financial assistance within a reasonable time.

(g) *Availability of Other Financing*

Assistance under this Act is limited to projects which would not be completed but for such assistance. Projects wholly capable of outside financing shall be ineligible for assistance.

COMMENT: The criteria for financial assistance follow the basic pattern of the State Industrial Finance Act but are somewhat broader, allowing for greater discretion in determining which projects may receive aid. This discretion permits the development credit corporations to participate in the financing of service and spin-off industries.

§ 3.150 *Borrowing; Limitation:*

At no time shall the loans outstanding to the Corporation exceed ten (10) times the stated capital and paid-in surplus of the Corporation.

COMMENT: This is to provide some degree of protection and insure that the corporation does not over-extend its resources.

§ 3.160 *Credit of State Not Pledged:*

Under no circumstances shall the credit of the state be pledged to the operation of a Development Credit Corporation.

COMMENT: This is to protect the state from having to assume the defaulted obligation of a development credit corporation.

§ 3.170 *Surplus; Reserve Requirement; Dividends:*

The board of directors shall set aside as earned surplus all of the net earnings of the Corporation until such earned surplus equals the total of stated capital and paid-in surplus or ten (10) percent of the total borrowings of the Corporation. Earned surplus shall be held in cash or negotiable securities and shall be used to meet losses and contingencies arising in the operation of the Corporation. Should the amount of earned surplus become impaired, it shall be regenerated in the manner provided for its original accumulation. In the case of a Development Credit Corporation organized for profit, once the required reserves are set aside, the board of directors is authorized to declare dividends on the balance of net earnings.

COMMENT: This provision is to safeguard the corporation from reverses in the course of operation.

§ 3.180 *Supervision by Department of Economic Development:*

The operation of Development Credit Corporations shall be monitored by the Department of Economic Development, which shall have the power to revoke the certificate of incorporation of any Development Credit Corporation which fails to comply with the purposes and provisions of this Act. A hearing shall be held prior to the revocation of any such certificate.

COMMENT: This last provision is to insure that the operations of development credit corporations are consistent with state development objectives.

V. An Act to Allow the Formation of Local Non-Profit Industrial Development Corporations

§ 4.010 *Short Title:*

This Act shall be known and may be cited as the Industrial Development Corporations Act.

§ 4.020 *Statement of Legislative Intent:*

Having perceived that many areas of the state are in a depressed economic condition, and believing that local initiative is a significant force in encouraging local economic and community development, the legislature proposes to authorize the formation of local non-profit corporations for the purpose of promoting economic and community development consistent with state and local development objectives.

Comment: Many states have already made provisions for profit-making and non-profit industrial development corporations. This model is concerned with non-profit corporations and their relationship to public development financing programs, and does not seek to preclude formation of profit-making corporations for development purposes. It would, however, exclude profit-making development corporations from participation in public financing programs.

Because the industrial development corporations are closely involved with the recruitment of industrial tenants, acquisition of sites, and construction of buildings, matters that are of great local import, the local nature of these corporations is stressed.

§ 4.030 *Industrial Development Corporations; Authorization; Formation:*

Industrial Development Corporations may be formed as provided in the non-profit corporations law of this state subject to compliance with the provisions of this Act.

COMMENT: Due to the nature and objectives of state development, local effort is of utmost importance. Non-profit development corporations are designed to allow civic leaders and public-spirited citizens to sponsor development in the community interest.

§ 4.040 *Articles of Incorporation:*

In addition to any requirements of law, the articles of incorporation shall set forth the following:

(a) The name of the Corporation, which shall include the words "Industrial Development Corporation".
(b) The purposes for which the Corporation is to be formed, which shall be within the purposes enumerated in this Act.
(c) The powers of the Corporation, which shall not exceed the powers enumerated in this Act.

The articles of incorporation shall be filed with the Secretary of State (or such other official as state law may provide).

COMMENT: See § 3.050.

§ 4.050 *Purposes:*

The purposes for which an Industrial Development Corporation may be formed under this Act shall include the following:

(a) To promote and encourage the economic stability and prosperity of its locality, reduce unemployment, and improve the standard of living of citizens of the locality.
(b) To encourage and assist the creation and location of new business and industrial enterprises in its locality.
(c) To encourage and assist the rehabilitation and modernization of existing business and industrial enterprises in its locality.

COMMENT: See § 3.060.

§ 4.060 *Powers:*

An Industrial Development Corporation is authorized to exercise the following powers and all other powers granted to non-profit corporations by law, subject to the limitations of this Act:

(a) To borrow money and otherwise incur indebtedness for any of its purposes and to issue its bonds, notes, or debentures, either secured or unsecured, and to offer such security in terms of mortgage or other lien on its property and other assets as deemed appropriate by the board of directors.

(b) To purchase, hold, lease, or otherwise acquire, and to sell, lease, convey, mortgage, or otherwise dispose of real and personal property as deemed appropriate by the board of directors.

(c) To acquire, hold, sell, assign, or otherwise dispose of stocks, bonds, debentures, notes, and other securities of any person, corporation, or governmental unit and to exercise all rights, powers, and privileges of ownership.

(d) To acquire industrial plant sites, construct industrial plants, purchase and install capital equipment, and lease or sell the completed project to responsible industrial or business firms. Under no circumstances shall the Corporation operate such a project as a business.[60]

(e) To apply to the State Industrial Finance Agency for financial assistance in developing industrial projects.

(f) To accept loans, grants, subsidies, and other aid from any federal, state, or local governmental agency in carrying out the purposes of this Act.

COMMENT: The important powers of industrial development corporations are the ability to acquire and develop industrial property and the power to obtain financial aid from the state industrial finance agencies.

§ 4.070 *Stated Capital Requirement:*

The stated capital of an Industrial Development Corporation shall be at least $10,000 evidenced by shares having a par value of at least ten (10) dollars per share.

60 *But see* MISS. CODE ANN. § 57-1-23 (1972).

COMMENT: See § 3.080. Although these are non-profit corporations, the state has an interest in assuring they will have the financial capability necessary to undertake their development role. Because of differences in the role of industrial development corporations from that of development credit corporations, a lower requirement is sufficient.

§ 4.080 *Certificate of Public Convenience and Necessity; Approval by Director of Economic Development:*[61]

No Industrial Development Corporation shall carry out operations under this Act without a certificate of public convenience and necessity from the Director of Economic Development. Such certificate shall be granted at the discretion of the Director and in accordance with the purposes of the Department of Economic Development. A Corporation for which a certificate is denied shall be entitled to a full hearing at which the Director shall be required to show cause for such denial.

COMMENT: This provision allows the state to insure that operations are consistent with state development objectives.

§ 4.090 *Supervision by Department of Economic Development:*

The operations of Industrial Development Corporations shall be monitored by the Department of Economic Development, which shall have the power to revoke the certificate of incorporation of any Industrial Development Corporation which fails to comply with the purposes and provisions of this Act. A hearing shall be held prior to the revocation of any such certificate.

COMMENT: This provision reinforces state control.

61 Explicit supervision is the exception rather than the rule in the context of both development credit corporations and industrial development corporations. The more closely related the corporation to the state development finance program, however, the more likely government supervision will be involved. *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 7005-7009 (Cum. Supp. 1970), *as amended*, (Supp. 1972); IOWA CODE §§ 496B.1-.20 (1971); LA. REV. STAT. ANN. §§ 51:1101-1107 (1965).

§ 4.100 *Limitation; Project Activity:*

No Industrial Development Corporation shall be actively involved in the construction of more than one project at any time.

COMMENT: This provision insures that the corporation will not extend itself beyond its resources.

§ 4.110 *Credit of State Not Pledged:*

Under no circumstances shall the credit of the state be pledged to the operation of an Industrial Development Corporation.

COMMENT: This provision protects the state from having to assume defaulted obligations of local corporations.

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